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Early Neutral Evaluation: The Second Phase

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EARLY NEUTRAL EVALUATION: THE SECOND PHASE*

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I. INTRODUCTION

The federal court for the Northern District of California has operated an experimental program in expedited dispute resolution called Early Neutral Evaluation (ENE) since 1985. After a lengthy and careful period of analysis and revision of the program,[1] the Court has permanently adopted

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1. *See* Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation*, 69 JUDICATURE 279 (1986) (ENE program at its inception); Levine, *Early Neutral Evaluation: A Follow-up Report*, 70 JUDICATURE 236 (1987) (initial pilot phase); Levine, *Northern District of California Adopts Early Neutral Evaluation to Expedite Dispute Resolution*, 72 JUDICATURE 235 (1989) (brief data analysis).

ENE on the basis of considerable evidence that it is an effective way to improve the resolution of civil disputes and on the basis of the strong endorsement of the program by those who have participated in it. This report first briefly describes ENE and the results from the author's study of the initial pilot phase. It then reviews the analysis of the data collected on the second experimental phase of ENE. It concludes by describing how ENE will work in the Northern District on a permanent basis.

II. THE DEVELOPMENT OF ENE

As described more fully elsewhere,[2] the developers of ENE were motivated by the desire of the judges of the Northern District to make litigation less expensive and burdensome for clients. The program developers thought that this could best be accomplished by getting a neutral party to intervene in the early stages of the litigation process and to inject a dose of "intellectual discipline, common sense, and more direct communication."[3]

The heart of ENE was to be an early, frank, and thoughtful assessment of the parties' relative positions and the overall value of the case. Each evaluation was to be given by a neutral, very experienced, and highly respected private attorney, called the evaluator. The confidential evaluation, based on the evaluator's reaction to the parties' written evaluation statements and oral presentations, was to be given in person to the parties and their attorneys. Using this technique, the developers of ENE hoped to accomplish a variety of specific goals: (1) to force the parties to confront the merits of their own case, and their opponents'; (2) at as early a stage as possible, to identify which matters of law and fact actually were in dispute; (3) to develop an efficient approach to discovery; and (4) to provide a frank assessment of the case. Later, fostering early settlements was added as an explicit goal.

III. INITIAL PILOT PHASE

The Court decided to assign a limited number of cases to a small pilot study before committing itself to a larger experimental program. The pilot study permitted the Court to determine what management problems would arise from ENE. As described elsewhere,[4] it also enabled this author to make independent observations of most of the original ENE sessions and to conduct structured interviews with fifty participants in the sessions.

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2. Brazil, Kahn, Newman & Gold, *supra* note 1.

3. *Id.* at 279.

4. Levine, *supra* note 1, 70 JUDICATURE 236.

From that study, it appeared that many of the goals of ENE were being met, largely because the evaluators were providing helpful assessments of the cases to the litigants. The program needed some improvement, especially in the areas of clearly communicating the evaluation to the clients, incorporating follow-up into the standard ENE process, and, where appropriate, taking advantage of opportunities to settle the case. On the basis of the information obtained by studying the pilot cases, the Court concluded that ENE was sufficiently promising to warrant making the recommended modifications and expanding the program to a second phase of experimentation with a larger number of cases.

IV. THE SECOND EXPERIMENTAL PHASE

In the second phase, 150 cases were assigned to ENE. A total of 67 of the assigned cases actually went through the ENE process.[5] This report on the second phase is based upon questionnaire data collected from the participants soon after those 67 sessions took place, observations by the author or staff members at five ENE sessions, review of the case files, and follow-up telephone interviews with the attorneys in the cases in which ENE sessions took place. The clerk's office of the district court selected cases for ENE using criteria based on subject matter. A law clerk in the supervising magistrate's office double-checked the cases for suitability and obtained evaluators for each case. Table 1 summarizes the types of cases that were assigned to ENE, and of the assigned cases, which actually had ENE sessions.

5. None of the cases in the sample reported on in the prior report, Levine, *supra* note 1, 70 JUDICATURE 236, were included in this phase.

Table 1

Types of Cases Assigned to ENE

	Assigned	Sessions Held
Antitrust	1	0
Banking	1	0
Civil Rights	18	11
Contracts	78	26
Intellectual Property	6	0
Labor	34	11
Real Property	3	1
Securities	5	1
Torts	33	16
Other	1	1
TOTAL	180	67

In the 67 cases that actually went through the ENE process, there were 286 total participants, including attorneys, clients, and evaluators. Questionnaires were sent to all of the participants, and a total of 210 were returned. A total of 67 questionnaires were sent to evaluators, of which 63 were returned, for a response rate of 94%. A total of 150 questionnaires were sent to the attorneys, a total of which 104 were returned, for a response rate of 69%. A total of 69 were sent to clients, of which 43 were returned, for a response rate of 62%. The questionnaire data are presented in the following pages.

As a follow-up, several months later, law students telephoned the attorneys in the cases in which ENE sessions were held. One purpose was to determine whether the passage of time and further progress on the cases had affected the attorneys' views on the usefulness of ENE. A second purpose was to collect limited data that would compare the value of ENE to the Court's Initial Status Conference. The survey responses are presented in this report starting on page 36.

A. *The Participants' Views of ENE and of the Evaluators*

1. Views of ENE

Overall, the reaction to ENE was very positive. Table 2 provides the participants' responses to ten different questions concerning different goals of ENE.

Table 2

(Entries are percent of those responding to each item)

Overall, did you find that the ENE procedure helped you by:

a) Providing you with *new* information about *your* case?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=114)	4.4	48.2	36.8	10.5
Clients (N=42)	7.1	33.3	54.8	4.8
Evaluators (N=51)	31.4	47.1	21.6	0.0

b) Providing you with *new* information about the *other party's* case?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=114)	5.3	53.5	33.3	7.9
Clients (N=41)	9.8	53.7	31.7	4.9
Evaluators (N=51)	31.4	47.1	21.6	0.0

c) Providing you with information about *your* case *sooner* than you would have obtained it without ENE?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=114)	7.9	37.7	43.9	10.5
Clients (N=41)	9.8	31.7	53.7	4.9
Evaluators (N=51)	37.3	49.0	13.7	0.0

d) Providing you with information about the *other party's* case *sooner* than you would have obtained it without ENE?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=114)	9.6	44.7	36.8	8.8
Clients (N=41)	12.2	51.2	31.7	4.9
Evaluators (N=51)	37.3	49.0	13.7	0.0

e) Providing information at *less expense* than without ENE?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=112)	9.8	42.9	37.5	9.8
Clients (N=41)	17.1	43.9	34.1	4.9
Evaluators (N=49)	42.9	34.7	22.4	0.0

f) Enabling the parties to enter into *stipulations of fact*?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=110)	3.6	20.0	64.5	11.8
Clients (N=41)	7.3	43.9	43.9	4.9
Evaluators (N=43)	9.3	23.3	67.4	0.0

g) Enabling the parties to *identify key issues*?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=114)	23.7	53.5	17.5	5.3
Clients (N=42)	16.7	69.0	14.3	0.0
Evaluators (N=50)	34.0	58.0	8.0	0.0

h) Enabling the parties to enter into a *discovery plan*?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=107)	2.8	33.6	56.1	7.5
Clients (N=40)	10.0	40.0	50.0	0.0
Evaluators (N=47)	10.6	48.9	40.4	0.0

i) Enabling counsel to *identify key motions* whose early resolution could affect the future of the case?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=108)	6.5	32.4	51.9	9.3
Clients (N=42)	16.7	45.2	38.1	0.0
Evaluators (N=47)	19.1	38.3	42.6	0.0

j) Improving the prospects for *settlement*?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=109)	28.4	29.4	33.9	8.3
Clients (N=39)	25.6	41.0	28.2	5.1
Evaluators (N=51)	29.4	60.8	7.8	2.0

It is notable that in response to almost all of these questions, there was substantial consistency on the part of the attorneys, clients, and evaluators. The strongest difference among the groups was that the evaluators were particularly positive in their responses. In response to only one of the questions listed in Table 2 did the evaluators fail to "agree" or "strongly agree" more than 50% of the time with the question posed. Only 32.6% of the evaluators agreed or strongly agreed that ENE enabled the parties to enter into stipulations of facts (Table 2, sub-part f). The clients were nearly as positive as the evaluators. In eight of the ten items, the clients agreed or strongly agreed with the statement more than 50% of the time. Only 40.4% of the clients agreed or strongly agreed that the procedure provided them with new information about their case (Table 2, sub-part a), and 41.5% agreed or strongly agreed that the procedure provided them with information about their own case sooner than they would have obtained it without ENE (Table 2, sub-part c).

