

Early Case Management and Early Neutral Evaluation

*The Best Practice to Reform
Custody, Parenting Time, and
Financial Outcomes for
Families in Transition*

Judge Tanja K. Manrique
June 8, 2010

**“Next to doing right, the great object
in the administration of justice
should be to give public satisfaction.”**

**John Jay,
first United States Chief Justice,**

Family Cases Require Judges to Manage a Multi-Faceted Process

“[T]he adversarial process of American jurisprudence may not produce the best results in some cases because it can accentuate differences and amplify the conflict.”

* * *

“In family cases the role of the judge – and therefore the court system – as adjudicator is compatible with being a **convener, mediator, facilitator, service provider, and case manager.”**

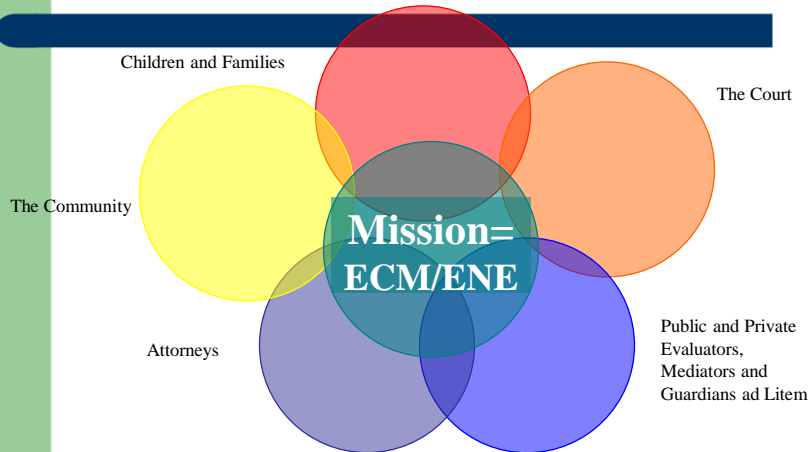
Position Paper on the Effective Management of Family Court Cases, COSCA, August 2002, as referenced by Judge James T. Swenson in his presentation, *Family Law Early Case Management*, at the 2004 Minnesota Judges' Conference

Family Law Stakeholders and Systems



- **Each system has different roles and expectations**
- **Systems often function as if they are independent**
- **The relationship between systems can be cooperative, strained, or adversarial**
- **Linking systems requires common vision & mission**

A Total Systems Approach Should Yield Qualitatively Enhanced Outcomes



Linked systems benefit from synergy. Each stakeholder system contributes to the successful implementation of the mission.

The Authority for ECM/ENE

*Retired Minnesota Supreme Court Chief Justice
Kathleen Blatz issued Order ADM-04-8002 on April 23, 2004*

In Re Family Court Early Case Management and ADR Best Practice Guidelines And Volunteer Pilot Projects in First, Second, Fourth, Cass County in the Ninth and the Tenth Judicial Districts



Every Judge in Minnesota is Authorized to Implement the Best Practice Guidelines

The Best Practices Guidelines “shall apply” to cases within the pilot projects and judicial officers in the remaining five districts and those in the [pilot districts] who choose not to participate in the pilot projects “are also encouraged to utilize all or portions of these Best Practices Guidelines and forms where practicable.”

Minnesota Supreme Court Order ADM-04-8002

ECM/ENE is a strategic priority for the Minnesota judicial branch



Focus on the Future

- I. Access to Justice**
- II. Administering Justice for Effective Results**

Promote early resolution of cases involving children and the family through strategies such as Family Early Case Management and Early Neutral Evaluation
- III. Public Trust, Accountability and Impartiality**

ECM/ENE Improves the Dissolution Process for Parties, Children and the Court

- Reduced cost, acrimony, and time to disposition
- Increased settlement rates
- Earlier resolution gives certainty to children and the parties
- Reduced need for full custody evaluations and trials
- Fewer appeals and post-decree motions

