EXPLORING
EARLY NEUTRAL EVALUATION
IN FAMILY CASES

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Introduction

Early Neutral Evaluation (ENE) is a process in which, early in life of a case, the parties present their cases in an informal fashion to an expert third party neutral evaluator, who then gives them a non-binding opinion about the likely outcome.

Not all ENE programs are the same but most share the following features:

- **Non-binding** – The evaluator's assessment is not binding on the parties.
- **Early** – ENE occurs early in the process, but almost always after parties have engaged the court process.
- **Parties attend together** – There are no opportunities for parties or lawyers to have private conversations with the evaluator.
- **Voluntary** – Parties opt in or are referred by a judge or case manager with their consent.
- **Confidential** – **T**he evaluator's assessment is confidential.
- **Subject matter expertise** – The evaluator is an expert in the substantive issues in dispute.
- **Informal and flexible** – ENE is not governed by strict rules of procedure and evidence but usually follows these steps: case presentation, focusing (identification of areas of possible agreement, in order to narrow the scope of dispute), assessment/valuation, and settlement exploration.

ENE was originally designed to reduce the cost of litigation in civil, non-family cases[1]. It has since been widely adopted as part of court-connected ADR programs for civil cases in California and other U.S. states. It has not caught on to the same extent in family cases, although interest in the process is growing and it is increasingly being seen as another useful dispute resolution tool for individuals going through separation and divorce. Where it is being used in family cases, some interesting adaptations have developed.

This paper will explore the theory and purposes of ENE, as well as the actual and potential use of ENE in family cases. The paper is divided into 5 parts:

- Part 1 - Development and use of ENE in civil cases
- Part 2 - ENE on the dispute resolution continuum
- Part 3 – Benefits and risks
- Part 4 – Current use of ENE in family cases
- Part 5 – Design issues for a BC ENE pilot, including:
  - Which cases?
  - When?

[1] In the remainder of this paper, where the term "civil cases" is used it refers to civil, non-family cases. "Family cases" will be used to refer to those involving separation and divorce.

- Who attends?
- Who evaluates?
- Who pays?

1. Development of Early Neutral Evaluation

Theory & Purpose of ENE

Early Neutral Evaluation was invented in California by a task force appointed by Chief Judge Robert Peckham in 1982 to find ways to reduce the cost of litigation in civil cases. It has since been widely adopted as part of court-connected ADR programs for civil cases in California and many other U.S. states. A study by the Federal Judicial Centre[2] shows that 23 out of 94 district courts have authorized ENE as a distinct ADR procedure. However, the same study shows that the volume of cases using ENE (1,320) is far lower than those using mediation (17,833).

The theory underlying the design of ENE for civil cases is stated by one of the pioneers of the process in the current California Handbook for evaluators[3]:

> Identify the principal sources of unnecessary cost and delay, then craft a procedure that parties of good will could use to cut through the formalities, indirection and inertia of the traditional system in order to get to the center of their dispute more quickly and set up a cost-effective way to resolve it fairly.

The designers of ENE identified the principal sources of cost and delay in civil cases as (from the Handbook):

- Poor or non-existent communication across party lines - due in part to pleadings that tend to overstate and under communicate. Parties often are forced to resort to expensive motion and discovery work to locate the center of the case and to identify the claims and defenses about which their opponents are serious.
- Temptation to put off core investigative homework. Counsel understandably tend to take on more work than they can comfortably handle -- then put out the hottest fires first.
- Difficulty lawyers/clients have in bringing themselves, early in the pretrial period, to confront systematically their position in the case and to understand it from the perspective of their opponents.
- Unrealistic clients who need a reality check.

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[2] Donna Stienstra, *ADR in the Federal District Courts: An Initial Report*, Federal Judicial Center, November 16, 2011, online at www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/$file/adr2011.pdf

[3] Magistrate Judge Wayne D. Brazil, *Early Neutral Evaluation in the Northern District Court of California, A Handbook for Evaluators*, United States District Court, Northern District of California (Revised, November 2008), p. 2. The lists on the following pages are also taken from the Handbook.

- Clients who do not have confidence in their own lawyer's judgments and recommendations.
- Clients who feel alienated from the formal litigation process -- because they are excluded from it, or do not understand it, or feel powerless in it. A client who feels alienated may remain disengaged and reluctant to make decisions necessary to move the case toward disposition. One goal of ENE is to involve clients more directly in order to improve their understanding and their feeling of power, and thus to reduce this possible obstacle to resolution.
- Lawyers who may be unjustifiably meter-running or milking a case. ENE involves clients more directly so they can act as important sources of economic discipline and of "business solutions."
- Unrealistic lawyers who need a reality check.
- Lawyers who lack confidence in their judgment about the case.
- Lawyer and client reluctance to be the first to raise the issue of settlement.

