



MINNESOTA JUDICIAL BRANCH

State Family Early Case Management/ Early Neutral Evaluation Program

Initial Early Neutral Evaluation (ENE) Provider Training Program Manual

Angela "Angel" Lussier
State Family ECM/ENE Program Manager
Court Services Division
State Court Administrator's Office
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155
(651) 297-1741
Angela.Lussier@courts.state.mn.us

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ENE Training and Accreditation

ENE Provider Training and Accreditation

The State ECM/ENE Program accredits training programs that meet the minimum Initial ENE Provider Training criteria. Any sponsor or individual who wishes to provide Initial ENE Provider Training may seek certification and accreditation of a proposed training course.

Initial ENE Provider Training is a prerequisite to be listed as an ENE provider on any of the ENE rosters statewide. Initial SENE Provider Training is a prerequisite for Initial FENE Provider Training. The State ECM/ENE Program maintains a Master Training List of individuals who have completed Initial ENE Provider Training. Only those individuals who have completed an Initial ENE Provider Training accredited by the State ECM/ENE Program shall be listed on the master training list of ENE-trained neutrals. The master training list of ENE-trained neutrals is available at <http://mncourts.gov/Help-Topics/ENE-ECM.aspx#tab04MasterTraining>.

Minimum Accreditation Requirements

Course certification is based upon the Initial ENE Provider Training Manual approved by the State Family ECM/ENE Program on March 7, 2017. Prospective trainers are encouraged to use the course outlines in the Manual as a model training course format and checklist of topics to be discussed in training.

The number of hours meeting the minimum requirements for certification are based on each contact hour of training. A contact hour shall consist of a sixty-minute class session. The number of hours certified does not include time spent on meals, breaks, or non-substantive activities.

Initial ENE Provider Training courses must be interactive, experiential, and in-person. Partial video replay and simulcast presentations will not be certified unless a qualified lead instructor is present to discuss the content, answer questions and facilitate the training participants' role play.

Initial SENE Provider Training Requirements

- Minimum 12 hours of instruction.
- Instructional topics must include:
 - Philosophy and purpose of ENE (See Manual, SENE Day 1, Part 4);
 - Comparison of ENE to other forms of ADR (See Manual, SENE Day 1, Part 4);
 - Background of ENE in Minnesota (See Manual, SENE Day 1, Part 1);
 - Overview of ICMC and relationship to ENE (See Manual, SENE Day 1, Part 2);

- Demonstration of ENE talk at ICMC (See Manual, SENE Day 1, Part 2);
- Introduction to, description of, and demonstration of each of the phases of SENE (minimum 3 hours of instruction¹) (See Manual, SENE Day 1, Part 3 & 5, and Day 2, Part 4);
- Opportunity for participants to role-play each of the phases of SENE (minimum 3 hours of roll play);
- Discussion of ethical issues associated with SENE (minimum 1 hour of instruction) (See Manual, SENE Day 1, Part 6);
- Instruction on special issues in SENE, including domestic violence (See Manual, SENE Day 2, Part 2 & 3); and
- Instruction on how to become listed on ENE Provider Rosters.
- Written materials, including the following:
 - Written description of each of the phases of SENE (*Recommend providing the descriptions in the Manual*);
 - Sample forms used for ENEs (*Recommend providing forms available on <http://mncourts.gov/Help-Topics/ENE-ECM.aspx> under County Information or Provider Information*); and
 - Current versions of statutes and rules relevant to SENEs.

Minimum Qualifications for Lead SENE Trainers

Lead SENE Trainers are those faculty that will directly teach the components of SENE, demonstrate the SENE, and provide instruction/feedback during experiential learning portions of the training. Training may be supplemented with presentations by experts in various subject matters such as domestic violence, family law, etc., and/or with question and answer panel discussions by ECM/ENE Program Coordinators/Managers and current ENE program rostered providers who are listed separately from the Lead Trainers.

Lead faculty must meet the following minimum criteria:

- a. Be listed on the Minnesota Statewide ADR-Rule 114 Family Law Neutrals Roster as a Mediator and an Evaluator or currently be a judicial officer;
- b. Have completed a qualified SENE training approved by the State Family ECM/ENE Program and be listed on the Master Training List for SENE and FENE Training;
- c. Provide a curriculum consistent with the State Family ECM/ENE Program-approved curriculum;
- d. Be part of a team consisting of a male and female, one who must be an attorney and the other a professional who has family-systems and/or child development background; and

¹ For purposes of complying with proposed changes to Rule 114, training sponsors should document in their application and materials exactly how many minutes of this section are spent demonstrating the components of SENE. It is recommended that 2 hours be demonstration or other experiential learning. This is in addition to the 3-hour roll play requirement.

- e. Have conducted 25 court ordered/appointed SENEs, or performed ICMCs as a judicial officer, during the five years prior to the time the applicant wishes to serve as an SENE trainer.

Initial FENE Provider Training Requirements

- Minimum 5 hours of instruction.
- Course must be presented along with Initial SENE Provider Training or attendees must be required to have previously completed Initial SENE Provider Training.
- Instructional topics must include:
 - Introduction to, description of, and demonstration of each of the phases of FENE (minimum 2 hours of instruction²) (See Manual, FENE Parts 2-8);
 - Opportunity for participants to role-play each of the phases of FENE (minimum 2 hour of roll play);
 - Instruction on special issues in FENE, including ethical issues (See Manual, FENE Parts 2-8); and
 - Instruction on how to become listed on ENE Provider Rosters.
- Written materials, including the following:
 - Written description of each of the phases of FENE (*Recommend providing the descriptions in the Manual*);
 - Sample forms used for ENEs (*Recommend providing forms available on <http://mncourts.gov/Help-Topics/ENE-ECM.aspx> under County Information or Provider Information*); and
 - Current versions of statutes and rules relevant to SE

² For purposes of complying with proposed changes to Rule 114, training sponsors should document in their application and materials exactly how many minutes of this section are spent demonstrating the components of FENE.