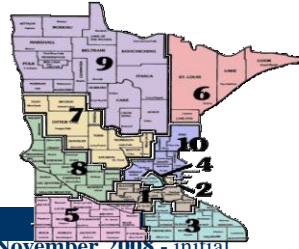


Focus on the Future

Trending Toward A Best Practice

- **2004** AFCC Annual Conference in **San Antonio, Texas** - the first presentation by Hennepin County ENE Court Team to a national audience
- **2005** – SENE trainings in **Fort Worth, Texas & Winnipeg, Canada**; AFCC presents Hennepin county Family Court Services Division with the **Irving Cantor Award for Innovative Programming**
- **2006** - **Albuquerque, New Mexico** - SENE training
- **October 2006** - ENE article by Hennepin Family Court Services published in AFCC journal, *Family Court Review*
- **Summer 2007** - Inquires by **Ohio and Florida**
- **January 2008** - 17th District, **Colorado** –SENE/FENE training; John Lande, [The Movement Toward Early Case Handling in Courts and Private Dispute Resolution](#), 24 Ohio St. J. on Disp. Resol. 83, 101-103
- **July 2008** - **University of Denver** – SENE/FENE training
- **Spring 2009** - Hennepin SENE designated **Top 50 Innovation in American Government** by Ash Institute at Harvard University's Kennedy School of Government, out of 600 applicants
- **Fall 2009** – Pilots operating in 7 of Minnesota's 10 Judicial Districts, with pilot planning underway in remaining 3 Judicial Districts

Expansion of the ECM/ENE Initiative



- **September 2006** – Family Law for the Judiciary conference
- **January 2007** - 3rd/5th Districts ECM/SENE training; Fillmore County FENE
- **May 2007** – 2nd District FENE training; SENE added summer 2009
- **Fall 2007** - 6th District (Duluth) initial presentation in August; training in December; January 2008 ECM/SENE/FENE pilot launched
- **February 2008** - 10th District (Anoka county) training; August 2008 ECM/SENE/FENE pilot launched
- **February 2008** - Statewide steering committee established
- **March 2008** – Family Law Institute
- **September – November 2008** - initial presentations to 9th District (Itasca county), 1st District (Dakota county), 10th District (Washington county)
- **January 2009** – Itasca county training; July 2009 ECM/SENE/FENE pilot launched
- **June 2009** – Washington county training; ECM/SENE/FENE pilot launch December 2009; SJI grant extended to June 2010; ECM/ENE continued into branch strategic plan for FY2009-2011
- **November 2009** – 1st District training; Dakota county pilot launch planned for summer 2010
- **February 2010** - 7th District training
- **March 2010** – 8th District training; Family Law Institute
- **June 2010** – State Justice Institute grant expires



The data from Greater Minnesota establishes that the ECM/ENE process generates successful outcomes when used by judges and private sector professionals in jurisdictions without on-staff custody evaluators or specialized family courts

What is Early Case Management?



5 Components of the ECM Model

5 Components of the ECM Model

- **First Hearing Set and Held Quickly After Filing**
- **Preliminary Data Sheets**
- **“The Pitch” on Cost, Time & Child Development**
- **Stipulated Agreements on Discovery and Neutrals**
- **Always Schedule the Next Court Contact**



time management

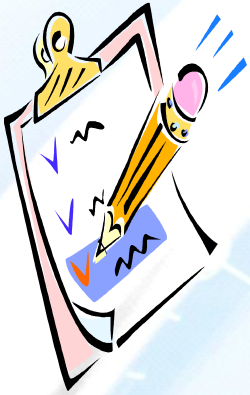
ECM Component 1 - Schedule the First Hearing ASAP

- **Set a Scheduling Conference, ICMC or CMC**
 - Notice mailed by court immediately after filing
- **Timing is Everything**
 - Conduct the first hearing within 3 - 4 weeks of filing
- **Scheduling Notice Impedes Posturing**
 - Parties prohibited from serving formal discovery or motions in advance of the hearing



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ECM Component 2 - Preliminary Data Sheets



- **A brief outline of issues**
 - specify whether custody is contested
 - employer and income information
 - statement of monthly expenses
 - identification of real property
 - list financial and retirement accounts
 - identify creditors and debt totals
- **Preliminary data sheets are not filed and are not admissible at trial**

ECM Component 3 - “The Pitch”