The value of a neutral opinion over that of a party's lawyer is underlined by the research on lawyers' ability to predict the outcomes of their cases. A study of the ability of lawyers to predict the outcome of their cases (at the time it was published, the largest study of American legal practitioners of its kind involving data drawn from actual cases), found that lawyers "frequently made substantial judgmental errors, showing a proclivity to over optimism." [4]

ENE, as developed in California, was intended to address these problems by pushing lawyers and parties to (from the Handbook):

- conduct core investigative work early;
- communicate directly across party lines;
- confront systematically their situations in the case;
- seriously consider the wisdom of early settlement; and
- attempt, early, to devise ways to position the case as efficiently as possible for disposition by settlement, some other form of Alternative Dispute Resolution, motion, or trial.

The core contribution of ENE to the enhancement of justice in civil cases is seen to providing the parties with access to more information and improving their analysis of the law and evidence. According to the Handbook, this is accomplished by:

[4] Goodman-Delahunty, Jane and Granhag, Par Anders and Hartwig, Maria and Loftus, Elizabeth F., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes* (May 1, 2010). Psychology, Public Policy, and Law, Vol. 16, No. 2, p. 133, 2010; UC Irvine School of Law Research Paper No. 2010-16. Available online: http://ssrn.com/abstract=1605487, p. 149.

- improving the accuracy of the parties' identification and understanding of the relevant law and legal issues;
- providing access to more evidence;
- improving the reliability of the parties' thinking about what inferences are likely to be drawn from the evidence; and
- sharpening the joinder of the adversary presentations on the pertinent matters in dispute.

Evaluations of Civil ENE

In Northern California where ENE is well established, about 13% of cases are referred to ENE. About 45% are referred to mediation and 25% to judicial settlement conferences.[5] A comprehensive review of evaluations conducted of civil ENE programs has not been done for this report. However, there have been a number of evaluations of civil ENE programs in the US that show: [6]

- High satisfaction rates – Among both lawyers and parties satisfaction with the process and its outcomes is high, with a very high number of participants saying they would use the process again or refer others to it.
- Cost savings – Lawyers and parties report cost savings.
- Time saving – Lawyers and parties report reduced time to disposition.
- Settlement – Although settlement is not the main purpose of ENE, evaluations show that it does result directly in settlement in as much as one third of cases and that it increases the likelihood of settlement in many more (60% of lawyers and parties report ENE results directly in settlement or improves settlement prospects.)

A note on settlement rates: in Northern California, settlement rates in ENE are about 30% while settlement rates in mediation are around 60%, but approximately 60% of cases in which there has been an ENE go on to mediation and the ENE is seen as contributing to successful mediations.

Civil Early Neutral Evaluation in Canada

While there are some signs of ENE being used privately and within institutional structures, it does not appear to be widespread for general civil cases. A couple of specific examples of ENE being used in Ontario are the Financial Services Commission, which offers ENE as part of its arbitration process, and the Personal Injuries Assessment Board, which provides independent, non-binding assessments of personal injury compensation for victims of workplace, motor and public liability accidents.

[5] Wayne D. Brazil, *Early Neutral Evaluation*, American Bar Association, 2012, p. 32.
[6] Summarized by Brazil, note 4, p 28-30.

In a 2010 report[7], the Law Reform Commission of Ontario canvased the use of ADR in a wide range of civil and family matters with a series of consultation papers. In their final report, they recommended a *Mediation and Conciliation Act* regulating the use of ADR in Ontario. While the focus of the report is mediation and conciliation, it notes the emergence of early neutral evaluation in personal injury matters and includes recommendations to support and promote ENE in that context. It does not raise the possibility of its use in other types of cases.

2. Early Neutral Evaluation on the Dispute Resolution Continuum

ENE is generally offered as part of a continuum of DR processes that typically include some sort of case management through which cases are sorted and referred to ENE, mediation, judicial settlement conferences, and arbitration. Sometimes one process flows directly into another; for example, parties in an ENE can enter directly into mediation after the evaluator has made his or her assessment (and sometimes before the parties hear the assessment). One of the benefits of ENE is that it can better prepare parties to negotiate or mediate a settlement.

The following chart sets out some of the differences between ENE, mediation and arbitration:[8]

Feature	ENE	Mediation	Arbitration
Principal purpose	Rationality and efficiency	Settlement	Decision and finality
Principal focus	Evidence and law	Interests and support for positions	Evidence and law
Principal role of neutral	Evaluator of merits	Process guide	Decision maker
Neutral with subject matter expertise	Essential	Not essential	Not essential
Primary target of persuasion	Neutral	Other party/counsel	Neutral
Format	Joint session until evaluation	Joint session and private caucusing	Joint hearing until decision
Participation by parties	Variable, but mostly lawyers	Variable, but larger role for parties	Lawyers, parties role as witnesses
Ex parte communication	None	Common	None

[7] Law Reform Commission of Ontario, *Alternative Dispute Resolution: Mediation and Conciliation*, 2010, 134.
[8] Adapted from the chart at p. 41 of Brazil, note 4.

3. Benefits and Risks

The benefits of ENE are reflected in the preceding discussion of its purposes, but are summarized as:

1. Saving time, money and emotional stress by streamlining and settling cases through:

    - requiring the parties (and their lawyers) to make an early and meaningful assessment of the strengths and weaknesses of the case earlier than they might otherwise;
    - giving the parties an opportunity to communicate directly about their case and to exchange information;
    - helping parties identity the core issues in their dispute; and
    - providing a reality check for parties and lawyers.