The attorneys had positive views of ENE, although their reactions were not quite as positive as the other two groups. In six of the ten questions, the attorneys agreed or strongly agreed more than half the time with the question. Only 45.6% of the attorneys agreed that the procedure provided them with information about their clients' cases sooner than they would have obtained it without ENE (Table 2, sub-part c); 23.6% agreed that ENE enabled the parties to enter into stipulations of facts (Table 2, sub-part f); 36.4% agreed that ENE enabled the parties to enter into a discovery plan (Table 2, sub-part h); and 38.9% agreed or strongly agreed that ENE enabled counsel to identify key motions whose early resolution could affect the future of the case (Table 2, sub-part i).

2. Evaluators' Contribution

These responses were consistent with the responses participants gave when asked to focus on the evaluators' contributions to the cases. Table 3 shows that there was overwhelming agreement among the attorneys, clients, and evaluators that the evaluators had made useful contributions.

Table 3

(Entries are percent of those responding to each item)

Did you find that the *evaluator* made a useful contribution to the parties' understanding of the case?

	Yes	No
Attorneys (N=110)	80.0	20.0
Clients (N=42)	81.0	19.0
Evaluators (N=48)	91.7	8.3

The participants were also asked to focus on particular goals that the evaluators might have helped to foster. Table 4 provides their responses.

Table 4

(Entries are percent of those responding to each item)

Did the *evaluator* help by:

a) Providing you with *new insights* about the case?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=113)	13.3	41.6	39.8	5.3
Clients (N=42)	7.1	54.8	35.7	2.4
Evaluators (N=51)	21.6	68.6	9.8	0.0

b) Providing you with a *fresh perspective* on the case?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=114)	14.0	38.6	42.1	5.3
Clients (N=42)	9.5	38.1	50.0	2.4
Evaluators (N=52)	26.9	65.4	7.7	0.0

c) Providing you with a *more complete understanding* of the case?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=114)	10.5	36.0	49.1	4.4
Clients (N=42)	4.8	47.6	42.9	4.8
Evaluators (N=51)	19.6	60.8	19.6	0.0

d) *Improving communications* between the parties?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=113)	14.2	46.0	34.5	5.3
Clients (N=42)	9.5	42.9	47.6	0.0
Evaluators (N=48)	22.9	56.3	18.8	2.1

e) Enabling the parties to enter into *stipulations of facts*?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=109)	3.7	16.5	73.4	6.4
Clients (N=40)	7.5	40.0	52.5	0.0
Evaluators (N=40)	5.0	10.0	85.0	0.0

f) *Identifying key issues?*

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=114)	14.0	61.4	19.3	5.3
Clients (N=42)	14.3	71.4	14.3	0.0
Evaluators (N=50)	30.0	58.0	12.0	0.0

g) Enabling the parties to enter into a *discovery plan*?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=107)	1.9	29.0	56.1	13.1
Clients (N=38)	5.3	39.5	55.3	0.0
Evaluators (N=45)	13.3	35.6	51.1	0.0

h) Enabling the parties to *shape the future* of the case through *important motions*?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=105)	6.7	26.7	55.2	11.4
Clients (N=38)	7.9	23.7	63.2	5.3
Evaluators (N=43)	9.3	41.9	48.8	0.0

i) Improving the prospects for *settlement*?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Attorneys (N=111)	21.6	33.3	37.8	7.2
Clients (N=41)	26.8	31.7	36.6	4.9
Evaluators (N=49)	32.7	51.0	14.3	2.0

As with the questions in Table 2, which were aimed at ENE overall, the questions in Table 4, which focused on the evaluators' contributions, yielded a similar pattern. Although the attorneys were the group least likely to agree with the statements, even their responses suggest that the evaluators contributed positively to the ENE process. Thus, in five of the nine questions cited in Table 4, over half of the attorneys agreed or strongly agreed with the statement, and over 46% agreed or strongly agreed with the statement in a sixth question. In response to the remaining questions reported in Table 4, only 20.2% of the attorneys agreed or strongly agreed that the evaluator enabled the parties to enter into stipulations of facts (Table 4, sub-part e), 30.9% agreed or strongly agreed that the evaluator helped the parties enter into a discovery plan (Table 4, sub-part g), and

33.4% agreed that the evaluator helped the parties shape the future of the case through important motions (Table 4, sub-part h).

The clients' responses yielded a similar pattern. In five of the nine items, the clients agreed or strongly agreed with the statement over half the time. In two additional instances, over 47% of the clients agreed or strongly agreed with the statement. The lowest agreement levels for the clients were that only 44.8% of clients agreed that the evaluator enabled the parties to enter into a discovery plan (Table 4, sub-part g), and only 31.6% of the clients agreed that the evaluator enabled the parties to shape the future of the case through important motions (Table 4, sub-part h).

The response pattern for the evaluators is similar, although, as before, even more positive than the responses of the other two groups. In many of the instances in which there was substantial agreement, there was a positive response from over 80% of the evaluators. Only twice did fewer than half of the evaluators agree or disagree with a statement. In one, the evaluators agreed in 48.9% of the cases that they had helped the parties enter into a discovery plan (Table 4, sub-part g). The only event which the evaluators clearly thought did not occur frequently was enabling the parties to enter into stipulations of facts (Table 4, sub-part e). Only 15% of the evaluators agreed or strongly agreed with that statement.

The response pattern to these two detailed questions on the value of ENE indicates that the participants agree that something of positive value is going on, but the less tangible goals of ENE, such as "a fresh perspective," tend to garner a higher level of agreement from the parties than the more tangible results of the session, such as enabling the parties to enter into stipulations of facts, or enter into a discovery plan, or to shape the future of the case through important motions. Thus, the participants agree that the ENE process, in general, and the evaluators are, in particular, useful and helpful for enhancing the prospects for settlement, for facilitating the exchange of information, and for improving communications between the parties. There is less agreement with respect to the more tangible items.

One important reason that the participants indicated that the more tangible items, such as a discovery plan, were less frequently a by-product of the ENE session was that 37% of the cases were settled at the ENE session or as a direct result of the session. At least in those cases where the session achieved or focused on settlement, one would not expect the participants to have discussed discovery plans, future motions or other fairly tangible items. These relatively lower numbers, then, are quite possibly a reflection of the differing nature of the cases where the ENE session becomes essentially a settlement conference, and those cases where the ENE session has more of the character of a status conference with case management as a major focus.

3. Satisfaction and Fairness

The participants were asked a number of questions to elicit their views about their satisfaction with the procedure and their sense of its fairness. It seems quite clear that the participants are very satisfied with the overall procedure. For example, when asked whether they were satisfied with the ENE procedure, over 79% of the attorneys, 73% of the clients, and 90% of the evaluators stated that they were somewhat satisfied or very satisfied with the ENE procedure. See Table 5.

Table 5

(Entries are percent of those responding to each item)

Were you satisfied with the ENE procedure?

	Very Satisfied	Somewhat Satisfied	Somewhat Dissatisfied	Very Dissatisfied
Attorneys (N=113)	40.7	38.9	10.6	9.7
Clients (N=42)	38.1	35.7	19.0	7.1
Evaluators (N=52)	46.2	44.2	9.6	0.0

There was overwhelming agreement that the process was fair. Even the attorneys agreed that the process was very fair or somewhat fair (94.5%). Eight-eight percent of the clients fell into these two categories, as did 96% of the evaluators. Moreover, in all three groups, the vast majority of the responses fell into the most positive category (very fair). See Table 6.

Table 6

(Entries are percent of those responding to each item)

How fair to everyone involved was the ENE procedure?

	Very Fair	Somewhat Fair	Somewhat Unfair	Very Unfair
Attorneys (N=109)	82.6	11.9	1.8	3.7
Clients (N=42)	64.3	23.8	11.9	0.0
Evaluators (N=52)	80.8	15.4	1.9	1.9

The overwhelming vote of confidence in the fairness of ENE was buttressed by the very strong vote of confidence in the evaluators. Over 91% of both the attorneys and the clients responded that the evaluator assigned to their case was not biased at all. See Table 7.

Table 7

(Entries are percent of those responding to each item)

Did you think that there was any bias on the part of the Evaluator?

	No Bias	Some Bias	Much Bias
Attorneys (N=113)	91.2	7.1	1.8
Clients (N=42)	92.9	4.8	2.4

The participants also agreed that the evaluators were sufficiently prepared for the sessions. Ninety-five percent of the attorneys and 92% of the clients stated that the evaluators were adequately prepared or well prepared. The evaluators rated their own performances somewhat more modestly. Only 76% of the evaluators placed themselves in these two categories. See Table 8.