*A frank discussion
about the time, expense and child
development consequences
of case management options
determined by the parties and counsel
at the outset of the case*

“The Pitch” A Frank Discussion



- **Empower the parties:** “This is your case!”
- **Discuss the Best Interest Factors and *The Guide to Making Child-Focused Parenting Time Decisions***
- **Explain that “Just & Equitable” does not require a 50/50 allocation of assets and debt**

time management

“The Pitch” Address the Expert v. Neutral Options

- **Custody Evaluations v. Social ENE**
Parents will agree that the goal should be to ascertain children’s best interests for the future via a process that minimizes harm during the dissolution process
- **Expert reports v. Financial ENE**
Time is money. Get the facts on the table quickly. A ‘reality check’ from a respected neutral is enough to move parties off unrealistic positions.
- **ENE Works in over 70% of cases!**



time management

“The Pitch” Address Discovery Options

Formal v. Informal Discovery?

- If informal, exchange letter requests in 10 days, and responsive information **45/60/ or 90** days thereafter
- **Disputes resolved via telephone conference** with judge; required before filing of formal motions; if unresolved during conference, submit letter briefs instead of motions
- For complex cases, **consider a phased approach**
 - delineate issues to be pursued formally from the outset
 - specify a time period for informal discovery on other issues and schedule a court contact (teleconference or joint letter) to address whether formal discovery is necessary thereafter



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ECM Component 4 – Stipulated Agreements



- After the frank discussion about the cost, time, and child development consequences of the decisions made at the very beginning of the dissolution process, **most parties will stipulate** to an informal, expedited discovery process and to hire neutral evaluators
- **Stipulations negate need for temporary hearings**

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ECM Component 5 – Always Schedule the Next Court Contact



- **Discuss the next type of hearing**
 - Telephone conference
 - Pre-trial conference
 - Written submissions for adjudication without further hearing
- **Instruct parties to schedule a telephone conference before filing any motions**
 - Most emergencies can be resolved with a phone conference; prompt scheduling is key

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Early Neutral Evaluation

**Social Early Neutral Evaluation (“SENE”)
regarding a parenting plan, or custody and the
parental access schedule**

**Financial Early Neutral Evaluation (“FENE”)
regarding marital estate issues**

ENE is an **Evaluative** ADR Process

A forum in which attorneys [or pro se parties] present the core of the dispute to a neutral evaluator in the presence of the parties.

This occurs after the case is filed but before discovery is conducted.

The neutral then gives a candid assessment of the strengths and weaknesses of the case.

If settlement does not result, the neutral helps narrow the dispute and suggests guidelines for managing discovery.

Minn.Gen.R.Prac. 114.02(a)(5)

ENE is a Unique ADR Process

- ENE is **NOT** mediation or arbitration
- ENE is **NOT** a full custody evaluation
- ENE is a **qualitatively different ADR process** and it yields qualitatively different results



As Summarized by the Minnesota Judiciary:

Early Neutral Evaluation is “a confidential, settlement-oriented, accelerated alternative dispute resolution process that moves families through court as quickly, fairly, and inexpensively as possible. In the ENE process a two-person male/female ENE team meets with the parties and their attorneys. Each side makes brief case presentations, gives brief responses to the other’s presentation, and answers questions from the ENE team.



“After a private consultation, the ENE team gives feedback regarding the probable outcome of a full evaluation and what they deem to be viable settlement options. The idea is to short-circuit potentially contentious negotiations and explore the possibility of expediting the final settlement.”

Minnesota Judicial Branch 2005 Report

Advantages of Male/Female SENE Team

- **Helps to neutralize gender bias concerns about court system**
- **Team can strategize about which member should say what and to whom during feedback and framing of recommendations. Crucial to how certain feedback will be received.**
- **Team models how to constructively communicate, problem solve, speak respectfully, embrace/tolerate/normalize differences of opinion and perspective**
- **Each team member has a unique perspective of the case. Merging perspectives injects a comprehensive, holistic view that creates more options to constructively resolve issues**