Minimum Qualifications for Lead FENE Trainers

The lead FENE Trainer(s) is(are) the presenter(s) that will directly teach the components of FENE, demonstrate FENE components, and provide instruction/feedback during experiential learning portions of the training. Training may be supplemented with presentations by experts in various subject matters such as domestic violence, family law, accounting, etc., and/or with question and answer panel discussions by ECM/ENE Program Coordinators/Managers and current ENE program rostered providers who are listed separately from the Lead Trainer(s).

Lead faculty must meet the following minimum criteria:

1. Be listed on the Minnesota Statewide ADR-Rule 114 Family Law Neutrals Roster as a Mediator and an Evaluator or currently be a judicial officer;
2. Have completed SENE and FENE training approved by the State Family ECM/ENE Program and be listed on the Master Training List for SENE and FENE Training;
3. Be an attorney or CPA;
4. Have conducted 25 court ordered/appointed FENEs, or performed ICMCs as a judicial officer, during the five years prior to the time the applicant wishes to serve as an FENE trainer; and
5. Provide a curriculum consistent with the State Family ECM/ENE Program-approved curriculum.

SENE Curriculum for Neutrals

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SENE Learning Objectives

At the conclusion of this training, participants will be able to:

1. Explain the SENE process to parties and their counsel.
2. State at least three factors to consider when forming an SENE team.
3. Describe at least three ways to enhance SENE team effectiveness.
4. Identify at least four ethical issues associated with conducting ENEs.
5. Develop at least three methods to acquire information from clients and attorneys that will provide the SENE team with sufficient grounds to give clients and attorneys valid and reliable feedback about likely court and/or custody and parenting time evaluations.
6. Describe at least five ways to constructively prepare feedback for clients and to deliver the feedback effectively.
7. Describe at least five techniques to manage session behavior and create an atmosphere in the session that is conducive to a successful outcome.
8. State at least two methods for reaching an agreement and memorializing the agreement.
9. Identify the critical components of the SENE process.
10. Articulate how the ENE process differs from other forms of evaluative and Alternative Dispute Resolution (ADR) processes.

SENE Course Outline

Day 1

1. Course Introduction

- a. Introduction of trainers
- b. Introduction of participants, including what they hope to learn in the training
(write their learning desires on flip chart so the information can be reviewed at conclusion of training)
- c. Overview of training and expectations for participation
- d. Training is interactive/experiential
- e. Demonstration of SENE by trainers will occur on Day 1 of training
- f. Participants will conduct SENE on 2nd day
- g. Overview of ENE
- h. Derivation/history of ENE
- i. Relationship to Early Case Management (ECM)
- j. Spread of ENE throughout the State of Minnesota

2. Demonstration of “The Talk” by judicial officer at ICMC

- a. The best practice is for The Talk to be live and conducted by judicial officer in district where training is being held.
- b. Discussion of how The Talk sets the tone and helps to facilitate success in the ENE process.

3. Staging the SENE and explanation of each stage of the ENE process

a. Setting the Stage

- i. Identifying and dealing with pre-session issues (phone calls, sending out materials, necessity of attorney’s participation, collecting fees, screening for domestic violence issues, etc.)
- ii. Venue necessities for conducting SENEs
- iii. Venue necessities in cases involving domestic abuse
- iv. Waiting room issues
- v. Adequate space for attorney/client caucusing
- vi. Kleenex
- vii. Pen and paper available to clients
- viii. SENE team makes conscious decision about seating arrangements (e.g., avoid having parents sit directly in front of one another, etc.)

b. Explanation of each phase of SENE process with discussion of each phase

i. Introduction phase

1. SENE team provides overview of ENE process and mechanics of how the session will be conducted.

2. SENE team shares introduction so that both team members are engaged early in process.
 3. SENE team sets tone of the session, including having ultimate control of the session.
 4. SENE team ensures the parties have reviewed and signed a confidentiality agreement (which should include a prohibition against recording the session).
- ii. **Information gathering phase**
1. Each parent tells his/her story.
 2. Team attends to non-speaking parent using verbal prompts, non-verbal gestures, including eye contact.
 3. Attorney's role is to prompt and support his/her client to tell his /her story without "taking over."
 4. SENE team asks questions, gives prompts in a narrative capacity to help clients get out story, important information. Questions should not be used to take control or change the parents' stories, as this can lead to parents feeling that they weren't listened to.
 5. Each party has opportunity to respond to information presented by other party.
 6. Once parents tell their stories and respond to one another, the SENE team asks questions, guided by statutory factors delineated in Minnesota Statute § 518.17, to equip themselves with enough information to consult and structure feedback to clients and attorneys.
- iii. **SENE team consultation phase**
1. SENE team shares their impressions.
 2. SENE team discusses whether additional outside information (medical records, counseling information, etc.) is required before being able to give valid and reliable recommendations. If so, another session will need to be scheduled.
 3. SENE team discusses custody and parenting time recommendations and basis for the recommendations.
 4. SENE team discusses viable settlement options.
 5. SENE team discusses how to structure, present feedback.
 6. SENE team discusses merits of caucusing with each side after feedback is given to entire group.
- iv. **Feedback phase**
1. **When additional information is required to give valid, reliable feedback**