Table 8

(Entries are percent of those responding to each item)

Was the Evaluator prepared for the ENE session?

	Not Prepared At All	Not Prepared Enough	Adequately Prepared	Well Prepared
Attorneys (N=111)	0.9	3.6	39.6	55.9
Clients (N=41)	4.9	2.4	48.8	43.9
Evaluators (N=50)	0.0	24.0	32.0	44.0

Finally, a strong positive reaction was manifested in the participants' response to the question regarding whether they would endorse expansion of the ENE program to more cases in the Northern District of California. Over 86% of the attorneys, 91% of the clients, and 100% of the evaluators endorsed or strongly endorsed expansion. See Table 9.

Table 9

(Entries are percent of those responding to each item)

Would you endorse expansion of ENE to more cases in this Court?

	Strongly Endorse	Endorse	Oppose	Strongly Oppose
Attorneys (N=109)	27.5	58.7	11.9	1.8
Clients (N=37)	27.0	64.9	8.1	0.0
Evaluators (N=47)	51.1	48.9	0.0	0.0

It is clear that the participants believed that the ENE procedure helped their cases, that ENE is a fair process, and that more cases should be assigned to ENE. This overall positive reaction holds even if the participants did not agree that all of the specific ENE goals were actually achieved in their sessions.

B. *Identification of Cases Well-Suited to ENE*

Despite seeking information on this issue in a number of ways, the responding participants did not seem to think that only a particular type of case was well-suited to ENE. When asked to consider particular types of cases, the participants strongly agreed that *all* the different categories mentioned would benefit from ENE. See Table 10. It is impossible to conclude that the participants thought that a particular category of cases by subject matter was especially well-suited (or poorly-suited) for ENE.[6]

6. The participants were also asked whether any characteristic of the parties or the attorneys might make a case particularly well-suited to ENE. Although some respondents agreed that there were such characteristics, the characteristics mentioned defy categorization in a way that would be useful to program administrators. The answers tended to mention subjective factors, such as "unreasonable attorneys," rather than any objectively verifiable characteristics that might be used in a ministerial fashion to decide whether a case ought to be assigned to ENE.

Table 10

(Entries are percent of those responding and agreeing that the type of case would benefit from ENE)

Do you think the following types of cases would benefit from ENE?

	Attorneys	Clients	Evaluators
Antitrust	75.4 (N=65)	92.3 (N=26)	89.7 (N=29)
Banking	86.7 (N=60)	100.0 (N=26)	100.0 (N=30)
Civil Rights	84.8 (N=79)	96.4 (N=28)	92.1 (N=38)
Contracts	90.8 (N=87)	96.7 (N=30)	100.0 (N=41)
Environmental	82.3 (N=62)	92.3 (N=26)	93.9 (N=33)
Intellectual Property	90.8 (N=65)	100.0 (N=25)	100.0 (N=33)
Labor	88.3 (N=77)	96.6 (N=29)	97.4 (N=38)
Real Property	90.3 (N=72)	96.6 (N=29)	100.0 (N=37)
Securities	81.3 (N=64)	96.0 (N=25)	93.5 (N=31)
Torts	90.1 (N=91)	100.0 (N=27)	97.7 (N=43)

The data from attorneys were also analyzed according to the subject matter of the cases. (Due to the smaller sample sizes, the data from the evaluators and clients were not analyzed in this fashion.) No significant differences were found among the attorneys when asked to respond to particular issues. Some representative responses from attorneys, which are divided according to the subject matter of the case assigned to ENE, are presented in Table 11.

Table 11

(Entries are percent of those attorneys responding to each item)

Attorney Responses According to Type of Case on Selected Questions

Overall, did you find that the ENE procedure helped you by:

a) Enabling the parties to enter into a *discovery plan*?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Civil Rights (N=23)	8.7	21.7	60.9	8.7
Contracts (N=27)	3.7	29.6	63.0	3.7
Torts (N=33)	9.1	27.3	54.5	9.1
Securities (N=2)	0.0	50.0	50.0	0.0
Labor (N=12)	0.0	33.3	58.3	8.3

b) Improving the prospects for *settlement*?

	Strongly Agree	Agree	Disagree	Strongly Disagree
Civil Rights (N=24)	20.8	25.0	37.5	16.7
Contracts (N=26)	30.7	19.2	42.3	7.7
Torts (N=31)	25.8	45.2	22.6	6.5
Securities (N=2)	0.0	50.0	50.0	0.0
Labor (N=12)	25.0	16.7	41.7	16.7

c) Were you satisfied with the ENE procedure?

	Very Satisfied	Somewhat Satisfied	Very Dissatisfied	Somewhat Dissatisfied
Civil Rights (N=25)	36.0	40.0	16.0	8.0
Contracts (N=29)	41.4	37.9	13.8	6.8
Torts (N=32)	46.9	40.6	3.1	9.4
Securities (N=2)	0.0	50.0	0.0	50.0
Labor (N=12)	33.3	25.0	33.3	8.3

d) How fair to everyone involved was the ENE procedure?

	Very Fair	Somewhat Fair	Somewhat Unfair	Very Unfair
Civil Rights (N=25)	76.0	20.0	0.0	4.0
Contracts (N=28)	85.7	10.7	3.6	0.0
Torts (N=31)	87.1	9.7	3.2	0.0
Securities (N=2)	100.0	0.0	0.0	0.0
Labor (N=12)	58.3	33.3	8.3	0.0

e) Would you endorse expansion of ENE to more cases in this Court?

	Strongly Endorse	Endorse	Oppose	Strongly Oppose
Civil Rights (N=24)	20.8	66.7	12.5	0.0
Contracts (N=28)	32.1	50.0	14.3	3.6
Torts (N=32)	34.4	56.2	9.4	0.0
Securities (N=2)	50.0	0.0	50.0	0.0
Labor (N=11)	18.2	63.6	18.2	0.0

In an effort to look for other variables that might suggest that ENE works especially well (or poorly) with certain types of attorneys, the data also were analyzed according to how long the attorneys had been admitted to any state bar, the percentage of time the attorneys had devoted to plaintiffs' matters over the past five years, the work setting in which the attorneys had spent the most time over the past five years, and the monetary value of cases in which the attorneys had most commonly been involved. Analyzed in these ways, there were no significant differences among any of the attorneys in their reactions to ENE. Thus, there emerges no pattern from the data collected that would clearly suggest that there are characteristics of either the cases, the attorneys, or the parties that a court could use in a consistent and fairly ministerial manner to decide whether to refer cases to ENE. If the views of the participants are a reliable guide, ENE appears to be equally well-received along any of these dimensions.

C. *Costs of the Evaluators' Services*

One of the concerns of the program designers was whether the evaluators should be paid for their services. For the experimental phase, the ENE Task Force decided that the evaluators would be asked to serve pro bono. The Court has not encountered any difficulties in obtaining volunteer services; however, that may not continue to be true.

1. Reaction to a Charge for ENE

To determine whether charges would be accepted, the participants were asked whether it would be fair for the Court to impose a fixed charge to compensate the evaluators for their time. The results are reported in Table 12, below. A majority of all three groups, attorneys, clients, and evaluators, agreed that it would be very fair or fair for the Court to impose a charge. The attorneys were the least certain of this; only 60.2% said it would be fair or very fair to charge. The clients and the evaluators were more likely to respond that it was fair. For the clients, 76.3% agreed that it was very fair or fair, and 77.1% of the evaluators agreed. Although the differences among the groups did not achieve statistical significance, it is of particular interest that the clients, having experienced ENE and who ultimately would be footing the bill, strongly agree, perhaps even more than their attorneys, that it would be fair to impose a charge.

Table 12

(Entries are percent of those responding to each item)

Would it be fair for the Court to impose a fixed charge so that the Evaluators can be paid for their time?

	Very Fair	Somewhat Fair	Somewhat Unfair	Very Unfair
Attorneys (N=108)	20.4	39.8	29.6	10.2
Clients (N=38)	23.7	52.6	21.1	2.6
Evaluators (N=48)	31.3	45.8	20.8	2.1

2. Amount of Charge

Those participants who responded that it would be fair to impose a charge were then asked to choose what specific amount of money would be a fair charge for the evaluators' services. The results are in Table 13.

Table 13

(Entries are percent of those responding to each item)

What specific amount of money would you say is a fair charge for the services of the Evaluator?