2. Better preparing parties to enter into mediation - Mediation guides parties to shape their own fair resolution, but for some parties, no agreement will feel fair until they know the value of what they are compromising.

3. Giving parties an early opportunity to tell their stories and have their voice heard, but at a fraction of the cost of a trial. It also "creates opportunities to reduce the alienation from the system of civil adjudication that many clients seem to feel, especially clients that are not repeat players in the system."[9]

A major criticism of ENE is that it creates a form of second-class justice for those who cannot afford to have their cases handled by the courts. This argument, raised in relation to any type of DR that is outside the court, needs to be considered within the current realities of access to justice. The alternative to ENE is far from perfect justice. It also raises the fundamental question, what is first class justice? It has been widely accepted that, in the vast majority of family cases, fair and lasting outcomes that benefit ongoing family relationships can be achieved outside the courtroom.

Another critique relates to the concern that neutral evaluation is fundamentally illusory and misleading. Addressing some litigators discomfort with the process, the concern is summarized by Brazil[10]:

> Lawyers who appreciate how difficult it can be to reliably determine what yesterday's reality was are likely to feel even less confidence in anyone's (even a neutral expert's) ability to determine what tomorrow's reality will be. Because reality is so complicated, because the adjudicatory process is such a tortured, artificial tool for trying to determine what any given reality was, and because litigation is so vulnerable to unforeseen

[9] Brazil, note 4, p. 21.

[10] Both quotes from Brazil, note 4, p. 38.

> developments and unlikely turns, the while concept of 'evaluating' a case might seem, at least in some circumstances, a dangerous illusion. Too much is unknowable. Too little is predictable. Uncertainty permeates too many dimensions of the proceeding. And false certainty can counterproductively restrict or distort the malleable, nonlinear, fuzzy dynamic between parties that is necessary to maximize the likelihood of securing a decent settlement.

He responds to this argument by characterizing the evaluator's job this way:

> At its heart, her job is to enrich and refine the guessing that all the players are doing. She helps focus, tighten, and refine analysis and helps identify alternative routes of reasoning, additional lines of inquiry, or new sources of evidence – all for the purpose of helping the litigants improve the odds of accurately predicating outcome.

Specific issues related to the use of ENE in family cases will be covered below.

4. ENE In Family Cases

ENE is being used in family cases in several US states and appears to be spreading. The most prominent model of ENE that is emerging for family cases started in Hennepin County, Minnesota. In Hennepin County, ENE was first adopted to deal with the rising demand for custody evaluations and initially used only for custody and parenting time (visitation) cases. This is referred to as Social Early Neutral Evaluation (SENE). It has since been expanded to a second separate program, Financial Early Neutral Evaluation (FENE), which addresses child support, spousal support and property division.

ENE in Minnesota flows from early case management, which is said to be "inseparable from the ENE process". [11] Central to early case management in Minnesota, is the Initial Case Management Conference (ICMC), an informal hearing that is to take place within three week of filing. At the ICMC a judicial officer meets with the parties and informs them of the various tools to resolve their dispute, one of which is ENE.

SENE uses a team of two evaluators: a man and a woman. This gender-balanced team is seen as critical to the design of the program. With its custody/parenting focus SENE is an alternative to more in-depth custody assessments and evaluators are employees of Family Court Services. They come from a wide range of backgrounds, but often have expertise in social work or mental health. The service is free and follows the steps set out in the chart below.

[11] State Justice Institute Final Report, ECM/ENE Initiative: Early Case Management/Early Neutral Evaluation Pilot (October 2010), Appendix XVIII FENE Manual, p. 11. http://www.mncourts.gov/?page=4145

Social ENE Steps:
At any time judicial officers can refer parties to Family Court Services for SENE
Male/Female team appointed
Parties and lawyers meet with ENE team within one week of assignment and present their cases and what they think should happen.
Unless more information is needed, team provides feedback and settlement possibilities discussed
If additional info needed, team can gather through, for example, interviews with children
Parties and lawyers may meet with ENE team a second time. Settlement options for full and partial settlement are discussed
If no settlement, team identified critical issues that may need additional study
If full or partial settlement, a copy of the agreement and/or a report on partial agreements is sent to the judicial officer (Team members are not compellable)
SENE team members can also communicate to the judicial officer to facilitate case management. For example, they can advise the court if substance abuse is an issue so that parties may be referred to a "chemical health assessment"
If the case does not settle, the judicial officers consults with the parties and their lawyers to decide the next step, which may be mediation, expedited evaluation of the remaining issues or a full custody evaluation.
SENE is completed within one month

The Financial ENE (FENE) program is described as a public/private partnership between the private bar and the judiciary. If the parties agree to participate, the court assigns a single evaluator, a lawyer or accountant from a roster, to conduct an FENE within 10 days of the case management conference. Parties pay a fee on a sliding scale as determined by the judge and set out in the order. The goal is to conclude the ENE within 60 days of the appointment. Evaluators deliver oral, not written opinions. If parties are represented, their counsel must attend. In some cases, parties engage in both processes and when they do Social ENE generally takes place before Financial ENE.