- a. SENE team conveys what information is needed and a rationale for why it is needed.
 - b. If parents and attorneys agree that the additional information is warranted, arrangements are made to acquire the information, and an additional meeting is scheduled to provide the final feedback.
 - c. The attorneys or the team should seek from the court an extension of the time frames, if necessary, using “Request for Order Extending Timeline for ENE and Order”, available on the ECM-ENE Website. (<http://mncourts.gov/Help-Topics/ENE-ECM.aspx>)
2. **When SENE team has sufficient information to present final feedback, recommendations to the parents, attorneys**
- a. Parents and attorneys are reminded that feedback will be delivered without interruptions so that, once delivered, parents and attorneys will have the opportunity to privately discuss the feedback prior to responding.
 - b. Prior to delivering specific recommendations, SENE team notes strengths and positive attributes of each parent, both individually and collectively.
 - c. SENE team notes the unique challenges in the family situation.
 - d. SENE team delivers recommendations and basis of recommendations. Feedback is delivered in a neutral, non- judgmental manner, and the analysis should weave family dynamics into the salient factors in Minnesota Statutes § 518.17.
 - e. SENE team offers settlement options for the parties’ consideration. Feedback is delivered in its totality without interruptions.
 - f. SENE team answers clarifying questions only.
- v. **Attorney/Client consultation phase**
- 1. Attorneys and clients meet privately to discuss recommendations.
 - 2. SENE team may or may not caucus with each side.
 - 3. Indications of when to caucus separately with each side.
 - 4. Contra-indications of when not to caucus separately with each side.
- vi. **Negotiation phase**

1. SENE team transitions from an evaluative process to facilitative and settlement-oriented process.
2. SENE team's recommendations do not change and are sometimes reiterated during negotiations.

vii. **Wrap up phase**

1. SENE team summarizes whether there is a full or partial agreement, whether the agreement is temporary or permanent, or there is no agreement.
2. If either or both sides indicate they need additional time to contemplate the recommendations, a specific date should be delineated for a conference call involving the attorneys and the SENE team to determine the disposition of case. In the alternative, a second session can be scheduled.
3. If there is no final agreement by the end of the session the SENE team offers suggestions/ recommendations for subsequent steps that can be taken to move the situation forward, which may include additional sessions with the SENE team.
4. If there is an agreement the SENE team will help determine how the agreement will be memorialized.
5. The SENE team shall communicate to the court within the timeline provided by the court whether there is a full or partial, temporary or permanent agreement or no agreement, using the appropriate "ENE Evaluator's Report", available on the ECM-ENE Website. (<http://mncourts.gov/Help-Topics/ENE-ECM.aspx>)

4. **Discussion of how ENE differs from other evaluative and ADR processes**

- a. ENE is unique because it has evaluative and mediation-like components to it.
- b. In story telling phase, areas of agreement between the parties are privately noted by provider(s), but are typically not shared with parties until the feedback phase.
- c. Settlement negotiations are informed by the evaluative recommendations of the ENE provider(s).
- d. Evaluative efforts of the ENE provider(s) are informed by the areas of agreement/ disagreement between the parties.
- e. ENE provider(s) make(s) conscious, active decisions about the elements of the case that need more comprehensive assessment.

5. **Role play demonstration of SENE by SENE faculty.**

- a. Training participants generate fact pattern to be used in role play (ask group for information and place it on whiteboard or flip chart so all can see it) (5 minutes).
- b. Two training participants role play parents in the demonstration.

- c. Two training participants role play attorneys in the situation.
 - d. Pause for discussion after each phase of the SENE.
- 6. Discussion of ethical issues associated with ENEs**
- a. Voluntariness of participation issues.
 - b. Confidential nature of ENE.
 - c. Pressuring clients to settle.
 - d. Making recommendations based on insufficient information.
 - e. Responsibility to recognize and address power imbalances and domestic abuse issues.
 - f. Responsibility to be part of cohesive SENE team.
- 7. Day 1 wrap-up discussion**
- a. Participants' questions, comments regarding SENE process.
 - b. Trainers indicate what will be covered in Day 2 of the training: participants participating in a complete ENE, discussing ethical issues associated with ENEs, discussing teaming issues, and discussing special topics, such as dealing with domestic abuse and chemical dependency issues.

DAY 2

1. **Follow-up discussion regarding residual day 1 issues**
2. **Discussion of SENE teaming issues**
 - a. Goodness-of-fit issues
 - b. Skill and knowledge requirements for effective SENE team
 - c. Prepping to work with a team member with whom you have not previously worked
 - d. Team-building requirements, tools
 - e. Maintaining balance between team members
 - f. Signs of functional versus dysfunctional SENE team
 - g. SENE team models appropriate interactions to parties
3. **Special /Significant issues in SENE and how to effectively manage them**
 - a. Chemical dependency issues
 - b. Mental health issues
 - c. Domestic abuse issues
 - d. Self-represented litigants (pro se parties)
 - e. High conflict attorneys, parents
 - f. Balance of power
 - g. Preparedness of parties
4. **Critical elements for successfully implementing each phase of the SENE**
 - a. **Introduction**
 - i. Clearly explaining goals and mechanics of SENE process
 - ii. Engagement of both team members
 - iii. Creating proper tone for session
 - b. **Information gathering**
 - i. Ensuring that each side is able to tell his/her story so that they have opportunity to state what THEY think is important
 - ii. Being judicious regarding the type of questions that are being interjected; allowing story to be told uninterrupted
 - iii. Being aware of how the other party is reacting (nonverbally) to the story-telling party.
 - iv. Asking necessary questions that will serve as foundation to give parties feedback regarding likely outcomes in court or an evaluation.
 - c. **Consultation**
 - i. Team does not compete over whose conception of the family and the situation is more valid or accurate
 - ii. Team may reach differing reasonable conclusions and share them with the parties
 - d. **Attorney/client caucus stage**
 - i. Team should have clear-cut reasons for talking with each party separately