	Under $250	$251-500	$501-750	$751-1,000	Over $1,000
Attorneys (N=59)	23.7	45.8	20.3	6.8	3.4
Clients (N=21)	19.0	52.4	9.5	9.5	9.5
Evaluators (N=36)	13.9	30.6	33.3	22.2	0.0

The categories selected for the questionnaire were based on the amounts freely suggested by the participants in the initial pilot study. The fact that the participants were asked to select from established categories may, of course, have skewed their responses on this point. Nevertheless, there seems to be general agreement across the three groups that a charge for the ENE process on the order of $250 to $750 would be deemed to be fair. In the three categories of attorneys, clients, and evaluators, over 60% of each group checked the two categories represented by this range. The upper end of this range would approximate the compensation for three to five hours of a senior San Francisco attorney who bills hourly. It should be noted that this is substantially above the amount paid to attorneys who work in the Court's arbitration program. The Court may desire to maintain parity between the two programs.

3. Allocation of Charge

When asked how the charge should be allocated between the parties, there was overwhelming agreement that the charge simply should be split equally among the parties, rather than having it paid by either the defendant, the plaintiff, or the non-prevailing party.

Table 14

(Entries are percent of those responding to each item)

How should the charge be allocated between the parties?

	Split Equally	Plaintiff Pays	Defendant Pays	Non-prevailing Party Pays	Other
Attorneys (N=68)	77.9	7.4	0.0	8.8	5.9
Clients (N=29)	62.1	3.4	13.8	20.7	0.0
Evaluators (N=36)	91.7	0.0	2.8	2.8	2.8

In sum, the participants clearly believe that it would be fair to impose a charge, that the charge ought to be within the range of $250 to $750, and that the charge ought to be split equally among the parties without regard to the final outcome.[7]

D. *Costs and Cost Savings*

There are available some limited data on cost savings. The attorneys and parties do not seem to believe that ENE is saving them substantial amounts of money. These are limited data, however, and must be treated with caution. Moreover, in order to enhance the response rate, the questionnaire asked for a prediction of savings, rather than the actual amounts billed.

1. Costs of ENE

Given the context of high litigation costs, the participants do not believe that ENE costs them a substantial amount of money. The participants were asked whether they had found that the case was more or less costly as a result of ENE. The responses of attorneys and clients were similar. The modal response in each group was that the costs were about

7. For the court's decision on this matter, *see* Appendix *infra* page 56.

the same. Over a third of each group thought that the costs were somewhat less, and about one-quarter of each group thought that ENE had increased the costs of litigation. The results are presented in Table 15.

Table 15

(Entries are percent of those responding to each item)

In general, do you think that this case was more or less costly to you than it would have been absent the ENE program?

	Much More Costly	Somewhat More Costly	About as Costly	Somewhat Less Costly	Much Less Costly
Attorneys (N=107)	2.8	26.2	37.4	17.8	15.9
Clients (N=31)	3.2	22.6	32.3	19.4	22.6

When asked how much ENE had cost, the modal response was over $1,000. Both clients and attorneys in over 70% of the cases reported that the cost was at least $500. Those results are presented in Table 16.

Table 16

(Entries are percent of those responding to each item)

About how much money did ENE *cost* you/your client?

	$1-250	$251-500	$501-1,000	Over $1,000
Attorneys (N=62)	6.5	21.0	30.6	41.9
Clients (N=17)	11.8	17.6	29.4	41.2

2. Cost Savings

When asked how much ENE had saved the client, it was difficult for the participants to name a figure, perhaps because most of the cases had not yet terminated at the time the question was asked. In any event, it would have been difficult to determine how much had been saved. Responses would be little more than guesses, based on experience and the initial prediction as to what the case might have cost. Perhaps as a result of these difficulties, very few people answered this question. Among those who did, however, the prediction was that over $1,000 had been saved in each instance. These results are presented in Table 17.

Table 17

(Entries are percent of those responding to each item)

About how much money did ENE *save* you/your client?

	$1-250	$251-500	$501-1,000	Over $1,000
Attorneys (N=16)	0.0	0.0	12.5	87.5
Clients (N=5)	20.0	0.0	0.0	80.0

For a number of clients and attorneys, the figure saved was zero because they were not in a billing situation. This would be true where the client is not billed on an hourly basis, as, for example, with a contingency fee arrangement and in an in-house corporate counsel or governmental setting.

In addition, presenting the data in small categories may obscure the fact that ENE is perceived to save a substantial amount of money for some clients. When the full ranges are examined, the vast majority of those responding stated that the cost to the clients was under $2,500. However, those who responded, when asked about the amount saved, believed that much more than $2,500 was saved. Most responded that, when money was saved, over $5,000 was saved. Three respondents stated that $45-50,000 was saved as a result of the procedure.

Although the number of responses was too small and the data too incomplete to provide truly meaningful analysis on this point, it does not appear that ENE is either costing an inordinate amount of money or is, overall, causing the parties to spend much additional money. When it does

save money, ENE may more than pay for itself. However, this statement is based on evidence that is barely adequate to support any sort of tentative conclusion. Finally, the predictions may have been affected by the stage in the case when the data happened to have been collected. It is especially difficult to say that ENE has or has not saved money when the case is not over yet. This is an area in which it would be helpful to study a very large number of cases and attempt to collect cost data in a systematic fashion, something that all researchers in this area have found very difficult to achieve. In addition, even if ENE proves to be not cost-effective from a strictly monetary standpoint, that finding would need to be assessed in the context of all of the goals of the program.

3. Scheduling

One very indirect measure of cost is the issue of scheduling problems. The modal group of attorneys reported that scheduling problems were about the same as those expected in ordinary trial procedure, and the clients' modal response was that scheduling problems were less than expected in ordinary procedure. No client said that scheduling problems were greater. The results are presented in Table 18.

Table 18

(Entries are percent of those responding to each item)

How did any scheduling problems you encountered in ENE compare with those you would expect to encounter in ordinary civil trial procedure?

	Greater	Same	Less
Attorneys (N=101)	11.9	67.3	20.8
Clients (N=29)	0.0	44.8	55.2

As an indirect measure of cost, the fact that the attorneys and clients do not report that ENE enhances scheduling problems is consistent with the limited findings that ENE is not further burdening the already heavy costs of modern-day litigation.

E. *Problems with ENE*

The data and comments of the participants in response to open-ended questions revealed a limited number of problems with the program. In my view, these problems are not fatal. However, the ENE administrators need to work on these problems; in certain cases, the evaluators need to alter their behavior.

1. Timing of ENE Sessions

One stated goal of the program initially was to have the ENE session take place within 100 days of filing of the case in federal court.[8] This goal was rarely met. In only two cases were the sessions held within this time limit. Twenty-five percent of the cases had ENE sessions held within 173 days, 50% of the sessions were held within 193 days, 75% within 240 days, and all of the cases had sessions held within 429 days. This pace is substantially slower than the program designers had hoped. In part, the slow pace can be attributed to the difficulties of getting a new program off the ground. For example, there was a delay of several weeks in assigning some cases while the district judges approved a necessary suspension of the local rules. In addition, there was another delay of several weeks in the assignment of cases because the assistant working part-time for the supervising magistrate took time off from her duties to study for law school examinations. Sometimes evaluators could not arrange for sessions to be held within the time limits.

The delay due to awaiting suspension of the rules will not recur. With more experience, routine delays ought to be reduced. If the ENE program is made permanent, it is recommended that the Court find the funds for the supervising magistrate to hire an extra law clerk, who will devote at least half of his or her time to administering the program. Law students have the disadvantage of being beholden to their school schedules. Inevitably, they will be able to devote limited amounts of time to the program. Part-time workers, who are not in the chambers during the entire business day, cannot accomplish as much because they will have great difficulty reaching busy people on the telephone. If the ENE program continues to rely on students for administrative tasks, one can expect that some otherwise unnecessary delays will occur. Evaluators must be diligent in their efforts to arrange sessions as promptly as possible.

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8. The program now seeks to have evaluation sessions held within 150 days. *See* Appendix *infra* at page 51.

Although the program's time goal was not met, in actuality it does not appear to have had an extremely detrimental effect on the perceived value of the program. A computer analysis was conducted, which examined the views of the attorneys, clients, and evaluators according to whether the ENE session fell into the first, second, third, or fourth quartiles of cases. The result was that there were virtually no statistically significant differences when the responses were analyzed according to these divisions. Table 19 lists those few questions and the group (attorneys (A), clients (C), evaluators (E)) in which a chi-square analysis revealed that there was a difference among the quartile groups that was statistically significant to at least the .05 level.

