

Using Early Neutral Evaluations for Effective Representation

Hennepin County Family Court has undergone a transformation in how family law is managed by the court. Hennepin County Family Court has allocated its energy and resources to resolving cases early and with less acrimony, with the goal of minimizing the impact of divorce on children and families. In particular, the family court has focused upon early case management (ECM), utilizing the initial case management conference (ICMC) and early neutral evaluations (ENEs) as tools to facilitate settlement in cases with contested custody and/or financial issues. Through early case management and the initial case management conference, attorneys and their clients meet, in person, with their assigned judicial officer within weeks of filing a matter. If appropriate, the case may then be referred on to either a social (addressing family or custody issues) or financial early neutral evaluation, wherein a neutral evaluator provides feedback to the parties and their attorneys. Overall, these processes can lead to an earlier recognition of the strengths and weaknesses in a party's position, and can facilitate an early settlement.

The success of these programs is now expanding beyond Hennepin County and this trend will only continue as ICMCs and ENEs are now part of the Minnesota Supreme Court's strategic plan. Early neutral evaluations are an emerging best practice, not only in Minnesota but also in other states and Ontario, Canada. Judge John Rodenberg in Brown County has started implementing ICMCs and ENEs and reports that of the 12 cases in which the approaches were applied, the results were seven full settlements and three partial settlements. Judge Rodenberg relates that he has found the ENE and ECM models effective and easy to implement in rural counties. He has

made a commitment to helping families by having every dissolution in Brown County assigned to him, resulting in a streamlined approach to case management. Based upon his work, the Third and Fifth judicial districts have created a joint pilot project to implement early case management conferences and social ENEs.

The ECM and ENE processes in the Fourth Judicial District started with Judge Charles Porter and were refined and fully implemented by Judge James Swenson during his tenure as presiding judge in family court. Current Presiding Judge Bruce Peterson fully supports these programs and Assistant Presiding Judge Tanja Manrique works with both the custody and financial ENE providers to ensure the programs' success. Hennepin County Family Court Services, lead by Gunnar Bankovics, has devoted extensive resources to the custody ENE process. James Goetz and Maryellen Bauman are the lead ENE team within the department, and they conduct ENEs full-time. A committee of lawyers, lead by Suzanne Remington, has implemented the financial ENE program and all of the financial evaluators agree to participate on a sliding-fee scale. The committee recently selected 20 new evaluators, who were trained in April. The Fourth District also is supporting efforts to expand implementation elsewhere. Just last month, James Goetz, Maryellen Bauman, and Judge Manrique conducted a two-day social ENE training in Rochester for over 50 practitioners from the Third and Fifth districts.

The success rates for both the custody and financial ENE programs are similar; more than 70 percent of the cases referred to the programs result in full or partial settlement. For the social

ENEs, the evaluators spend an average of 14 hours on each case and nearly all cases are finished within 30 days. For financial ENEs, the evaluators spend an average of 5.7 hours on each case and charge an average of just under \$1,000, and the average time from ICMC to disposition is 59 days.

As the ENE process continues to grow and evolve in Hennepin County and beyond, it is critical that attorneys know how to effectively represent their clients in this nontraditional context. To effectively advocate for one's client, an attorney must first carefully assess whether the case is appropriate for an ENE, and, if it is, both the attorney and client must properly prepare for the process. Then, once at the ENE, the attorney should understand how to best advocate for the client.

ASSESSING THE CASE

Even though social and financial ENEs have proven highly effective in resolving cases, not all cases are suited for the process. It is a mistake to assume that all cases should be automatically referred to an ENE. Indeed, it is a better use of court resources for attorneys to acknowledge when a case is not right for the program. Because ENE resources are limited, the program only suffers if inappropriate cases are pushed into the process. Therefore, the attorney should carefully assess whether a case is a good fit for an ENE. To make this determination, the attorney should consider several points.

Prior to the ICMC, an attorney should fully explain ECM and the ENE programs to the client. At this point, the attorney should consider whether the

parties are already so entrenched in their positions that an ENE will probably be ineffective. Settlement is not likely if the parties are already polarized and if an adverse opinion from an evaluator is likely to be ignored. In order for the ENE to have a chance of succeeding, the parties must be committed to solving problems rather than abrogating them to a judicial officer.

On the other end of the spectrum, a case may also be inappropriate for an ENE if it is close to settlement. To determine whether this is the case, settlement discussions must occur prior to the ICMC. Then, if the case is nearly resolved, a concerted effort at the ICMC by the attorneys and the judicial officer may be all that is required to resolve the case. In that situation, the attorney should let the judicial officer know how he or she can assist in facilitating settlement, and attempts can be made to resolve issues without any further time or expense.