- ii. Team should inform the two parties beforehand whether it wishes to caucus with each party and his/her attorney
- e. **Feedback**
 - i. Team should deliver feedback in a way that demonstrates to the parties that his/her position was understood, including the unique challenges and dilemmas they are facing, etc.
 - ii. Team emphasizes strengths of parents
 - iii. Team is clear about the content and basis of its recommendations
 - iv. Team highlights the statutory factors that are most pertinent
- f. **Negotiation phase**
 - i. Team does not lose sight of the recommendations that were made during the evaluation and may reiterate these at selected times throughout the process
 - ii. Can be shaped into a form that is acceptable; team does not exert undue pressure on the parties to settle
 - iii. Team ensures the attorneys are active in the negotiation process.
- g. **Wrap-up phase**
 - i. Not continuing session past the time when session participants have reached their limit
 - ii. Team makes it clear how agreements will be memorialized and submitted to court
 - iii. Team schedules any needed conference calls or additional sessions when everyone is still together

5. **Training participants role play a complete ENE**

- a. Group generates role play fact pattern with faculty modifying as needed to make situation resolvable
- b. Participants put together in groups of six and decide which role they will play (attorney, parent, or team member)
- c. Each role is given written guidelines for the role that they will assume
- d. Participants are reminded to stay in role during role play
- e. Faculty rotate time amongst role play groups to ascertain progress and to make suggestions if problems or impasses develop
- f. Faculty will halt role play at end of selected SENE stages and facilitate group discussion. Helpful to go table-to-table and gain perspective of each segment of the SENE (i.e., parents, attorneys, and teams)
- g. Trainers/Faculty use discussion points to delineate, exemplify SENE best practices
- h. Faculty will monitor and manage time in a manner that enables role play to be completed and discussed in the allotted time

6. Wrap up discussion of training

- a. Roster and implementation issues associated with court districts represented in the training
- b. Remaining questions regarding SENE
- c. Ride-along option

Pre-Session Issues/Tasks

1. Obtain and review the order.
2. Conduct conflict search.
3. Confirm (or determine if not set by court order) date, time and venue of the session. Often done by email.
4. Venue of session often held at most centrally-located office of attorneys or SENE team. Some clients may feel one-down if session held at attorney's office.
5. Venue should have adequate space for caucusing, meeting as entire group.
6. Send out letter/email to parents/attorneys; letter may include:
 - a. Bio of team
 - b. Description of process
 - c. Payment requirements
 - d. Intake sheet (names of parents, names and ages of children, contact information, date of marriage, date of separation, DV screening questions)
 - e. Confidentiality sheet
 - f. Cancellation policy
 - g. Directions to office
 - h. Request for pictures of children, documents, etc.
7. Note that confidentiality and intake sheets are sometimes filled out at time of session.
8. If possible, do not have phone contact with parents/attorneys before session. Do not engage in substantive talks. Divulge any contact with one side with the other before the session starts.
9. Consult with other SENE team member prior to session, either by phone or before session starts to prep for session.
10. Have Kleenex on meeting table.
11. If possible, have refreshments available.
12. Be aware and discuss seating arrangements with other SENE team member, keeping in mind DV issues. As a rule, avoid having parents sitting directly across from one another.
13. Be aware of rules, culture associated with the district, county where the SENE is venued.

ENE Phases

1. Introduction
2. Information Gathering
3. SENE Team Consultation
4. Feedback
5. Attorney – Client Caucus
6. Negotiation
7. Wrap-up
8. Reporting to the court

Introduction

GENERAL POINTS ABOUT INTRODUCTION

1. SENE team should give introduction in its entirety without interruptions, after indicating that clarifying questions will be entertained at the end of the introduction. This will allow SENE team to establish control and tone of the session, help to minimize anxiety of the parents, and ensure that there is a common framework/understanding for the session/ process.
2. SENE team should equally share in providing the introduction. Doing so will establish the team members as equals, and begin to model team and male/female cooperation.
3. Introduction should address issues that commonly arise in an ENE session (interrupting, crying, etc.) and how these issues will be handled. Doing so helps to establish team credibility and a framework for addressing the issues if they do arise.
4. Collect payment
5. Collect signed confidentiality agreement

INTRODUCTION STEPS

1. Team members introduce themselves and provide salient information about their educational background and work history. Helpful to emphasize to parents that no matter how educated and experienced team members are, that they, along with other parts of the family court system, will never know or love their children as much as they do.
2. SENE is a process designed to keep parents in charge of decision making and sharing time regarding their children.
3. SENE team will gather sufficient information about the family situation in the session to give parents and their attorneys their opinions about what the likely outcome of a full custody evaluation would be, including specific recommendations and the basis for the recommendations. Team indicates that doing so can inject some reality that can help lay the foundation for potentially successful settlement negotiations.
4. SENE team describes the mechanics of the rest of the ENE session/process:
 - a. See pictures of the child(ren) to "see who everyone is working for."
 - b. Ask attorneys if there are any agreements to date relating to custody or parenting time, so as not to address issues that are not in dispute.
 - c. Explain that each parent, starting with Petitioner, has approximately 20-30 minutes to tell "his/her story."
 - d. Reassure parents that there is no advantage, disadvantage to going first.
 - e. Indicate to second parent (Respondent) that you want them to tell "his/her unique story" rather than simply respond to what first parent says.