Table 19

Questions for Which There Was a Statistically Significant Difference When Examined by Quartiles

Question	Participant
Overall, did you find that the ENE procedure helped you by:	
1. Enabling counsel to *identify key motions* whose early resolution could affect the future of the case?	(A)*
Did the *evaluator* help by:	
2. Providing you with a *fresh perspective* on the case?	(C)
3. *Improving communications* between the parties?	(E)
4. Enabling the parties to *shape the future* of the case through *important motions*?	(A)*

If the Evaluator *did* arrange for any additional contacts between the parties, what did the Evaluator arrange?

5.	Another session with the Evaluator	(E)
6.	Report to the Evaluator by a certain date	(A)*
7.	About how much money did ENE *save* your client?	(A)*
8.	How was this case terminated in the district court?	(A)
9.	In your opinion, did the Early Neutral Evaluation session influence the outcome of your case?	(A)

These data are revealing in several respects. First, as indicated in Table 19, there were only nine times when there was a statistically significant difference in a particular group on the basis of the quartile in which the case fell. Potentially, there could have been significant differences in over 160 instances. This means that, overall, there were few differences in attitudes on the basis of when the case was actually heard by an evaluator. Second, even in those few instances where there were significant differences, there was not a consistent pattern indicating that early or late evaluations are absolutely unsuited to ENE.

For example, the trend in the first item on the table, the identification of key motions, does suggest that attorneys were less likely to agree that ENE was helpful in the latter stages of a case than in the earlier stages. However, other items do not point in the same direction. Thus, for the third item, where there was a significant difference among evaluators, the data show that the statistically significant difference was that those evaluators who heard their cases in the first and fourth quartiles (i.e., the earliest and latest cases) were more likely to agree that they had improved communications than were those evaluators whose cases fell into the third quartile. It may be that evaluators are doing something different at the early stage of a case than in a later stage, but this finding is certainly not supportive of the hypothesis that the basic usefulness of ENE deteriorates over time. In fact, in only four of the nine items in which there was a significant difference examined by quartiles, is it even plausible to contend that the usefulness of ENE declined over time. In the other five items,

there was no clear-cut pattern. (The four items suggesting a decline over time are starred in Table 19.)

Overall, then, while it may make intuitive sense to believe that an ENE session ought to occur as early as possible in the process, at least in terms of the perceptions of the participants, there is no empirical basis to conclude that the usefulness of ENE deteriorates when the sessions are held later in the process. While the program may well desire to attempt to improve its record of timeliness, there is less cause for concern in terms of the perceptions of the participants. Even at a late date in the life of the litigation, ENE is performing a useful service.[9]

2. Communicating with the Parties

In the pilot study reported on previously,[10] it was noted that there were some problems with the parties' understanding of the evaluations. Sometimes the parties did not understand how the evaluator arrived at the predicted result, and sometimes the parties did not understand certain aspects of the evaluation, such as why a particular item of claimed damage was not recoverable. In that previous report, I recommended that the evaluators write their evaluation and show the clients in a step-by-step fashion how they reached their evaluation of the case. I do not have direct survey data concerning whether or not the evaluators followed this particular suggestion. However, there is some evidence that there is still a problem in communication between the evaluators and the clients. The data supporting this statement are found in two questions. All participants were asked whether the evaluator assessed the probability that the plaintiff would prevail on the merits, and, if so, how much the plaintiff would receive. Table 20 shows the responses to those questions.

9. What these data cannot demonstrate is whether an early session will lead to termination of the case more promptly. Such an examination needs a different type of data than was collected for this report.

10. *See* Levine, *supra* note 1, 70 JUDICATURE at 240.

Table 20

(Entries are percent of those responding to each item)

a) Did the Evaluator assess the probability that the plaintiff would prevail on the merits of the case?

	Yes	No
Attorneys (N=111)	77.5	22.5
Clients (N=39)	56.4	43.6
Evaluators (N=51)	94.1	5.9

b) Did the Evaluator predict how much money the plaintiff would receive if the case were to go to trial?

	Yes	No
Attorneys (N=106)	47.2	52.8
Clients (N=41)	26.8	73.2
Evaluators (N=49)	51.0	49.0

What is striking about these data are the discrepancies among the groups in their answers. While 94% of the evaluators said that they had assessed the probability of the plaintiff's success, just 56% of the clients and 77% of the attorneys stated that the evaluators did this. This difference is statistically very significant. The result perhaps can be explained by the natural tendency of the evaluators to state on the survey questionnaire that they actually did something that they knew they were supposed to do.

However, the data from the question asked immediately after this one do not support that hypothesis.

The participants were next asked whether the evaluator predicted how much money the plaintiff would receive if the case were to go to trial. The second question in Table 20 provides the responses to that question. While 51% of the evaluators said that they did provide a monetary assessment, only 26.8% of the clients said that this happened. In this instance, the attorneys' figure, 47.2%, is quite close to the evaluators' figure. Since the attorneys would have no incentive to "fake positive," that is, to falsely state that the evaluators did something that they were supposed to do in the ENE session, the correspondence between the attorneys' figures and the evaluators' stated figures is instructive.

Taking the responses to the two questions together, it appears that the evaluators usually are assessing the probability of the plaintiffs' success and often are assessing the amount the plaintiffs would receive if they won at the liability stage, but that too often the message is not getting through to the clients. The discrepancy between the clients' figures and the evaluators' figures is of concern. It behooves the program managers to be especially careful in the training sessions to underscore for the evaluators the potential problem in this area and to encourage them to be as clear and as thorough in explaining their evaluation to the parties as possible. Showing the participants something in writing, even if it consists of nothing more than notes on a yellow pad, would help to emphasize to the clients that the promised evaluation was being given. This might help the parties to remember that the evaluation was indeed presented, to recall what the reasons were for the evaluation, and to leave the session with a more lasting impression of the results.

F. *Telephone Survey of Attorneys with Cases Assigned to ENE*

Because at the time of the distribution of the questionnaires reported upon above, many of the cases had not been terminated, it was difficult to determine whether the ENE process would have any lasting value to the cases on a continuing basis. As a result, assistants to the author attempted to conduct telephone interviews with all attorneys in those cases in which at least one ENE session was actually held. The assistants were able to reach the attorneys in 18 cases which had been settled as a direct result of the ENE process ("Settled Cases") and 46 cases which had not ("Other ENE Cases"). These telephone interviews took place approximately five months after the questionnaires were distributed. The results of that telephone survey are reported below.

1. ENE versus Initial Status Conference

One important focus of these interviews was to compare the attorneys' views on the effectiveness of ENE as compared to the Court's Initial Status Conference (ISC), which, in theory, ought to provide many of the same benefits to the litigants as the ENE process. However, among attorneys who had participated in the ENE process, there was overwhelming agreement that the ENE process is superior. This held true even in those cases in which ENE had not led directly to settlement. As Table 21 indicates, the attorneys in both groups definitely believe that ENE is superior in clarifying the issues (sub-part a), communicating information about the case across party lines (sub-part b), setting the groundwork for cost-effective discovery (sub-part c), and enhancing the prospects for settlement (sub-part d). This is true even though the judges conducting the ISCs are "experts," because they conduct so many proceedings of this type, and the evaluators are "amateurs" at conducting ENE sessions.

Table 21

(Entries are percent of those responding to each item)

Please compare the utility of the ENE session to the initial status conference as you have typically experienced it in our federal court. Which is likely to contribute more to:

a) Clarifying the issues:

	Settled Cases (N=34)	Other ENE Cases (N=87)
ENE	76.5	81.6
ISC	2.9	13.8
No Answer	11.8	0.0
Same	2.9	2.3
"Depends"	5.9	0.0
Neither	0.0	2.3

b) Communicating information about the case across party lines?

	Settled Cases (N=34)	Other ENE Cases (N=91)
ENE	79.4	84.6
ISC	0.0	4.4
No Answer	11.8	0.0
Same	0.0	0.0
"Depends"	8.8	0.0
Neither	0.0	11.0

c) Setting the groundwork for cost-effective discovery?

	Settled Cases (N=36)	Other ENE Cases (N=83)
ENE	97.2	62.7
ISC	8.3	13.3
No Answer	16.7	0.0
Same	8.3	6.0
"Depends"	5.5	0.0
Neither	8.3	18.1
Both	5.5	0.0

d) Prospects for settlement?

	Settled Cases (N=34)	Other ENE Cases (N=95)
ENE	88.2	78.9
ISC	0.0	11.6
No Answer	5.9	0.0
Same	2.9	2.1
"Depends"	2.9	0.0
Neither	0.0	7.4

2. Lasting Benefits of ENE

Another purpose of the follow-up interviews was to determine whether the perceived benefits of ENE had proved to be relatively lasting. The results are presented in Table 22.

