

# VERMONT

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

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

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

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

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

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

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

**(C) Torts Cases.** 310 – 368 (All Personal Injury Cases) and 370 – 385 (All Personal Property Cases);

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

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

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

**(G) Cases Arising Under Other Statutes.** 410 (Antitrust), 430 (Banks and Banking), 470 (Racketeer Influenced and Corrupt Organizations), 480 (Consumer Credit), 490 (Cable/Satellite TV), 850 (Securities/Commodities/Exchange), 891 (Agricultural Acts), 893 (Environmental Matters), and 900 (Appeal of Fee Determination Under Equal Access to Justice).

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

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

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

**(d) Neutral Evaluators.**

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

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

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

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

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

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

**(A)** the parties file a stipulation with the ENE administrator on or before the date they are required to report their evaluator selection;

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

**(C)** the stipulation contains the following information:

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

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

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

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

**(e) Neutral Evaluator Selection.**

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

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

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

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

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

**(2) *Conflicts of Interest.*** Unless all parties waive objection, no person may serve as a neutral evaluator for a case in which any of the circumstances specified in 28 U.S.C. § 455 exist. An evaluator must promptly disclose disqualifying circumstances to the ENE administrator. A party who believes that a potential or assigned evaluator has a conflict of interest must notify the ENE Administrator within 7 days of learning of the possible conflict; otherwise the party is deemed to have waived objection.

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

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

**(2) *Rescheduling.***

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

- (i) the new date is within 60 days of the original date; and
- (ii) rescheduling is not anticipated to affect the trial-readiness date.

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

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

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

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

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

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

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

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

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

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

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

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

- (A) the person shows undue hardship;
- (B) the person submits a written request to be excused at least 21 calendar days before the session date;
- (C) the person is available by telephone during the session;
- (D) the person designates, in the written request, a substitute familiar with the case to attend in his or her place, and describes that substitute's familiarity with the case; and
- (E) the court approves the substitute.

**(h) Evaluation Statements.**

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

- (A) not exceed 10 pages in length (excluding exhibits and attachments);
- (B) provide a brief statement of facts;
- (C) identify the legal and factual issues in dispute and the submitting party's position relating to those issues;
- (D) address whether there are legal or factual issues that, if resolved, would facilitate early settlement or reduce the scope of dispute;
- (E) identify the attorney who will represent the party at the ENE session; and
- (F) identify the person(s), in addition to counsel, who will attend the ENE session as the party's representative with decision-making authority.

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

**(3) *Important Documents.*** Parties must attach to their statements copies of key documents that gave rise to the action (e.g., contracts) or other materials (e.g., medical reports, photographs) that will assist the evaluator and advance the ENE session's purposes.

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

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

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

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

(A) case value;

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

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

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

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

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

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

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

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

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

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

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

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

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

**(1) *Items to Include.*** Within 21 calendar days after the ENE session, the evaluator must file with the court and send to the parties a report that includes:

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

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

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

**(k) Confidentiality.**

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

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

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