- f. Indicate that goal is to understand each of their perspectives, rather than to determine who is right and who is wrong.
- g. Emphasize that you expect them to have different perceptions of the situation.
- h. State to parents that team wants to hear primarily from the two parents, rather than the attorneys, so that team can get to know them as people and as parents. Indicate that their attorney's role during the storytelling phase is to help them get their story out to the team.
- i. Indicate that they are free to tell the team what they feel is important but that team does need to hear: a) brief history of the parents' relationship; b) what the parenting roles have been to date; c) the future custody and parenting time arrangements that will best meet the children's needs; d) concerns about the other parent as they relate to parenting; e) and perhaps most importantly, who their children are and how they are adjusting to the changing family situation. Parents are told that team wants to get to know the children through their eyes.
- j. Emphasize that parents will have the opportunity to respond to one another, but that interruptions while the other parent is talking are not allowed because it makes it more difficult for the team to gain an understanding of each parent's perspective. Indicate that the non-presenting parent should write down the things that they wish to respond to and that they can subsequently refer to their notes when it is their turn to talk.
- k. Indicate that sensitive topics will need to be discussed, including expressing any concerns about the other's chemical use or mental health. Also whether any intimidation, violence or out-of-control expression of anger have occurred, and, if these issues do exist, what has been done about it.
- l. State that the team's questions while they are presenting/responding will be geared towards helping them to get out their narrative.
- m. Indicate that after the parents present and respond to one another the team will ask questions to have parents expand on salient issues that they brought up or to broach new subjects that would be examined in a custody evaluation per Minnesota Statutes § 518.17.
- n. Indicate that the team, after collecting available information from the parents and the attorneys, will take a consultation break to discuss whether they have enough information to give reliable, valid feedback, or whether there is indispensable outside information (doctor's report, school consult, etc.) which must be obtained before the team can give the parties reliable, valid feedback. If this is the case, the team will provide the parties and the attorneys with the rationale for gathering the outside information, and, assuming that there is an agreement to continue, will request that the parties sign the necessary releases of information and/or schedule additional sessions, including a session for the team to give their final feedback.

- o. If the team feels that they have sufficient information to deliver their final feedback to the parents and their attorneys, they will discuss/analyze the family situation in accordance with Minnesota Statutes § 518.17, determine specific recommendations for the case, and the basis for these recommendations. Emphasize that the team may or may not agree on aspects of the recommendations, and that significant differences will be noted.
- p. Indicate that the team's feedback will be given without interruption because the team wants the parents to be able to discuss the recommendations privately with their attorneys before responding.
- q. Indicate it is normal for parents to agree with some but not all recommendations. Emphasis should be placed during the attorney/parent caucus on shaping the recommendations that make them acceptable, rather than as "take it or leave it" propositions.
- r. State that, after reconvening as a group, the attorneys will summarize each side's position after they have consulted privately with the parents.
- s. Indicate the team will "switch hats" and attempt to facilitate an agreement between the parents around their custody and parenting time issues.
- t. Indicate there is the possibility that they may need additional post-session time to contemplate recommendations and to consult with their attorneys. Goal is not to pressure them into agreeing, but to forge an agreement that they deem to be in their children's best interests. Indicate that a subsequent conference call or an additional meeting is sometimes warranted to complete to determine the disposition of the case.
- u. Emphasize that confidentiality is the cornerstone of the SENE process. The session shall not be recorded. The SENE team cannot be deposed or called to testify at any subsequent Court proceeding, nor can their session notes be subpoenaed, or used for litigation purposes. The Court will only receive a summary of what the parents agreed to or notice that the SENE process was not successful. **The Court will receive no content information of what occurred in the SENE session(s).**
- v. The SENE team also will not share content information with any subsequent mediators, custody evaluators, guardians, parenting consultants, etc., even if the parents sign releases of information for this to occur.
- w. Reason why confidentiality is so crucial in SENE is because want to have an atmosphere where parents can talk openly without having to worry that it will set a precedent in any subsequent Court proceeding or dispute resolution process.
- x. Note the exceptions to confidentiality: non-attorney SENE team members are mandated child protection reporters. In addition, the team is obligated to contact authorities if a parent makes a specific threat to harm themselves or others.
- y. Indicate it is natural for parents to wonder how SENE team can give reliable, valid recommendations in a few hours when a full custody evaluation customarily takes 3-

4 months. Point out there are factors in Minnesota statutes the court MUST consider when making a custody determination: Minn. Stat. §§ 518.17, 518.18 and 256C. In reality, all of the factors are rarely, if ever, in dispute, and there are usually only disagreements around 2-3 of the factors. Team can keep track of the factors in their heads, but only focus on those factors that are in dispute. If these factors are isolated early, they can be talked about in great detail during the SENE session. This facilitates progress and agreements being made quickly and reliably in the SENE process.

Information Gathering

1. Storytelling Stage

- a. **Parents' role in storytelling stage:** Each parent tells the story of the family from his/her perspective that could include (note the list is not exhaustive):
 - i. Description of each child, including personality traits, any special needs, medical and mental health, likes/dislikes, reactions to family changes, school performance, etc.
 - ii. Synopsis of parents' relationship with one another, including length of relationship, date of separation (if resided together), reasons for break up, etc.
 - iii. History of parenting arrangements, parental roles.
 - iv. Current areas of agreement, disagreement regarding parenting, parenting time schedule, parental decision making.
 - v. Concerns regarding other parent, including physical, mental and chemical health issues.
 - vi. History of conflict resolution.
 - vii. Current living arrangements and work situations and future plans in these areas, including whether there is a dispute over occupancy of the family home.
 - viii. Domestic violence issues
 - ix. Specific wishes regarding legal custody, physical custody, and parenting time.
 - b. **SENE team's role in storytelling stage:** Ensure that atmosphere is conducive to parents telling their story. (No interruptions, etc.).
 - i. Ask only questions that facilitate parents telling their stories. Team should not ask questions that put them in charge of subject matter presented, i.e., team acts as editors rather than authors.
 - ii. Team tracks nonverbal behavior of non-presenting parents, provides verbal or nonverbal prompts of reassurance to this parent, and enforces no interruption rule.
 - iii. Remind parent who is presenting second that team needs to hear their unique perspective regarding the family situation and that this involves more than simply responding to statements made by the other parent. Suggest that the second parent presents as if they were presenting first, and that this will likely serve to respond to many of the items that the other parent brought up that they wish to contest. State that the parent can review the notes they took when the first parent was presenting to see if there are additional things that they wish to respond to that were not covered in their presentation.
2. Team reminds attorneys if they become too active/verbal that the team wants to hear primarily from the parents in order to get to know them as people and as parents.