A summary of program evaluations of Hennepin County SENE show that the process results in full settlement in 73% of cases and partial settlement in 5%. The remaining cases are referred back to court. The summary illustrates that parents are very satisfied with the process and outcome, with 87% of those surveyed saying they would recommend it to

others.[12] Based on a six month period in 2010, a comprehensive report on FENE and SENE throughout Minnesota provided slightly different figures with a 64% rate of full settlements and a 73% rate of full and partial settlements. The same report shows FENE settlement rates for the same period as 50.7% for total settlement and 3% for partial settlement. An additional 19.4% were settled before or outside ENE.[13]

The success of ENE in Hennepin County has resulted in it being expanded to most other districts in Minnesota. The model adopted is similar, although not all Social ENE programs are free. Colorado is also using ENE in family cases (called Early Neutral Assessment). Like Minnesota, Colorado's process focuses on parenting and uses a male/female team of evaluators. In that state they also pair a lawyer with a mental health professional. Parties are referred to ENE by a judge and, except in some counties where free services are available to people with low-incomes, the parties pay about $400.

South Carolina has recently amended their ADR rules to add ENE to mediation and arbitration as an ADR option. Mediation is mandatory in all family cases (a few exceptions apply) and parties may elect to use ENE at any time. In addition to providing a non-binding assessment about the outcome, the evaluator can help the parties make a plan for sharing information, assess the relative strengths and weaknesses of their cases, and help the parties to make a realistic assessment of the cost of litigation. In New York State the Matrimonial Neutral Evaluation Program[14] offers ENE in family matters. Parties attend a free three-hour session in which discrete issues are identified for evaluation.

The only jurisdiction in Canada that has an ENE program is Manitoba. The Manitoba program is based on the Hennepin County model and was developed after close consultation with officials there. First Choice is the name of the free service offered by Manitoba's Family Conciliation Services to all families going through separation and divorce. It is a combination of assessment and mediation. As in Hennepin County, the original intent of the program was to reduce the number of cases referred for full custody evaluations and the program deals only with parenting issues. First Choice has adopted the male/female evaluator team model and the evaluators are generally mental health or child development specialist.

An independent evaluation[15] of the pilot found the following settlement and party satisfaction rates with ENE:

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[12] This data is from a Powerpoint summary of the evaluations provided by Michael Weinstein, Family Court Services (FCS) Supervisor, Hennepin County.

[13] SJI Final Report, note 15, p. 15, http://www.mncourts.gov/?page=4145

[14] www.nycourts.gov/courts/1jd/supctmanh/NEP%20Procedures.pdf

[15] Eve Finnbogason, *First Choice Pilot Project: Second Service Evaluation* (January 2011). On file with the author.

Settlement (%)		**Party Satisfaction** (%)	
Full settlement	31.3	Very satisfied	50
Partial settlement	50.7	Satisfied	31.8
No settlement	14.3	Neutral	9.1
Not completed	1.7	Dissatisfied	9.1
		Very dissatisfied	0

The evaluation also found that 71% of parties said the process helped prevent a lengthier dispute and 79% said it would help them better manage and resolve parenting issues. First Choice has been expanded to two other Manitoba communities.
While ENE is widely used in civil cases in the US, its use in family cases is much less common. A prominent model, which is gaining in popularity, uses ENE as to provide less in-depth child custody evaluation. There is little information about the use of ENE for a broader range of family issues. Evidence of its use outside the court-connected ADR programs is not readily available.

While interest in and use of ENE in family cases is growing, it is still not a common feature of family court ADR programs in the US. Wayne Brazil, the pioneering California judge who spearheaded the creation and implementation of ENE, has reservations about its suitability for family cases.[16]

His concern is that ENE is not designed to deal with personal and intense emotional issues. Instead, it is principally designed to get lawyers and clients to do the investigative and analytical work on a case earlier than they would otherwise. Its primary purpose, he says, is not to settle, but to compact the process so everyone learns more about the evidence and the law early on. He notes that, in contrast to mediation:

> ENE is less flexible in form (at least through the point at which the neutral drafts her evaluation) and less amenable to adjustments to cater to the emotional, informational or situational needs of litigants or lawyers.… Similarly, the range of variables the parties can put into play in ENE (again, until the evaluation is drafted) is much narrower than in ENE than in mediation. In ENE the only variables in play during the first half of the process are evidentiary and legal. [17]

He also believes that the future orientation of family law makes it less suitable for ENE than civil cases, which has a greater focus on coming to conclusions about past actions. Predicting outcomes in the latter context is more reliable than when the focus is on predicting how a court might order reality for future relationships.

[16] Telephone conversation with Wayne Brazil, January 7, 2014.
[17] Brazil, note 4, p. 38.

