



The view from Minnesota

How early neutral evaluation can help in family cases

The dispute resolution process known as early neutral evaluation, or ENE, has been growing in popularity since it was introduced in California in the 1980s. Court officials and dispute resolution practitioners in Minnesota have been using ENE for family cases with considerable success for almost two decades.

Kelly Browe Olson, one of the guest editors for this issue, interviewed Marty Swaden, a longtime Minneapolis-based attorney, mediator, arbitrator, special magistrate, early neutral evaluator, and parenting consultant who has been involved with this process for many years.

Q: *How did the early neutral evaluation process take hold in Minnesota?*

A: Since its introduction in California as a way to reduce the cost of litigation and ease the backlog of cases, people have seen that ENE reduces parties' acrimony and facilitates more resolutions. When social and financial issues are addressed early in the process and judicial officers monitor them closely, marriage dissolution cases have a much better chance of settling.

ENE was introduced in Hennepin County, Minnesota, which includes Minneapolis, in 2001.

It was first developed in the Hennepin County Department of Court Services and then expanded into the private sector and throughout the state of Minnesota. The Minnesota judicial branch officially adopted ENE in its fiscal year 2007–2009 strategic plan, and it has been a part of the alternative dispute resolution options in family law cases ever since.

Q: *How do parties learn about ENE?*

A: In Minnesota, as soon as a family-law related case is filed with the court and a judicial officer is assigned, an initial case management conference, called an ICMC, is scheduled. The parties and their attorneys (if they are represented), attend this in-court conference. The general practice is that no motions can be scheduled and no formal discovery can be conducted pending the completion of the ICMC. During this informal court appearance, the judicial officer discusses the issues of the case and the possible use of dispute resolution processes. The ENE processes are explained as possible options.

If parties are arguing over financial issues such as child support, spousal maintenance, or marital property valuation and division, they might opt for financial early neutral evaluation, known as FENE. If people disagree about social issues such as child custody and parenting time, then social early neutral evaluation,

or SENE, is an option. Both social and financial early neutral evaluation have helped reduce animosity between parties, kept down costs, and reduced the time between initial filing and resolution. They've also resulted in more settlements – and more settlements that parties have honored.

Q: *How does a typical FENE process get started?*

A: FENE is an evaluative process in which a neutral, selected by the parties and their attorneys, meets with the parties and their lawyers.

Once the parties have selected their neutral and the neutral has confirmed that he or she is not conflicted, the neutral schedules a conference call with the parties' attorneys. Many parties do not have lawyers; in those cases, the parties participate in the conference call. During the conference call, participants discuss the basic facts of the case, such as the length of the marriage, the parties' ages and employment, whether there are minor children, the parties' assets and liabilities, and other issues that need to be addressed in the process. The neutral then usually asks that the attorneys provide certain documents

and information for the neutral to review before the scheduled date for the FENE.

These documents usually include copies of the parties' most recent income tax returns, verification of the parties' incomes year to date, copies of initial pleadings, monthly living expenses for both parties if spousal maintenance will be an issue, and the beginning of a prepared balance sheet identifying the parties' assets with assigned values and any liabilities. Other documents may include a prenuptial agreement or prior court order. The neutral usually also asks each attorney to draft a position letter indicating what the client is requesting and why.

After the conference call, the neutral sends an email to the parties and attorneys confirming the date of the FENE session, listing the documents to be provided to the neutral and the deadlines for supplying them, and specifying the amount of the neutral's fees, which usually must be paid before the FENE session. The confirmation email also includes a copy of the Agreement to Participate in the FENE and a document listing the neutral's financial qualifications.

Q: *What does the actual FENE session look like?*

A: The neutral usually meets first with the parties' attorneys in the neutral's private office to see whether the parties have resolved any of the financial issues since the conference call. The neutral then meets with the parties and their attorneys to execute the Agreement to Participate and discuss the process. Many neutrals meet individually with each party and attorney before the joint session begins, which gives the neutrals a chance to screen for domestic abuse, learn more about each party and what is important to that person, and start gaining trust.