3. Indicate that team needs to act as time-broker in session, including ensuring that parents have an equitable amount of time to present.
4. Note issues presented that warrant follow-up in questioning stage. Avoid pursuing these issues in this stage, since it will detract from the parent telling their story in their preferred manner.
 - a. **Attorneys' role in storytelling stage:**
 - i. Prompt client, when needed, to tell their story to give the SENE team salient information about the family.
 - ii. Reassure client when other parent is presenting client will have ample opportunity to give his/her perspective and to respond to statements made by the other parent if he/she does not agree.
 - iii. Remind client to take notes of statements made by other parent about which he/she wishes to respond.
5. **Response Stage**
 - a. **Parents' role in response stage:** Each parent has the opportunity to respond to statements made by the other:
 - i. Second presenting parent responds to first presenting parent during and at the end of their own presentation.
 - ii. Parent who presented first responds to presentation made by parent presenting second.
 - iii. Second presenting parent responds to response of the first presenting parent.
 - b. **SENE team's role in Response Stage:**
 - i. Structure in a way that prevents response-counter-response from degenerating into a "tit-for-tat" process involving trivial aspects of the situation.
 - ii. Remind parents that they do not need to repeat statements that they have previously made.
 - iii. Artfully redirect parents as needed.
 - iv. Provide reasonable time limits for responding.
 - c. **Attorneys' role in Response Stage**
 - i. To help their clients determine the appropriate issues to respond to, i.e., to sort out and distinguish salient issues from trivial issues.
 - ii. To prompt his/her clients to move on to the next issue once his/her have sufficiently responded to an issue.
6. **Questioning Stage**
 - a. **Background**
 - i. The SENE team, after receiving information from the parents in previous stages, asks questions that will result in their having sufficient information, after consulting with one another, to be able to provide the parents and their attorneys with a preview of the likely outcome of a full custody and parenting

time evaluation, i.e., reliable and valid custody and parenting time recommendations and the basis for the recommendations.

- ii. The SENE team's questions are asked in accordance with the statutory factors delineated in Minnesota Statutes. Questions should continue until the team feels that they are capable of addressing the factors driving the dispute between the parents.
- iii. The amount of questions will vary depending on how the clients have negotiated the storytelling and response stages. Some parents present and respond clearly and comprehensively, reducing the amount and types of information that the team needs to ask about. More extensive questioning is required when the information provided by the parents is fragmented, unclear, and incomplete.

b. SENE team's role in Questioning Stage

- i. To ask the parents to clarify and provide more expansive information about salient issues that they broached in their presentations and in their responses to the other parent.
- ii. To broach new subjects that would be part of any custody evaluation but were not brought up by the parents (e.g., domestic violence issues).
- iii. To ask "what if" questions that will be helpful in determining viable settlement options for the parties (e.g., what if the exchanges took place at school?).

c. Attorneys' role in Questioning Stage

- i. To prompt their clients, when necessary, to provide clear and definitive answers to questions asked by the SENE team.

SENE Team Consultation

1. Prior to Team Consultation

- a. Before breaking to consult, team tells parents and attorneys that they are free to take a break or that there is private space for them to caucus.
- b. Also reiterate that when team returns it will either:
 - i. Indicate there is some additional essential outside information that the team requires before it issues its final recommendations, define what the information is and why it is essential, determine whether there is an agreement to get the information, and, if so, make arrangements to secure the information, and set a return time for the final feedback session; or
 - ii. Present its findings/recommendations and the basis of the findings/recommendations.

2. Team Consultation

- a. The team trades initial impressions of family. Team should note non-verbal as well as verbal statements that were made, whether a power-imbalance was evident, how well each parent seemed to know the child(ren), ability of each parent to separate his/her feeling/needs from the needs of the child(ren)'s, areas of agreement/disagreement, apparent degree of cooperation between the parents, and how each parent related to each team member, including from a gender standpoint, etc.
- b. The team weighs in on whether they feel there is sufficient information to provide parents and attorneys with reliable, valid recommendations, along with a cogent analysis of how they arrived at the recommendations.
- c. The team discusses whether additional information (e.g., medical records, CD evals, interviewing children, talking to teachers, etc.) is critical and whether and how it can be accessed. Team may have differences regarding whether the additional information is necessary, and must determine how this should be handled, including whether the parents and the attorneys should weigh in on this issue.
- d. If the team agrees that there is sufficient information to issue final recommendations, the team should each discuss what they would recommend for legal custody, physical custody, and parenting time, and how they reached their conclusions in this regard. The team should note similarities and differences. Minnesota Statutes § 518.17 should be the framework for team analysis.

- e. Team should note strengths of the family, parental actions that can be complimented, and the specific and unique dilemmas and challenges that the family is facing.
- f. Team should note any non-statutory dynamics that are contributing to impasses and ill-will between the parents (e.g., an affair, non-payment of child support, etc.), and whether and how these dynamics should be addressed.
- g. Team should discuss whether interim, rather than final, recommendations are more appropriate (e.g., helping parents separate when they still live together). Discuss process for obtaining final resolution.
- h. Team should discuss what educational, therapeutic, and supportive services, if any, are indicated for the parents and/or children.
- i. Team should determine the most appropriate mechanism of dispute resolution for resolving future parenting disputes.
- j. Team members should avoid debating whose analysis is the more “correct” one, and should not engage in attempts to win the other team member over to their perspective. Rather, each team member's perspective informs the other's and leads to a more holistic way of considering the situation.
- k. Team should discuss viable settlement options for the parents to consider (e.g., parenting plan with no label of physical custody, transitional or contingent schedules, etc.).
- l. Team should discuss how feedback should be structured to best serve these parties:
 - i. Should the team gradually build towards making concrete recommendations regarding custody labels and parenting time or are parents better served by starting with the bottom line and then filling in the details?
 - ii. Will one of the parents be more accepting of feedback about a specific issue if delivered by one of the team members?
 - iii. Are there statements the team can make to convey to the parents that their positions were heard and considered?