5. Developing ENE For Family Cases in BC

ENE in Family Cases: General Comments

A 2011 symposium brought together prominent ADR academics, commentators and practitioners to examine the status of court ADR programs in the US and start shaping an agenda for the future of family and civil ADR, including looking at new ADR processes. The symposium focused on and endorsed two "new" processes for family cases: ENE and parenting coordination. The summary report of the symposium stated:

> The relatively high level of self-determination and lowered level of coercion, the potential benefits derived by the parties, and the efficient use of court resources all justify the use of ENE within court systems. [18]

Some of the main sources of cost and delay it was designed to address in civil cases are also sources of cost and delay in family cases, in particular:

- poor or non-existent communication across party lines;
- difficulty lawyers/clients have in bringing themselves, early in the pretrial period, to confront systematically their position in the case and to understand it from the perspective of their opponents;
- unrealistic clients who need a reality check;
- clients who feel alienated from the formal litigation process; and
- unrealistic lawyers who need a reality check.

BC is often on the leading edge of justice reform and a carefully designed pilot could help develop a better understanding of how ENE might best be used in family cases. In limited and preliminary discussions with BC family law practitioners there was a strong interest in the process and a sense that it had promise. Some pointed out that a form of Early Neutral Evaluation was taking place at FCCs and JCCs, although the nature of these case conferences depends on the skills and preferences of the judge. One person suggested that family mediation had become so evaluative in some cases, it was starting to look like ENE.

Others interviewed were cautious about the notion of introducing a new process for family cases, which necessarily takes time, money and resources away from other initiatives. Questions were raised about whether better triage of family cases would have a more widespread impact and whether ENE could be made available to the most underserved

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[18] See this article summarizing the symposium: Yishai Boyarin, *Court-Connected ADR — A Time of Crisis, A Time of Change*, 95 Marq. L. Rev. 993 (2012), p. 24. Online at: http://scholarship.law.marquette.edu/mulr/vol95/iss3/12

groups. Some of these issues might be addressed through careful design; others are broader policy questions for the Law Foundation board to consider.

The remainder of the paper will look at the specific design issues involved in creating an ENE pilot in BC.

Getting Cases to ENE

O P T I O N S

1. Court referral
2. Out of court referral through lawyers, intermediaries and other gatekeepers
3. Both

Where ENE is used, it is one of a number of processes available through a well-established court-connected ADR program. In these programs, cases flow to ADR through mandatory rules requiring all contested cases to go to mediation or, for other types of DR like ENE, through judicial referral at a mandatory case management conference. In Minnesota the early case management conference is seen as essential to the successes of ENE.

Arguably, mandatory or voluntary court referral to ENE is possible under the current law in BC. Section 224 of the *Family Law Act* says the court may make an order requiring the parties to participate in family dispute resolution. Family dispute resolution is defined as a process used by parties to a family law dispute to attempt to resolve one or more of the disputed issues outside court, and includes:

- assistance from a family justice counselor;
- the services of a parenting coordinator;
- mediation , arbitration, collaborative family law *and other processes*, and
- prescribed processes.

ENE is a process that seems to fit into this definition, although it is not specifically referred to.

The court rules reflect this statutory power by allowing judges to make these orders at family case conferences in Provincial Court (FCCs) and judicial case conferences (JCCs) in Supreme Court. Interestingly, despite the fact that the *FLA* gives both Provincial Court and Supreme Court judges the power to make mandatory referrals to family dispute resolution, only the Provincial Court Rules allow judges to make such mandatory orders.[19]

To get ENE added to the list of orders that a court can make at a case conference, the Ministry of Justice (in consultation with the Supreme Court Rules Revision Committee or the Office of the Chief Judge) would have to amend the court rules, which is done by OIC.

[19] See Provincial Court (Family) Rule 7(4) and Supreme Court Family Rule 7-1(15).

There is, however, little evidence that courts are referring parties to the existing DR processes in any great numbers. This is despite the fact that mediation, for example, has been around for a long time, its efficacy in family cases is well established and there is a well-respected roster of mediators.

This points to a significant difference between the US and BC context. In the US the courts have taken a central role in promoting DR. In fact, judicial leadership is often cited as critical to successfully establishing DR processes.[20] Most US courts have ADR rules and many offer free or subsidized DR services. In BC, the growth of DR processes in family justice has taken place outside the courts. So, while court rules and judicial support for ENE could be helpful in promoting its use, unlike in the US, to date these have not been the starting points for developing new DR process in this province.

Like mediation, the more likely source of referrals for ENE would be the bar, intermediaries (e.g. JACs, advocates) and other justice system gatekeepers. A pilot might focus on working with the bar and local justice system intermediaries in particular communities to generate referrals to ENE. Other projects in which DR processes have been piloted, such as the IT-Assisted Mediation pilots would provide valuable insight about the practices and pitfalls of trying to generate referrals. If judicial support and referral could be achieved, that would be a bonus.