Then the joint session begins. Sometimes one or both parties request that the session be conducted in separate rooms; usually, if one party requests this, the session is conducted in separate rooms, but the neutral decides how and where the session will proceed. If there is an order for protection or a no-contact order, the order must include a provision that allows for the parties to be in the same location for the FENE. In those cases, separate rooms are required.

Financial Early Neutral Evaluation Process

Pre-session logistics

- Selection of neutral
- Conflicts check
- Setting the date for conference
- Conference call and/or submission of questionnaire
- Confirmation email with details

Session

- Execution of Agreement to Participate
- Opening statement
- Parties' statement
- Preparation of feedback by the neutral
- Caucus
- Agreement (or partial agreement?)

Q: *How do the neutrals provide feedback?*

A: The neutral tries to facilitate an agreement on as many financial issues as possible before the neutral becomes evaluative and renders an advisory non-binding opinion on what the court might do if the unresolved issues are brought before it. Timing is important: the neutral should provide an opinion when enough time remains for the parties to discuss it with their attorneys and negotiate. The attorneys usually draft a list of the resolved issues that the parties sign, acknowledging that it is a binding agreement. The neutral may be a scrivener but should not draft anything for the parties to sign.

If the agreement represents a resolution of all of the financial issues, the neutral notifies the court that the case has settled and that a formal legal stipulation will be prepared and executed and sent to the court. If there is a partial agreement, the neutral notifies the court that a partial settlement has been reached and that a partial legal stipulation will be prepared and executed and sent to the court. If no agreements are reached, the neutral notifies the court of this, and the court proceeds with the next step in the litigation process. The neutral communicates only the fact of settlement, partial settlement, or non-settlement to the tribunal and not any additional information.

Q: *How is the SENE process different from the FENE process?*

A: In the SENE process, two neutrals evaluate the contested social issues. Ideally, one neutral is familiar with mental-health issues, and the other is knowledgeable about the law. Most teams aim to have their makeup reflect the genders and orientations of the parties. It is common for the team to include one male and one female, and if cultural issues are in dispute, having at least one neutral who knows about those matters is helpful.

SENE does not usually include a conference call, but some neutrals ask the parties to complete and deliver a short questionnaire about the contested social issues.

Before the actual SENE session, the team sends an email to the parties and attorneys confirming the date

Social Early Neutral Evaluation

Selection of Process

- Team Selection
- Conflicts check
- Setting of date for conference
- Conference call and/or submission of questionnaire
- Confirmation email with details

Session

- Execution of Agreement to Participate
- Opening statement
- Parties' statement
- Conference of neutrals and preparation of feedback
- Caucus
- Agreement (or partial agreement)

of the SENE and providing a copy of the Agreement to Participate and a list of the neutrals' qualifications, along with an accounting of fees that parties are required to pay.

The evaluative process begins with each party telling the neutrals their hopes for legal and physical custody and parenting time and the reasons for their requests, which usually takes 20 minutes per party. During this presentation, the neutrals might ask questions, and each party has an opportunity to respond to the other's initial presentation, which usually takes 10 minutes. The neutrals then leave the room, discuss what they have heard, and prepare feedback for the parties and attorneys, which includes their opinions as to how the assigned judicial officer might decide the contested issues. The parties then caucus with their attorneys, and negotiations commence. The discussions proceed with the exchange of settlement proposals that may include segments of the neutrals' opinions.

If the parties reach agreement, either a partial or a full agreement, the attorneys may decide to draft a short summary of the agreement, which will be binding, for the parties to sign. The neutrals advise the court that the parties have reached agreement and that a formal legal stipulation is being prepared

for execution and delivery to the court. If agreements are not reached, the court is so advised, and it then schedules the next step in the litigation process.

Q: *What kinds of cases are appropriate for ENE?*

A: The processes can be used not only for initial marriage dissolution cases but for parentage cases and post-decree motions. In parentage cases, an SENE can help resolve the custody and parenting time issues, and an FENE can help resolve child support and other financial issues. In post-decree cases involving modification of child support and/or spousal maintenance, an FENE can help resolve those issues.