SENE Feedback

1. **Prior to SENE Team's Provision of Feedback**

- Upon reconvening with the parents and their attorneys, the team should remind everyone that there should be no interruptions during the feedback. It is important for the parents to consider the feedback and/or to talk privately with their attorneys prior to responding to the feedback.
- State that team will, however, answer any clarifying questions about any aspects of the feedback that were unclear.
- Team should also point out that it is common for parents to agree with some aspects of the team's feedback while disagreeing with other aspects.
- Reiterate that feedback should not be viewed through a "take it or leave it" lens, and the parties should each consider whether the recommendations that they don't agree with can be shaped into something that they can accept.
- Reiterate that the parties are hearing the team's opinions and that it is up to each party to decide how much weight to give the opinions.

2. **Feedback**

- Team should compliment parents, acknowledge their specific strengths, and any appropriate steps that they have taken to support the children in the changing family situation.
- Feedback is usually best provided in a calm, matter-of-fact manner.
- Take notes regarding SENE team's recommendations. Important, as there may be times during feedback when client reacts to an aspect of the feedback and misses some of the subsequent statements of the team. The attorney's notes will ensure he/she can provide his/her client with any missed information during the subsequent parent/attorney caucus.
- Feedback is most impactful if the team can mesh the family story within the framework of the salient statutory factors.
- Feedback should clear and direct. It should not be diluted, nor should problems be minimized in the hope of achieving a settlement.
- The key elements to the situation, including those things that are driving the impasses between the parties, should be clearly identified and addressed. The unique challenges and dilemmas for each parent and child should be also be specified. Doing these things will help the parents to feel like they were understood and increase the probability that they will be receptive to the team's recommendations.
- Both team members should be engaged in delivering the feedback.

- Team members should note how the parents and their attorneys are responding non-verbally to the feedback. Doing so will better equip the team to successfully structure and manage the negotiation phase.
- The team should let parents know that they have more flexibility in forging an agreement than if the court were to make a decision following a trial.
- In cases where parents are in early stages of separation or divorce, remind parents that they may misinterpret each other's behavior and feel very hopeless, confused, and defeated by the changing family situation. In such situations, the team should give feedback that provides the parents with a conceptual framework that includes how they can both maintain satisfactory relationships with their child(ren), and how they can co-exist peacefully and co-parent effectively with the other parent
- Specific recommendations should be given, along with specific reasons for making the recommendations. This includes recommendations for legal custody, physical custody, parenting time, supportive services, communication methods, and future dispute resolution mechanisms.
- Viable settlement options should be provided.
- Note that a perfect parenting time schedule does not exist. It may be better for the parties to agree on one of a number of reasonable schedules, and to have a framework for evaluating the schedule after it is implemented, including making appropriate adjustments depending on feedback that will reveal how the child(ren) are faring with the schedule. Because the parenting time schedule may need to be revised for various reasons over time, the parents having a process to jointly and cooperatively evaluate the efficacy of a given parenting time schedule is a critical skill for them to develop.
- If SENE team members view the situation and/or nuance their recommendations differently, the differences should be matter-of-factly shared with the parties and the attorneys. This is important information for the parents to have, since it is common for each parent to think that there is only one "correct" way to conceptualize their situation. The fact that two professionals, each with reasons that seem valid and reasonable, view the situation differently appropriately challenges a parent's belief that their conception of the situation is right and the other parent is wrong. It all suggests the possibility that a judge considering the situation may have yet another perspective on the situation, so that there is some risk that the parent may not prevail if the Court makes custody and parenting time decisions. This dynamic is likely to make one or both parents more amenable to a settlement.

3. SENE Team's Post-Feedback Phase Actions

- The team trades impressions of parent, attorney reactions during provision of feedback. What non-verbal reactions were noted when specific topics were being discussed? What did clarifying questions pertain to? What are team member's

opinions about the recommendations that were accepted? Rejected? What were reactions to settlement proposals? Team exchanges ideas about how to structure negotiations, including subjects that are important to emphasize.

- Team discusses whether there is merit to caucus with each side individually to nuance aspects of the feedback. If this occurs, both sides should be notified that this will be occurring.
- Team checks in with both sides periodically to determine progress and readiness to reconvene as a group.

Negotiation

1. Team indicates that it is "switching hats" and going from an evaluative role to a facilitative role geared towards helping the parents ascertain whether they can forge an agreement concerning their disputed custody and parenting time issues.
2. Team indicates that their involvement in helping to shape and forge an agreement between the parents will not alter their previously delivered recommendations regarding the likely outcome of a custody evaluation regarding their situation. Reminders of this fact may need to occur periodically.
3. Team asks each attorney to give responses to recommendations made by team. Team may or may not designate which attorney they wish to hear from first.
4. Team presents options and asks "what if" questions.
5. Team articulates potential problems that the parents have not considered when they are contemplating a settlement option. The goal is for the parents to achieve a lasting settlement that will meet the children's needs, not for the parents to agree to something that will likely fail when implemented.
6. Team may suggest trying something on a temporary basis before making it permanent, in order to ascertain whether the arrangement meets the children's needs. This option is appropriate when the arrangement is significantly different than past practices and when one or both parents lack confidence that the other will take the necessary steps to successfully implement the arrangement. The team may suggest a follow-up session to review how the arrangement is working and criteria to determine whether or not the temporary arrangement should be considered a success worthy of becoming a permanent arrangement that both parents can have some faith in.