Advantages of Male/Female SENE Team

- **Team is better able to track the often complicated dynamics of the session. When one member speaking, the other can collect thoughts or observe non-verbal cues between parties or counsel. Insight to structuring subsequent aspects of session**
- **Cohesive, well-functioning team will be able to resolve wider range of cases than an individual**
- **Teams can be constructed to ensure necessary skill set and areas of expertise for optimal service**

Referral And Intake

- Referral from the Initial Case Management Conference. *Early* is key.
- Parents agree to use ENE to resolve disputed custody/parenting time issues. ENE is *voluntary*.
- Scheduling/Intake immediately after ICMC. The “Pitch” is forgotten if too much time passes between ICMC and ENE.
- The bench and the evaluators must work in tandem to define the parties’ expectations and explain the role of counsel. The parties must be primarily engaged and vocal.



Introductory Phase



- Setting the stage
- Stating goals of the ENE process
- Detailed explanation of each step in the process
- Describe data privacy
- Check for areas of agreement
- Shift to child focus/ ask for pictures

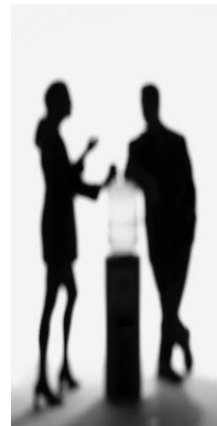
Evaluative Phase

- Each client tells their “story”
- Each client responds to the other parent’s issues
- ENE team asks questions to clarify issues, isolate factors driving the dispute, and determine areas of agreement



Consultation Phase

- Trade impressions
- Determine whether more information is needed to provide a valid preview of evaluation
 - If so, determine what is needed
 - If not, formulate your neutral evaluative opinion
- Generate viable settlement options
- Strategize how to present the feedback



Feedback – Phase A



- **Provide rationale why additional information needed to give valid preview**
- **Identify information needed**
- **Obtain releases, schedule collateral evaluations, schedule interviews**
- **Set appointment to reconvene the ENE for final feedback session**

Feedback – Phase B

- **Acknowledge family strengths**
- **Identify unique family challenges**
- **Provide preview of the evaluation and rationale for recommendations**
- **Provide settlement options**
- **Answer questions that clarify recommendations**
- **Break to allow client/attorney caucus**



Negotiation Phase

- Each side responds to the proposal
- If agreement – specify/memorialize
- If no agreement – identify source of impasses, problem solve, generate additional options
- Allow additional attorney/client caucus time
- Consider scheduling additional session



Wrap Up Phase



- If settlement reached, determine whether ENE team or attorneys prepare stipulation to submit to Court. Require submission within 5 days.
- If no settlement, ENE informs Court. Team may request order for evaluation, GAL, or testing.
- Schedule additional review sessions, as needed

Critical Components of the SENE Model

- **Used in conjunction with ECM**
- **Voluntary opt-in to SENE; decision at ICMC**
- **SENE occurs within 2 weeks of ICMC to build on momentum created by stipulated case management plan**
- **Male/Female SENE Team**
- **Tailored process to one or multiple sessions**

Critical Components of the SENE Model

- **Team reports results to court; confidentiality maintained as to session content**
- **For cases which do not settle: team will not conduct subsequent work in different process, will not share diagnostic impressions with subsequent providers, cannot be deposed or testify in court**
- **For cases which do not settle: team will recommend subsequent case management options, such as full custody, CD, or MH evaluations**

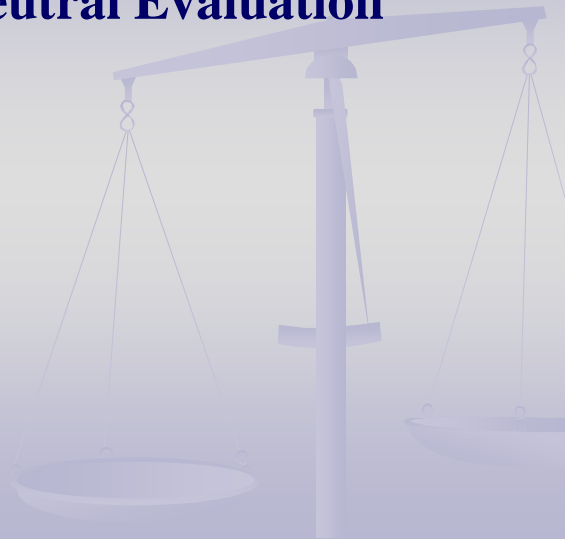
Addressing Domestic Violence Issues in SENE