Table 22

(Entries are percent of those responding to each item)

a) Did participation in the ENE process contribute in any way to developing or disposing of this case?

	Settled Cases Develop or Dispose: (N=34)		Other ENE Cases Develop: (N=96)
Yes	88.2	Yes	61.4
No	11.8	No	36.4
		Not Sure	2.1
		Dispose: (N=94)	
		Yes	31.9
		No	54.3
		Not Sure	13.8

b) Did anything happen earlier or faster in the case because of the ENE process?

	Settled Cases (N=34)	Other ENE Cases (N=90)
Yes	73.5	54.4
No	26.5	45.5

c) Did going through the ENE process help reduce the overall cost of litigation in any way?

	Settled Cases (N=34)	Other ENE Cases (N=93)
Yes	73.5	34.4
No	26.5	60.2
Not sure	0.0	5.4

The attorneys in the cases that had settled at or shortly after the ENE session were in substantial agreement that the ENE session had contributed to the development or disposition of their cases. In the Other ENE Cases, the attorneys agreed by a nearly two-to-one margin that ENE had helped to develop their cases, but by a 54%-to-32% margin disagreed that ENE had helped to dispose of their cases. It is probably to be expected that most attorneys in the Other (not settled) category would respond that ENE had not helped to dispose of their cases. What is of note is that even among the cases that had not settled, almost one-third of the attorneys several months later believed that the ENE process had made a contribution to the ultimate disposition of their cases.

The responses to the other questions presented in Table 22 are consistent. Almost three-quarters of the attorneys in the Settled category agreed that something happened earlier or faster in their cases because of ENE; over one-half in the Other category agreed. Almost three-quarters of the attorneys in the Settled category agreed that ENE reduced the cost of litigation, while only one-third of the attorneys from the Other category agreed.

3. Contribution to Settlement

Another important focus of the telephone survey was the contribution of ENE to settlement discussions and the prospects for settlement. Table 23 indicates that 88% of the attorneys from the Settled cases, and nearly 60% of the attorneys from the Other cases agreed that participation in ENE contributed to any settlement negotiations that may have taken place. By similar amounts, the attorneys agreed that settlement discussions occurred earlier than they might have without ENE.

Table 23

(Entries are percent of those responding to each item)

a) Regardless of whether the case has settled, did participation in ENE contribute anything to settlement negotiations?

	Settled Cases (N=34)	Other ENE Cases (N=91)
Yes	88.2	59.3
No	8.8	40.6
No Answer	2.9	0.0

b) Did settlement or settlement discussion occur earlier than they might have without the ENE session?

	Settled Cases (N=34)	Other ENE Cases (N=76)
Yes	79.4	48.7
No	17.6	44.7
No Answer	2.9	6.6

4. ENE v. Settlement Conferences

The developers of ENE were also interested in a comparison of the utility of ENE and judicially hosted settlement conferences. Tables 24 and 25 report the data relevant to this issue. Table 24 indicates that among the attorneys from the Settled category, there was overwhelming agreement (83.3%) that in those few cases in the category that had a judicially hosted settlement conference and an ENE session, the ENE session contributed more to settlement. The attorneys from the Other category were more equivocal in their responses. Only one-sixth agreed that ENE was superior; 39% indicated that the judicially hosted settlement conference was more useful, and approximately one-third said that they were equally useful (or useless). In Table 25, the attorneys were asked to compare ENE to their

typical experience with judicially hosted settlement conferences in federal court. The largest groups of attorneys in both categories reported that ENE was more useful than settlement conferences; however, the comparison is not as dramatically in favor of ENE as was true when the attorneys were asked to consider the relative merits of the ISC (see Table 21).

Table 24

(Entries are percent of those responding to each item)

a) Has there been a judicially hosted settlement conference in this case?

	Settled Cases (N=34)	Other ENE Cases (N=47)
Yes	17.6	23.4
No	79.4	74.4
Not Sure	2.9	2.1

b) If so, did ENE contribute more or less than the conference to the "settlement dynamic?"

	Settled Cases (N=6)	Other ENE Cases (N=18)
More	83.3	16.7
Less	16.7	38.9
Draw	0.0	27.8
Neither	0.0	5.5
No Answer	0.0	11.1

Table 25

(Entries are percent of those responding to each item)

As a general matter, how would you compare the usefulness of the ENE session to judicially hosted settlement conferences *as you have typically experienced them in the federal court*?

	Settled Cases (N=31)	Other ENE Cases (N=89)
ENE More Useful	32.2	35.9
Settlement Conference Better	9.6	20.2
Same	29.0	13.5
Cannot Compare	16.1	13.5
Both Are Useful	3.2	0.0
No Answer	9.6	16.1

5. Cost-benefit of ENE

The attorneys were also asked about whether ENE was beneficial from a cost-benefit perspective. As Table 26 indicates, the attorneys whose cases settled as a result of ENE were strongly in agreement (67.6%) that their clients were better off. In contrast, only 37.6% of the attorneys from the Other category agreed that their clients were better off from a purely cost-benefit perspective.

Table 26

(Entries are percent of those responding to each item)

Looking back, from a cost-benefit perspective, was your client better or worse off because this case was sent to ENE?

	Settled Cases (N=34)	Other ENE Cases (N=93)
Better	67.6	37.6
Worse	23.5	37.6
Same	5.9	21.5
No Answer	2.9	0.0
Don't Know	0.0	3.2

6. Expanding ENE

Despite the reduced usefulness that ENE might have had for those attorneys whose cases did not settle as a result of going through the ENE program, even these attorneys were strongly in favor of expanding ENE to more cases in the court. Among the attorneys in the Other category, 86.7% endorsed expansion, a figure nearly as high as the 94.1% endorsement from the attorneys whose cases had settled. (See Table 27.) These results are comparable to those obtained from the earlier questionnaire data, when 86.3% of all the attorneys endorsed expansion. (See Table 9.) Thus, even the attorneys in the cases for which ENE has proved to be of somewhat less tangible and direct benefit see the merits of the program and endorse its expansion to other cases.

Table 27

(Entries are percent of those responding to each item)

Would you endorse expansion of ENE to more cases in this court?

	Settled Cases (N=34)	Other ENE Cases (N=90)
Yes	94.1	86.7
No	2.9	11.1
Don't Know	2.9	2.2

Finally, the attorneys were asked whether the experience of having gone through the ENE process might be of help in future cases which were not assigned to ENE. In both groups, fewer than 40% of the attorneys responded affirmatively. (See Table 28.) However, the research assistants who did the telephone survey reported that, with some probing, attorneys who responded in the negative frequently would indicate, for example, that the process of focusing on their case as early as possible with a disinterested person might be of value in the future, even if the new case were not assigned to ENE. For purposes of consistency in the tabulations, these attorneys were nevertheless recorded as having answered in the negative.

Table 28

(Entries are percent of those responding to each item)

Do you think you learned anything from the ENE process that has or could help you with future cases?

	Settled Cases (N=34)	Other ENE Cases (N=54)
Yes	35.3	38.9
No	55.9	61.1
No Answer	8.8	0.0

7. Summary of Telephone Survey

In sum, the data from the telephone survey indicate that even after several months of time for reflection, those attorneys whose cases settled as a direct result of the ENE process are very positive about the benefits of the program. Although the attorneys whose cases had not settled as a result of ENE are substantially less enthusiastic about the program, even they can be counted as supporters. The endorsement of expansion to other cases is overwhelming from both groups of attorneys. Both groups clearly prefer ENE to ISCs; there is less agreement concerning the comparative value of ENE as opposed to judicially hosted settlement conferences.

V. SUMMARY AND CONCLUSIONS

Analysis of an extensive body of data, including questionnaires sent to evaluators, parties, and attorneys, as well as follow-up telephone interviews with the attorneys, indicates that ENE works. The overall goal of the program designers was to alleviate some of the problems encountered in standard civil litigation. Their original specific goals were to force the parties to confront the merits of their own case, and their opponent's, at as early a stage as possible, to identify which matters of law and fact actually were in dispute, to develop an efficient approach to discovery, and to provide a frank assessment of the case. Later, the program designers added settlement as an express goal of ENE.

With the possible exception of obtaining formal stipulations regarding facts and the future course of the case (i.e., formal agreements regarding discovery and motions), these goals are being met by ENE. The procedure makes counsel and clients confront their cases systematically; it enables the parties to exchange detailed information about their cases and to identify the areas in need of additional discovery; it contributes greatly to the parties' understanding of the issues in their cases; it provides a vehicle for communication among the parties that can be more efficient than formal discovery and more productive than most scheduling or status conferences; it gives parties a fresh perspective on their case and a frank assessment of the relative strengths of their competing positions from a neutral and experienced attorney; and it creates opportunities to conduct settlement negotiations before the parties have wasted resources on ritual pretrial skirmishes.