Case Types/Characteristics

OPTIONS

1. Parenting Issues
2. Financial Issues
3. All issues
4. Limited defined issues
5. All issues in a case

ENE was designed as a process to bring an early focus to the collection, sharing and analysis of evidence, which could suggest it might not be well suited to deal with parenting disputes. But, as outlined above, in family cases ENE has been most prominently adopted to deal with parenting issues. In this context, ENE is has been introduced to address the cost and delay involved in obtaining full custody evaluations. Cost and delay for child assessments (formerly known as section 15 reports) is also a problem in BC. It can take from 6-12 months to complete if done by a family justice counselor and, if done privately, can cost between $5,000-10,000.[21]

[20] For example, "A successful ENE program can only be provided through a partnership between the judiciary and the evaluators" from Pearson, Y., Bankovics, G., Baumann, M., Darcy, N., DeVries, S., Goetz, J. and Kowalsky, G. (2006), *Early Neutral Evaluations: Applications to Custody and Parenting Time Cases Program Development and Implementation in Hennepin County, Minnesota*. Family Court Review, 44: 672–682, online at: http://onlinelibrary.wiley.com/doi/10.1111/j.1744-1617.2006.00118.x/abstract

[21] Numbers taken from Westcoast LEAF, *Troubling Assessments: Custody and Access Assessments and their Equality Implications for BC Women*, June 2012, online at http://www.westcoastleaf.org/userfiles/file/Troubling%20Assessments%20e-report%202012.pdf; CBA, Dial-A-

Lawyers and parties might be interested in having the option of a quicker, cheaper and non-binding assessment to replace these more drawn out and expensive child assessments. However, this could raise concerns with the Family Justice Services Division, which is responsible for the publicly funded assessments, and with women's groups, such as LEAF, who are concerned about the use of the existing assessment process, with all its safeguards.

While less likely to result in prescriptive rules, guidance on what characteristics are likely to make ENE an effective tool in helping to resolve the dispute would be helpful. Wayne Brazil[22] suggests lawyers ask the following questions:

- How important to achieving your goals at this juncture is a credible evaluation of the merits of the case from an impartial and knowledgeable source?
- How important at this stage is focusing and expediting the case development process?
- How important to achieving your objectives at this juncture is face-to-face interaction with the other side?
- How important is it for your client (or an opposing litigant) to feel he or she has had something like his or her day in court?

The federal Department of Justice offers another list of questions to guide the decision about whether to use ENE[23]:

1) Are there really only a few issues at stake?
2) Can the factual and/or legal issues be concisely presented?
3) Are the factual issues dependent on the parties' differing opinions or on the credibility of witnesses?
4) Are the parties being unrealistic regarding the outcome of the case?
5) Are the parties (emotionally) inseparable from the issues of the dispute?
6) Will the evaluation polarize to a greater extent the already existing distance between the parties?
7) Is the issue of law relatively settled or in flux?
8) Are there only a few parties?
9) Will the evaluation help foster an early settlement or rather, increase costs after trial?

Law, Custody and Access, Guardianship, Parenting Arrangements and Contact, online at http://cbabc.org/For-the-Public/Dial-A-Law/Scripts/Family-Law/142

[22] Wayne D. Brazil, *Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?* Dispute Resolution Magazine, Volume 14, Number 1, Fall 2007. (Full article attached.)

[23] Department of Justice Dispute Resolution Reference Guide, Suitability of ENE: Questions to Consider, online: http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/eval.html.

For a pilot, developing this type of guidance would be essential to promoting the process and educating the bar and community about its place in the DR continuum.

Timing

O P T I O N S

1. Guidelines re: timeframe for referral
2. Flexible referral

The early timing of ENE is central to its function. This is easily achieved in court-connected programs by rules that require ENE and other ADR processes to take place within prescribed timelines. Most often, parties are referred to ENE by a judge from an early case management conference and the ENE must take place and be completed within a set number of days.

Without court rules, enforcing timelines would be more complicated. In a pilot, guidelines could be developed for the acceptance of referrals and completion of the process based on an agreed upon timeline. However, because it is often very difficult to find a sufficient number of cases when out of court dispute resolution processes are being piloted, a more flexible approach might be preferable. A downside of this approach is that it could dilute one of the primary purposes of ENE, which is to provide an early examination of a case.

Who Attends

O P T I O N S

1. Represented parties
2. Counsel
3. Self-represented parties

If parties are represented, generally both they and their lawyers are required to attend ENE. Civil programs appear to be built on the expectation that parties will be represented. But self-represented litigants do participate in ENE in some jurisdictions, including Minnesota, and educating and tempering the expectations of self-represented litigants is seen as one of the potential benefits of ENE. In some other jurisdictions, such as New York State, self-represented litigants are not eligible to participate in ENE.

For an ENE program to benefit self-represented litigants, SRLs would benefit from targeted self-help resources to support them in preparing for ENE. Consideration would also need to be given to what skills and training evaluators would need to make sure they were dealing effectively and fairly with SRLs. As Professor Macfarlane noted in a written interview, the procedural justice benefits (i.e. being heard) of ENE would not be realized if an evaluator failed to reference points made by an SRL in an ENE, however misguided. Evaluators may also need to provide more guidance to SRLs during the session.

Professor Macfarlane also cautions against relying too heavily on the “logical-rational paradigm” which is such a strong component of ENE, as originally conceptualized and designed. SRLs need more than just evaluation, they need support in dealing with an

unwanted outcome. While any litigant would need emotional support in these circumstances, the SRL does not have the benefit of a having someone to weigh the implications of the outcome of an ENE.