- **Emphasis that SENE is voluntary must not be illusory by bench, attorneys or SENE team**
- **Screening can and should occur during components of ECM and phases of SENE**
- **SENE team must be well-trained in DA issues, and updated training must occur on regular basis**
- **Male/Female team composition helps to ensure gender balance and awareness of issues**
- **Attorneys invited and expected by team to present issues when client reluctant or intimidated**

Addressing Domestic Violence Issues in SENE

- **Team can caucus with each side**
- **Team explicitly encourages clients & attorneys to bring up DA issues during the Introduction phase. If none, team explicitly asks about DA issues during Questioning phase**
- **Team careful not to overtly or covertly exert pressure to settle. Provide additional time for consideration of options**
- **Attorney involvement helps to ensure appropriateness of agreements**

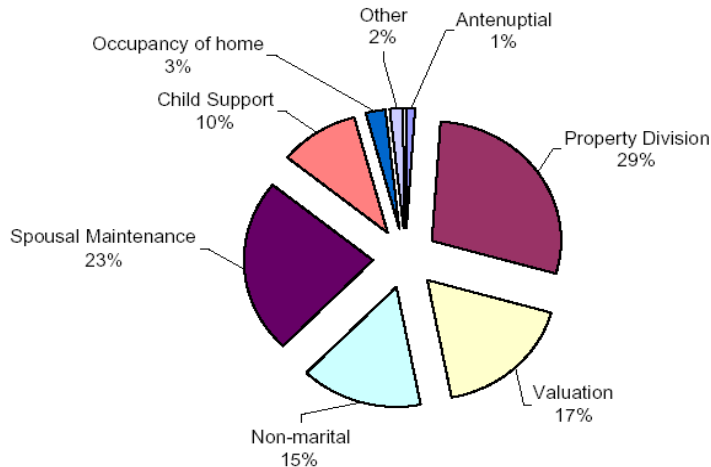
Financial Early Neutral Evaluation



Legal and Financial Professionals Created FENE

*Attorneys and C.P.A.'s
volunteer their time at
free or reduced rates
to assist families in transition*

Issues Submitted to FENE – 4th District



The Referral Process

- **Referral from the ICMC**
- **Parties & attorneys select the evaluator; in pro se cases, the court selects the evaluator**
- **Judge contacts evaluator during the ICMC to schedule a mutually convenient intake session for the parties and counsel**
- **Court clerk completes macro referral order within 48 hours and transmits directly to evaluator via facsimile**
 - The Order confers immunity to the evaluator
- **Parties/counsel transmit ICMC data sheets and economic data to evaluator prior to intake session**

The Sliding Fee Scale – 4th District

	<u>Gross Income</u>	<u>Fee/Hour</u>
● Based upon the parties' combined annual gross income	\$0 - \$25,000	\$0.00
	\$25,000 - \$50,000	\$50.00
● Court sets the fee based on ICMC data sheet and required attachments	\$50,000 - \$75,000	\$75.00
	\$75,000 - \$100,000	\$100.00
● Each party pays one-half of the fee	\$100,000 - \$125,000	\$150.00
	\$125,000 - \$250,000	\$250.00
	Over 250,000	\$300.00

Timelines

- Intake Session with evaluator within **10 days** of ICMC
- Formal discovery is suspended. Evaluator determines scope of informal discovery at the intake session
- Process completed and report to court within **75 days** of ICMC
- Continuances possible, but rarely necessary
- If process unsuccessful, court sets pre-trial

The Use of Neutral Experts

- **Helpful in cases involving tracing, valuation, or tax issues**
- **Work product streamlined to fit the process**
- **Same sliding fee scale applies**
- **Macro appointment order completed by Judge, usually at time of FENE referral**
- **Neutral Expert hired in conjunction with an evaluator. Note, however, that the same individuals also may be retained to provide stand-alone FENE service.**