The parties and attorneys have shown considerable confidence in the integrity of the program. By overwhelming margins, they report that the procedure is fair and the evaluators are unbiased. Those who have experienced ENE strongly endorse its expansion to more cases, even where

the session did not lead to the direct settlement of the action. As a final indication that the participants believe that ENE is valuable, they are willing to be charged a substantial fee (approximately $500, split between the parties) for the services of the evaluators.

Although, in general, the ENE program is working very well, it could be improved. The materials sent to litigants must be as clear as possible. Evaluators need to be especially careful that they are doing all that they can to help the litigants focus on case development planning, where that is necessary. Evaluators must also take great pains to improve the likelihood that the clients who attend the evaluation sessions really hear and understand what they are told about their cases. The program ought to strive to meet its goal of having evaluations done within approximately 100 days of filing the case. Although there appears to be no significant deterioration in the participants' views on the value of ENE if the session takes place much later in the litigation, there is certainly value in assisting the litigants as soon as possible.

The study that was completed could not provide meaningful data on the actual cost-effectiveness of the ENE program. On the basis of the data presently available, it is impossible to reach any conclusions regarding whether, as compared to case management or to other alternative dispute resolution (ADR) programs such as court-ordered arbitration, ENE is the superior vehicle to speed the satisfactory termination of law suits, or whether it is truly a means to save litigants and the court time and money. Nevertheless, there can be no question that, with ENE, the Northern District of California can be confident that it has developed a program that the participants strongly believe is worthwhile.

On the basis of an earlier version of this report, and further consideration by its Task Force on Expediting Dispute Resolution, the judges of the Northern District of California have ordered that ENE be made a permanent program.[11] The Court's goal is for the program to have 250 actual ENE sessions per year. (Because of the attrition that the program experienced after a case was assigned in the second phase, it is expected that approximately 400 cases per year will be formally assigned to ENE from the dockets of all of the full-time judges of the court, but that only 250 sessions will actually occur.) This figure was based upon the Task Force's prediction that the Court could develop, train, and maintain a pool of no more than 125 first rate evaluators, and that any one evaluator could not be asked to actually host more than two sessions per year. Even if more evaluators could be found, the clerk of the court was concerned that with the resources

11. *See* Appendix *infra* at page 50.

available, his office could not absorb the administrative burdens of a larger program.

The ENE program will be presumptively mandatory for the assigned cases, in order to ensure that there will be a program that is substantial enough to justify the commitments of the evaluators and the Court. The cases are "presumptively mandatory" because the judges to whom the cases are assigned originally will have the power to remove cases from ENE on their own initiative (such as at the initial status conference) or upon a showing of good cause by counsel. (Such motions could also be referred to the ENE magistrate for disposition.)

Because of the limitations on the number of available evaluators, the Court designated only certain categories of cases as being eligible for ENE. The first criterion is the subject matter category, as reflected on the standard Civil Cover Sheet. The categories selected include many contract and personal injury matters, employment civil rights cases, wrongful termination matters, and certain types of commercial litigation, such as actions under the securities and antitrust laws and civil RICO. These categories were selected because of their frequency on the docket of the Northern District and because of the Court's confidence that it could develop and maintain a pool of well-qualified arbitrators for these matters without severe problems of conflicts of interest. (Such conflicts proved to arise frequently in those subjects where the bar is comparatively small and highly specialized.)

The second set of criteria for identifying cases was based on the experiences suggesting that certain cases would be less appropriate for ENE. These are where: (1) at least one party is proceeding *in pro per*; (2) the principal relief sought is equitable, not monetary; (3) the case raises an important issue of public policy on which a judicial pronouncement is sought; or (4) the legal standards on which the disposition will turn are not clear and the parties will need a judicial pronouncement on the law to resolve the matter. The first two can be applied administratively; the last two can be considered by the trial judge or upon motion as a basis for removing a case from the ENE program.

Finally, the Court decided that any case that met the criteria for referral to its mandatory arbitration program (under Local Rule 500) would not be designated for ENE. Given the fact of limited resources, the Court decided to provide a greater number of cases access to some ADR procedure rather than providing two special procedures to a smaller number of cases. Having made ENE a permanent program, the Court has expanded the pool of trained evaluators and is now regularly assigning cases to ENE.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GENERAL ORDER NO. 26
EARLY NEUTRAL EVALUATION

1. PURPOSE

The Court recognizes that full, formal litigation of claims can impose large economic burdens on parties and can delay resolution of disputes for considerable periods. The procedure established by this General Order provides litigants with means to resolve their disputes faster and at less cost.

2. CATEGORIES OF CASES ELIGIBLE FOR INCLUSION IN THE EARLY NEUTRAL EVALUATION PROGRAM

a. Only civil matters are eligible for inclusion in the Early Neutral Evaluation (E.N.E.) program. Among civil matters, cases in which the principal relief is sought is equitable, or in which one of the parties is proceeding in *pro per*, shall not be eligible for inclusion in the program. Suits of the following nature, as designed on the Civil Cover Sheet, shall be eligible for inclusion in the program: CONTRACT: Insurance (110), Miller Act (130), Negotiable Instrument (140), Stockholders Suits (160), Other Contract (190), and Contract Product Liability (195); TORTS: Motor Vehicle (350), Motor Vehicle Product Liability (355), Other Personal Injury (360), Personal Injury - Product Liability (365), and Other Fraud (370); CIVIL RIGHTS: Employment (442); PROPERTY RIGHTS: Copyrights (820), Patent (830), and Trademark (840); OTHER STATUTES: Antitrust (410), Racketeer Influenced and Corrupt Organizations (470), and Securities/Commodities/Exchange (850). To the extent that qualified evaluators are available, individual judges may designate cases in other subject matter categories for inclusion in the program.

b. Cases that meet the criteria for inclusion in the Court's arbitration program under Local Rule 500 shall not be designated for E.N.E.

3. ADMINISTRATIVE PROCEDURE

a. Subject to the availability of qualified evaluators and of administrative resources in the Court, every even numbered case that meet the criteria set forth in Paragraph 2, above, and that has been assigned to a judge who is participating in the program, shall be designated for E.N.E. Any judge of this Court, on motion from a party or acting *sua sponte*, may designate additional individual cases for inclusion in the program.

b. The Court has assigned responsibility for all procedural matters related to the Early Neutral Evaluation program to the E.N.E. Magistrate. Appeals from his decisions will be heard by the judge to who the case is assigned only if they are filed within ten calendar days of service of the order containing the Magistrate's ruling.

c. A party who believes that some extraordinary circumstance makes it unfair to have its cases go through the evaluation process may petition the E.N.E. Magistrate for relief, but must do so within ten calendar days of receiving notice that the case has been designated for the program.

d. At the time a case is designated for E.N.E. the Clerk shall provide plaintiff's counsel with a notice of such designation, a copy of this General Order and such other materials as required by the Court or the E.N.E. Magistrate. The plaintiff shall provide all defendants with copies of the Notice, General Order, and materials explaining the E.N.E. program at the time the defendants are served or within ten calendar days of the date plaintiff's counsel receives this material from the Court. Any party who, after the filing of the original complaint, causes a new party to be joined in the action (e.g., by way of impleader) shall promptly serve on that new party a copy of the Notice described in this paragraph, this General Order, and the material that explains the E.N.E. program.

e. Each party who has a duty under this Order to serve documents on another party shall file proof of service promptly after affecting the same.

f. Cases designated for E.N.E. are subject to the following requirements:

(1) The evaluation session described hereafter shall be held within 150 days of the filing of the complaint unless otherwise ordered by the E.N.E. Magistrate on a showing of good cause.

(2) Service of the summons and complaint on all defendants shall be effected within forty (40) days of the filing of the complaint. Failure to effect service within this period will result in the issuance of an order to show cause why the complaint should not be dismissed for lack of prosecution.