Who Evaluates

O P T I O N S

1. Lawyers
2. Private mental health or child specialists
3. Family Justice Counselors
4. Accountants

The key attribute of evaluators is that they are subject-matter experts. So identifying evaluators will depend on which cases are eligible for ENE. ENE programs that focus on parenting use child development or mental health experts as evaluators. ENE focusing on financial issues relies on lawyers and accountants. A team approach is common: male/female, lawyer/child specialists, or lawyer/accountant.

When lawyers are used as evaluators, they must be well-respected and senior practitioners in order to garner the trust and legitimacy required to make other lawyers and litigants be willing to seek and rely on their assessments. In Ontario, many ADR professionals are marketing themselves as ENE providers, but experienced family lawyers not involved in ADR could also be drawn on to participate in a pilot.

In Manitoba, government employees similar to BC's Family Justice Counselors conduct the early neutral evaluations done in relation to parenting issues. If a BC ENE program focused on parenting issues, the use of Family Justice Counselors could be explore. Using private mental health or child specialists is another option.

Funding/Payment

O P T I O N S

1. Public funding
2. Private pay – set rate
3. Private pay – sliding scale
4. Volunteer

In the US, ENE in family cases is delivered using a variety of payment models, including public funding (free to users), private pay (set rate and sliding scale) and delivery by volunteers.

In Santa Clara and New York State senior lawyers deliver family ENE on a volunteer basis, where a certain amount of recognition and prestige comes with playing this volunteer role. Lawyers in BC provide their services for free through structured pro bono organizations or on their own. At the same time, there is understandable reluctance to rely on volunteerism to an extent that it would take pressure of government to provide adequate justice services.

Government does fund a number of out-of-court dispute resolution processes, including free mediation by family justice counselors and the soon-to-be implemented Civil Resolution Tribunal, which will provide online dispute resolution for cases falling within the

jurisdiction of the Provincial Small Claims Court. Government's interest in finding ways to help parties achieve resolution outside the court is encouraging and they should be engaged in early discussions about a pilot, although funding for new initiatives is scarce.

The Small Claims Pilot in Vancouver uses senior lawyers appointed as JPs to adjudicate small value claims. The lawyers, who were recruited for the pilot by the Chief Judge at the time, are paid $600 to adjudicate four one hour hearings and to read materials provided in advance. For the lawyers involved, this is akin to an honorarium. The pilot evaluation noted that:

> all the JPs in the Simplified Trial stream are Queen's counsel who hold positions in large firms. This degree of experience was felt to be important as a way of securing respect from the bar for this new court process, especially in Vancouver. It was also felt that these JPs could only commit to the process if court sittings were held at night, as the significant income of senior counsel would otherwise be lost to their firms if sittings were in the day. If Simplified Trials were held during the day, significantly more money would be required to attract Vancouver JPs. Furthermore, the number of schedule conflicts would increase during the day.[24]

Pilot developers wonder if system wide and permanent implementation of the model would be viable, given its dependence on very senior counsel working at substantially reduced rates. These considerations would be important in developing a fee model for ENE. Other professionals, such as child development or mental health specialists do not have the same relationship to the justice system and are not generally called upon to provide their services pro bono or for far below their market rate when doing this work.

Sliding scales payment structures have been adopted in many jurisdictions for out of court dispute resolution processes, including in Ontario where a sliding scale is used for subsidized mediation. Attempts to use a sliding scale in the Distance Mediation Pilot Project in BC exposed challenges in administering this model that would have parallels with an ENE pilot. Mediators did not think it was appropriate for them to be responsible for making the determination about the parties' incomes that was required to apply the sliding scale, especially if the parties' income levels might be in dispute. And, the mediators did not feel comfortable assigning different fee levels to the parties because of the potential impact on both the mediators perceived neutrality and the power balance between the parties. Ultimately the sliding scale was abandoned. While sliding scale models are successfully used in many locations for different types of dispute resolution services, they may be easier to implement when the program is administered centrally and individual DR professionals are not being asked to apply the scale.

Another option is to follow the model for private mediation and have the parties pay a set fee directly to the evaluator. In a pilot, a standard fee could be set and parties could either

[24] Focus Consultants, *Evaluation of the Small Claims Court Pilot: Final Report*, August 2009, p. 74.

pay half or decide among themselves how to share it. Arriving at an appropriate fee level would be best done in consultation with potential evaluators and would depend on their qualifications, other funding available and who the pilot targeted.

Family Violence

OPTIONS

1. Presence of family violence a bar
2. Cases involving family violence can use ENE

There are two issues to consider in relation to family violence. First, are cases involving family violence appropriate for ENE? Second, do evaluators screen for family violence?

There is no standard approach to dealing with family violence in ENE programs. Where allowing cases involving family violence to be eligible for ENE, it is expected that evaluators will have the skills to guard against intimidation and power imbalance.[25] It assumed that if abuse renders a party incapable of consenting freely to the process or participating in a meaningful way, ENE is not appropriate. In Minnesota cases in which a party has been subject to family violence are not screened out of ENE, but a local legal aid brochures advises potential users that they may not want to agree to an ENE if they are scared of the other party or the other party has abused them.[26] In New York, on the other hand, cases involving family violence are considered inappropriate for ENE.