The attorney should also realistically assess his or her own schedule, as well as the client's. By definition, an ENE is most likely to be successful if it is early. Otherwise, parties become increasingly entrenched in their positions and conflict may escalate to the point where settlement is increasingly difficult. It is the goal of the financial ENE program to have resolution within 75 days, and the biggest impediment to success in financial ENEs is a lack of information. Therefore, if the attorney and/or client are not going to be able to gather information and turn it around quickly, mediation may be a more appropriate venue. Custody ENEs are generally scheduled within one week of the ICMC (and optimally the ENE will be held the same day as the ICMC) and most cases are resolved within 30 days. The attorney should have a frank conversation about the demands of the ENE process with the client to determine whether an ENE is appropriate.

PREPARING FOR THE ENE

Once it is determined that a case is appropriate for an ENE, preparation is critical to maximize the chance of

success. In preparing for an ENE, the attorney should keep the following points in mind. In a financial ENE, where the parties agree on the neutral, it is crucial to select an evaluator that both sides respect and trust.

Because an ENE is an early and abbreviated process, the client has a short time frame to make an important impression on the neutral evaluators. In order to maximize the chance of a positive impression, clients must fully understand what to expect at the ENE meeting. In order to allay nerves, the attorney should also stress that the process really is confidential—nothing from the ENE will be conveyed to the judicial officer or any subsequent experts involved in the case, absent agreement of the parties.

For both social and financial ENEs, parties must also be prepared by knowing what their requests really are. If a party arrives for a meeting without knowing his or her issues and general positions, the ENE will be inefficient and likely ineffective.

In the context of a social ENE, where clients bear more of the burden of conveying information, advance preparation is particularly important. The client should be given the statutory best-interest factors to review, and the attorney should conduct an extensive interview with the client on each factor to determine what information needs to be conveyed to the evaluator. The attorney and client should then practice asking and responding to open-ended questions that are designed to convey



Referee Kevin J. McGrath
Contributing Author

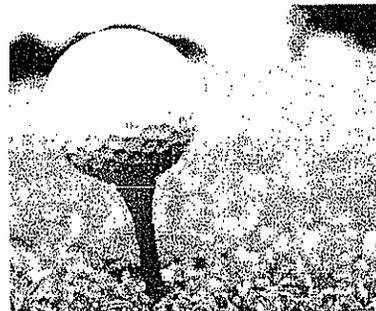
Referee McGrath has served on the Hennepin County Family Court bench since April 2006. Prior to his appointment, he was a partner in the Bloomington family law firm of Jensen, McGrath, Mullen & McSwaney, PLLP, where he practiced family law in the district courts and appellate courts. Referee McGrath also served as a Rule 114 mediator.



Jaani C. Moberg
Contributing Author

Ms. Moberg is an associate attorney with the law firm of Larkin Hoffman Daly and Lindgren, Ltd., practicing exclusively in family law, including marriage dissolution, paternity, custody, parental access, and related appeals.

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specific information and to present it in an efficient and effective manner. To some extent, the process should resemble preparing the client for trial testimony.

For a financial ENE, the attorney should prepare as she or he would for a dispositive motion, developing issues and arguments for all major points. The attorney and client should also be certain to have gathered and provided any financial information that is requested by the evaluator. If the evaluator asked that the information be provided before the meeting, the attorney should fully comply. This preparation will make the meeting more productive and increases the chance that only one meeting will be required to settle the case.

DURING THE ENE

After the attorney has assessed and prepared a case for the ENE, the hardest part

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is done. However, during the ENE, the attorney should avoid several pitfalls.

Unfortunately, some practitioners are inclined to misuse the ENE system by using it as a deposition rather than as a tool for settlement. This compromises chances of settlement and can be avoided by either opting out or consciously changing one's approach. For example, in order for an ENE to be successful, the attorney must accept the premise that a fair settlement can be achieved without formal discovery. The ENE services are part of a pilot project authorized by a 2004 Supreme Court Administrative Order. As such, implementation is monitored carefully. If attorneys repeatedly abuse the process, the ENE services will not be offered at ICMC hearings for that attorney's clients.

Don't allow the client to do all of the talking without providing some guidance or structure. Time is of the essence, so if the client begins to ramble or get off point, the attorney should not hesitate to redirect the client with a statement of clarification or with an open-ended question.

CONCLUSION

Along with early case management, early neutral evaluations are proving to be an effective settlement tool that results in earlier settlements with less rancor and fewer fees and costs. As such they can help a family come through the divorce process with as little financial, and is it hoped as little emotional, damage as possible. Attorneys are encouraged to embrace the programs, but be realistic about each individual case and how it fits within the ENE process. 

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