ENE is not right for all cases, however, and attorneys and parties should be careful in proceeding with a process that seems doomed from the beginning. If a financial case requires formal discovery because of very complex financial issues, FENE is not the appropriate process. If a party is adamant about how certain financial issues should be resolved and will not accept an advisory opinion from a financial neutral, money spent on FENE would be wasted. If a party is similarly adamant about being granted sole physical custody and is unwilling to even listen to an SENE neutral who has a different opinion, SENE is not a good choice.

Q: *How are neutrals identified and selected for ENE processes?*

A: ENE neutrals should have experience in the financial aspects of family law cases, including division and valuation of marital and non-marital property, and should be knowledgeable about spousal maintenance and child support and other pertinent financial issues. Most of the time, ENE neutrals are experienced family law attorneys, but neutrals can also be CPAs or other financial experts. Almost every neutral has been trained in the ENE process, and most are listed on Minnesota's state roster of qualified neutrals.

Q: *If the parties are self-represented, who drafts documents such as the position letter and the agreement?*

A: The parties prepare the submissions to the neutral, and they draft the necessary legal documents for the court to execute. The Minnesota courts have forms available for self-represented parties to assist them. If only one party is represented by an attorney, that attorney prepares the submissions for his/her/their client, and the attorney prepares the legal documents for the non-represented party to review and approve before the documents are sent to the court.

Q: *What about timing? How important is that?*

A: Some attorneys, seeking to use an ENE session as discovery rather than a chance to resolve issues, want the session to be scheduled as soon as possible. In my own practice, I advise parties to schedule the session far enough in the future to give them time to prepare the documents they'll need for the meeting. Ideally, the evaluations take place within 30 days of the ICMC.

FENE sessions are usually scheduled for three hours, and SENE sessions are scheduled for four hours. In many cases, more than one session is necessary, with the length and number of sessions depending largely on the attorneys' level of preparation and the number and difficulty of the financial issues. If the case requires a neutral CPA to value a closely held business, trace the non-marital value of a retirement plan, or prepare a cash-flow analysis, the session will take longer.

Q: *What are the average costs of the FENE and SENE processes? Who sets the fees?*

A: For the FENE process, in most Minnesota counties the policy is that each party pays one-half of his or her attorney's hourly rate for the neutral's preparation and session time. If the FENE session is scheduled for the standard three hours, assuming the neutral may have an hour of necessary preparation for the FENE and if the party's attorney's hourly rate is \$300, the cost for that party would be \$600 (\$150/hour x 4 hours).

Pro se parties are charged based on their income according to a sliding fee scale provided by the court. Some counties allow the parties to pay the neutral or neutrals based upon the parties' incomes according to a sliding scale. The funds are deposited into a trust account and paid to the neutral only for the amount of actual services provided.

Because two neutrals are involved in SENE, each party must pay the neutrals the full hourly rate charged by the party's attorney. For example, if one party's attorney charges \$300 per hour and the session is scheduled for the standard four hours, that party pays the neutrals \$1,200 for his or her share of both neutrals' fees. As with FENE, self-represented parties are charged on a sliding fee scale established by the court based on party income.

Q: *If people in Minnesota are looking for information on how to use SENE or FENE, where should they start? And if readers from other states want to investigate whether SENE and FENE could be adapted for their family court structure, what resources are available?*

A: The Minnesota judicial branch has an early case management/early neutral evaluation website, <http://www.mncourts.gov/Help-Topics/ENE-ECM.aspx>, with summaries of the ENE processes and rosters of trained ENE professionals as well as other information. ■



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COUNCIL MEMBERS The Nominating Committee is now accepting nominations for: Four at-large Section Council positions and three Executive Committee positions: Budget Officer, Vice-chair, and Chair-elect.

To be eligible for the elected Council and Executive Committee positions, nominees must have been Dispute Resolution Section members for at least one year prior to nomination. Individuals may self-nominate or may be nominated by others by sending a: (1) cover letter; (2) brief biographical statement; and (3) summary of Dispute Resolution Section involvement/contributions **no later than May 30, 2019** to Dispute Resolution Section Director Linda Seely at linda.seely@americanbar.org.

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