The *Family Law Act* requires family dispute resolution professionals to screen for violence. Section 8 provides:

> (1) A family dispute resolution professional consulted by a party to a family law dispute must assess, in accordance with the regulations, whether family violence may be present, and if it appears to the family dispute resolution professional that family violence is present, the extent to which the family violence may adversely affect
>
> (a) the safety of the party or a family member of that party, and
> (b) the ability of the party to negotiate a fair agreement.
>
> (2) Having regard to the assessment made under subsection (1), a family dispute resolution professional consulted by a party to a family law dispute must
>
> (a) discuss with the party the advisability of using various types of family dispute resolution to resolve the matter, and

[25] Pearson, Y., Bankovics, G., Baumann, M., Darcy, N., DeVries, S., Goetz, J. and Kowalsky, G. (2006), *Early Neutral Evaluations: Applications to Custody and Parenting Time Cases Program Development and Implementation in Hennepin County, Minnesota.* Family Court Review, 44: 672–682, online at http://onlinelibrary.wiley.com/doi/10.1111/j.1744-1617.2006.00118.x/abstract

[26] Education for Justice Fact Sheet, Family Court Process, Early Neutral Evaluation, online at www.LawHelpMN.org.

(b) inform the party of the facilities and other resources, known to the family dispute resolution professional, that may be available to assist in resolving the dispute.

The paramount considerations reflected in these provisions are the safety of the party (or a family member) and the ability of the party to negotiate a fair agreement. Ensuring these may be challenging in an ENE (or mediation) where both parties are unrepresented, but the *Act* leaves it to the family dispute resolution professional to make the determination on a case-by-case basis. If this is the approach underlying the use of dispute resolution processes in family law in BC, including mediation and parenting coordination, is there any reason not to take the same approach with ENE?

Since a family dispute resolution professional includes "a lawyer advising a party in relation to a family law dispute", lawyer evaluators would appear to be covered by this provision and be required to assess for family violence and consider the safety of the parties and their ability to negotiate fairly in making a determination about whether ENE is appropriate. If other professionals act as evaluators, it makes sense to subject them to the same requirements.

CONCLUSION

Study after study has shown that our existing approach to family cases is not serving families. All jurisdictions continue to search for new ways to help people resolve their issues arising out of separation and divorce in a way that minimize the emotional and financial impact on families. Fundamental changes have been repeatedly recommended, but the justice system has proven highly resistant to deep transformation.

Still, the family justice world has been fertile ground for the growth of many new processes aimed at helping families. This includes collaborative law, mediation, parenting coordination, arbitration, parenting education, and case management. Early Neutral Evaluation has potential to be another tool that, if used at the right time and in the right way, could support families in achieving fair and affordable outcomes.

NEXT STEPS

Determining if ENE is right for BC and, if so, how it should be implemented requires further consultation. While some local family lawyers and dispute resolution experts were canvassed as part of this research, they were asked to comment on the basis of a limited amount of information. It was difficult for them to provide more than brief and general feedback on whether ENE would be a helpful process in family cases.

As this paper illustrates, there are significant policy questions to be addressed in developing an ENE program for family cases in BC. An initial consideration is to what type of cases is ENE most suited in BC? Where would it be most helpful to parties in resolving their cases? Given the reliance on early case management to stream cases in jurisdictions where ENE

has been successful, is there an alternative model for getting the right cases to ENE in this jurisdiction? Is ENE accessible to SRLs and what support would they need to be able to participate effectively in the process? Could sufficient protections be built in to the process to allow parties who had been subject to family violence to use ENE? Finally, who will evaluate and how will the service be funded?

Debate and discussion among justice system professionals and users based on a deeper understanding of the process, the choices involved in developing it, and its implementation in other jurisdictions would be helpful as a next step in determining if an ENE pilot would be a productive endeavor in BC and, if so, how it should be designed to best meet the needs of British Columbians and take into account the capacity of the available resources.

Appendix A

Descriptions of Family ENE Programs

1. MANITOBA

Manitoba Family Services, First Choice
http://www.gov.mb.ca/fs/childfam/first_choice.html

2. MINNESOTA

Hennepin County, Minnesota
Social Early Neutral Evaluation and Financial Early Neutral Evaluation
http://www.mncourts.gov/district/4/?page=1747

ENE in other Minnesota Judicial Districts
http://www.mncourts.gov/?page=4015

State Justice Institute Final Report, ECM/ENE Initiative: Early Case Management/Early Neutral Evaluation Pilot (October 2010)
http://www.mncourts.gov/?page=4145

3. COLORADO

Colorado Early Neutral Assessment
Adams County
http://www.courts.state.co.us/userfiles/file/Court_Probation/08th_Judicial_District/Larimer/ENA%20Info%20Sheet.pdf.

4. NEW YORK

Supreme Court, Civil Branch, New York County, Statement Of Procedures, Matrimonial Neutral Evaluation Program
www.nycourts.gov/courts/1jd/supctmanh/NEP%20Procedures.pdf