(3) Subparagraph (a) of Local Rule 220-10, which permits parties to stipulate to one 60 day extension of time to comply with deadlines fixed by the Federal Rules of Civil Procedure, shall *not* apply to pleadings or responses to pleadings that are filed in cases designated for E.N.E. In cases designated for E.N.E., pleadings and responses to pleadings shall be filed by the deadlines set in the Federal Rules of Civil Procedure unless, prior to those deadlines, a party has secured permission from the E.N.E. Magistrate to file by another date.

g. When the Clerk ascertains the identity of the lawyers who will be representing the named parties in the action he or she will designate an evaluator with expertise in the subject matter of the lawsuit. After being satisfied that the evaluator has no conflict of interest and will be available during the appropriate period, the Clerk will disclose the identity of the evaluator to the assigned judge and to counsel for plaintiff. Counsel for plaintiff shall immediately forward the notice identifying the assigned evaluator to all other counsel.

h. No evaluator may serve in any matter in violation of the standards set forth in Section 455 of Title 28 of the United States Code. If an evaluator is concerned that a circumstance covered by subparagraph (a) of that section might exist, e.g., if the evaluator's law firm has represented one or more of the parties, or if one of the lawyers who would appear before the evaluator at the E.N.E. session is involved in a case on which an attorney in the evaluator's firm is working, the evaluator shall promptly disclose that circumstance to all counsel in writing. A party who believes that the assigned evaluator has a conflict of interest shall bring this concern to the attention of the E.N.E. Magistrate within ten calendar days of learning the source of the potential conflict or shall be deemed to have waived objection.

i. Within the time frames fixed by the Court, the evaluator shall fix the specific date and place of the evaluation session. The evaluation session shall be held in a suitable neutral setting, e.g., at the office of the evaluator or in the courthouse. Unless otherwise ordered by the E.N.E. Magistrate or the judge to whom the case is assigned, the evaluation session shall be

held within 150 days of the filing of the complaint and within forty-five days of the date on which the Clerk's office notifies plaintiff's counsel of the identity of the evaluator. All requests for extensions of these deadlines must be presented in the first instance to the E.N.E. Magistrate. Any such request by a party must be in writing and must be presented within ten calendar days of receiving notice of the date set by the evaluator for the session. The Magistrate will grant such request only after a showing of extraordinary circumstances.

j. The Clerk and the evaluators shall schedule E.N.E. events and administer the program in a manner that does not interfere in any way with the management of the action by the assigned judge. No party may seek to avoid or postpone any obligation imposed by the assigned judge on any ground related to the E.N.E. program.

4. WRITTEN EVALUATION STATEMENTS

a. No later than ten calendar days prior to the evaluation session each party shall submit directly to the evaluator, and shall serve on all other parties, a written evaluation statement. Such statements shall not exceed ten pages (not counting exhibits and attachments) and shall conform to Local Rule 120.1. While such statements may include any information that would be useful, they must (1) identify the person(s), in addition to counsel, who will attend the session as representative of the party with decision making authority, (2) address whether there are legal or factual issues whose early resolution might appreciably reduce the scope of the dispute or contribute significantly to settlement negotiations, and (3) identify the discovery that promises to contribute most to equipping the parties for meaningful settlement negotiations. Parties may identify in these statements persons connected to a party opponent (including a representative of a party opponent's insurance carrier) whose presence at the evaluation session would improve substantially the prospects for making the session productive; the fact that a person has been so identified, however, shall not, by itself, result in an order compelling that person to attend the E.N.E. session. Parties shall attach to their written evaluation statements copies of documents out of which the suit arose, e.g., contracts, or whose availability would materially advance the purposes of the evaluation session, e.g., medical reports or documents by which special damages might be determined.

b. The written evaluation statements shall *not* be filed with the Court and the assigned judge shall not have access to them.

5. ATTENDANCE AT THE EVALUATION SESSION

a. The *parties themselves* shall attend the evaluation session unless excused as provided in this section. This requirement reflects the Court's view that one of the principal purposes of the evaluation session is to afford litigants an opportunity to articulate their position and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the relative strength of the two sides' cases. A party other than a natural person (e.g., a corporation or association) satisfies this attendance requirement if it is represented at the session by a person (other than outside counsel) with authority to enter stipulations (of fact, law, or procedure) and to bind the party to terms of a settlement. A party that is a unit of government need not have present at the session the persons who would be required to approve a settlement before it could become final (e.g., the members of a city counsel or the chief executive of a major agency). In cases involving insurance carriers, representatives of the insurance companies, with authority, shall attend the evaluation session.

b. Each party shall be accompanied at the evaluation session by the lawyer expected to be primarily responsible for handling the trial of the matter.

c. A party or lawyer will be excused from attending the evaluation session only after a showing that attendance would impose an extraordinary or otherwise unjustifiable hardship. A party or lawyer seeking to be excused must petition the E.N.E. Magistrate, in writing, no fewer than 15 calendar days before the date set for the session. A party or lawyer who is so excused from appearing in person at the session shall be available to participate by telephone.

6. PROCEDURE AT THE EVALUATION SESSION

a. The evaluators shall have considerable discretion in structuring the evaluation sessions. The sessions shall proceed informally. Rules of evidence shall not apply. There shall be no formal examination or cross examination of witnesses.

b. In each case the evaluator shall:

(1) permit each party (through counsel or otherwise) to make an oral presentation of its position;

(2) help the parties identify areas of agreement and, where feasible, enter stipulations;

(3) assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain as carefully as possible the reasoning by the evaluator that supports these assessments;

(4) if the parties are interested, help them, through private caucusing or otherwise, explore the possibility of settling the case;

(5) estimate, where feasible, the likelihood of liability and the dollar range of damages;

(6) help the parties devise a plan for sharing the important information and/or conducting the key discovery that will equip them as expeditiously as possible to enter meaningful settlement discussions or to posture the case for disposition by other means; and

(7) determine whether some form of follow-up to the session would contribute to the case development process or to settlement.

7. FOLLOW-UP

At the close of the evaluation session the evaluator shall determine whether it would be appropriate to schedule some kind of follow-up to the session. Such follow-up might include written or telephonic reports that the parties might make to one another or to the evaluator or, if the parties consent, a second evaluation or settlement session.

8. CONFIDENTIALITY

This Court shall treat as confidential all written and oral communications made in connection with or during any E.N.E. session. The Court hereby extends to all such communications all the protections afforded by Federal Rule of Evidence 408 and by Federal Rule of Civil Procedure 68. In addition, no communication made in connection with or during any E.N.E. session may be disclosed or used for any purpose (including impeachment) in any pending or future proceeding in this Court. The privileged and confidential status afforded to communications made in connection with any early neutral evaluation is extended to include not only matters emanating from parties and counsel but also evaluators' comments and assessments, as well as their recommendations about case development,

discovery, and motions. There shall be no communication about such matters between evaluators and judges of this Court. Nothing in this paragraph shall be construed to prevent parties, counsel, or evaluators from responding, in absolute confidentiality, to inquiries by any person duly authorized by this Court to analyze the utility of the E.N.E. program.

9. LIMITS ON POWERS OF EVALUATORS

a. Within limits imposed by this Order or by individual judicial officers of this Court, evaluators shall have the authority to fix the time and place for and to structure evaluation sessions and follow-up events. Evaluators shall have no powers other than those described here and in paragraphs 6 and 7 of this Order. Evaluators shall have no authority to compel parties or counsel to conduct or respond to discovery or to file motions. Evaluators shall have no authority to determine what the issues in any case are or to impose limits on parties' pretrial activities.

b. Evaluators shall promptly report to the E.N.E. Magistrate violations of the Order, including failures to submit timely Written Evaluation Statements or failures to comply with the attendance requirements set forth in this Order.

10. COMPENSATION OF EVALUATORS

The Court assumes that the evaluators will be able to perform the functions contemplated here in about five hours in most cases. The Court does not expect to ask evaluators to serve in more than two cases per year. These assumptions serve as the principal underpinnings for the Court's conclusion that it is appropriate to permit evaluators to serve in most instances on a *pro bono* basis and not to compel the litigants to compensate the evaluators for the time they commit to given cases. There may be circumstances, however, in which the Court concludes that fairness requires that the parties offer some compensation to evaluators. For example, if there are substantial financial resources on both sides of a case, and if an evaluator cannot make a meaningful contribution without investing considerably more than five hours to the matter, the Court might deem it appropriate to order the litigants to share responsibility for compensating the evaluator for his or her time at a reasonable level.

11. ENFORCEMENT

The E.N.E. Magistrate shall conduct evidentiary hearings, make findings of fact and recommend conclusions of law with respect to alleged violations of this Order. The Magistrate's reports shall be made to the judge assigned to the case in which the violation(s) allegedly occurred. Objections to the Magistrate's report shall be made in writing within ten days after service of notice that the report has been filed.

ADOPTED: May 21, 1985
AMENDED: July 22, 1986
AMENDED: August 12, 1988

FOR THE COURT
/s/ Robert F. Peckham
CHIEF JUDGE