Wrap-up

- During this phase, the team should summarize whether there is a full or partial, temporary or permanent agreement, or no agreement.
- If either party indicates he/she needs additional time to contemplate the recommendations, a specific date should be delineated for either a telephone conference call between the attorneys and team members to determine the disposition of a case; or, in the alternative, a second session scheduled.
- If there is no final agreement by the end of the session, the team should offer suggestions and recommendations for subsequent steps to move the situation forward, which may include additional sessions with the team.
- If there is an agreement, the SENE team will help determine how the agreement will be memorialized.
- If there is a stipulation to be drafted, the team should determine with the parties who is going to draft and when the stipulation will be submitted to the court.
- In finalizing the agreement, the team needs to avoid becoming a lawyer for the parties.
- In any event, the team should report to the court the fact of a full or partial, temporary or permanent agreement or no agreement, using the appropriate “ENE Evaluator’s Report”, available on the ECM-ENE Website. (<http://mncourts.gov/Help-Topics/ENE-ECM.aspx>). If appropriate, the Report can be filled out during the wrap up phase with the parties

Dealing with Domestic Violence

When an OFP or Restraining Order is in place, the parties should not be in the same room unless the OFP or Restraining Order is modified to allow this to occur. In most circumstances, but not all, both attorneys, rather than both parties, can be in the same room while each party is putting forth their story. Venue of SENE must be conducive to deal with domestic violence issues, i.e., there needs to be adequate space and rooms to keep parties separate. In addition:

1. Continued emphasis by judicial officers, attorneys, and SENE team that SENE is voluntary. Must not be illusionary.
2. Screening for domestic Violence can/should occur by each entity in the SENE process, i.e., attorney, judicial officer, SENE team.
3. SENE Team must be well trained in domestic violence issues, and updated training should occur on an ongoing basis. Attorneys should ensure that the SENE team is qualified to constructively handle domestic violence issues before securing team's services.
4. Male/female team helps to ensure gender balance, sensitivity to gender issues, and power imbalances.
5. Attorneys invited / encouraged by SENE team to present issues that client might be reluctant or intimidated to talk about in front of the other party.
6. SENE team can caucus with each side when DV issues are known or suspected.
7. SENE team should explicitly encourage clients and attorneys to bring up DV issues during introduction. If no issues are brought up, SENE team should explicitly ask about DV issues during questioning phase.
8. SENE team should be careful not to overtly or covertly exert pressure on abused party to settle. Common to give parties additional time outside of session to consider recommendations, settlement options.
9. Attorneys being involved in sessions and being provided with ample time to caucus with clients helps to ensure that clients will not enter into agreements that run counter to their best interests.
10. Exercise more caution with self-represented litigants/pro se clients. More caucusing; avoid final decision-making in session and give additional time for client to consult with outside sources and consider options; stress confidentiality and voluntariness of program.
11. Stagger arrival and departure times when domestic violence is known to be an issue before the session. Stagger departure times when domestic violence is discovered during the session.
12. During breaks, structure where clients will be placed in different areas.

FENE Curriculum for Neutrals

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FENE Learning Objectives

Participants will be able to:

1. Explain the FENE process to parties and their counsel.
2. Acquire at least three techniques to use in an FENE to ensure that parties feel heard.
3. Identify at least three different ways to collect needed financial information for an FENE.
4. Develop at least two approaches to use in delivering an evaluative opinion.
5. Recognize at least two methods for concluding the FENE with a settlement.
6. Identify at least two ways to memorialize the FENE agreement

FENE Course Outline

1. Course introduction

- a. Introduction of facilitator(s)
- b. Introduction of participants, including what they hope to learn in the training (*write their learning desires on flip chart so the information can be reviewed at conclusion of training*)
- c. Overview of training and expectations for participation
- d. Reminder that training is interactive/experiential

2. Pre-FENE Considerations

- a. Prior to conducting an FENE, the evaluator(s) should consider the following issues and, if appropriate, conduct a conference call or meeting with the attorneys and/or self-represented litigants/pro se parties:
- b. Consider how the litigants came to you.
 - i. ICMC – Court-ordered and court-appointed.
 - ii. Other – (Private ENE). If private, you may not have an order, so make sure they sign an ENE agreement.
- c. Screening for domestic violence
 - i. Screening for domestic violence should occur by judicial officers and neutrals at all phases of ECM, including at the ICMC and ENE.
 - ii. Evaluators should screen for domestic violence and review any existing orders for protection or harassment restraining orders, and consider if it is necessary to discuss amendment with the parties.
 1. If an existing Order for Protection or Harassment Restraining Order does not permit contact between the parties, participation in ENE without amendment of the no contact provisions in such an order may constitute a violation by the respondent in that proceeding.
 2. Note that amendment of an Order for Protection or Harassment Restraining Order does not affect any DANCO orders (Domestic Abuse No Contact Order) or other criminal no contact orders that may be in effect against one party on behalf of the other.
 - iii. In this context, “domestic violence” is not to be limited to the definition of domestic violence as set forth in Minn. Stat. § 518B, or to the existence of an Order for Protection.
 - iv. Domestic violence may be present without the existence of any court order or any police involvement.
 - v. It may take many forms from actual physical assault to more subtle coercive, controlling behavior.
 - vi. It also may not be readily disclosed by a victim of such behavior.

- vii. The existence of domestic violence does not preclude participation in an ENE.
- viii. Describe techniques and questions used to identify domestic violence:
 - 1. Review the responses on data sheets and other documents regarding fear of partner, HROs, OFPs, DV
 - 2. Watch body language for non-verbal cues and control indicators such as who has control of purse strings and other knows nothing; and whether one person always talks over the other
 - 3. Recognize that just asking the question may not elicit much, but asking it on data sheet and in ENE and later will elicit more information
- ix. If domestic violence exists, consider the following options:
 - 1. Stagger arrival, departure, and break times for the parties
 - 2. Place the parties in separate rooms upon arrival
 - 3. Conduct the process with the parties in separate rooms and the evaluator moves back and forth between rooms
 - 4. Conduct the process through Skype or conference call
 - 5. If there has been a very recent domestic violence event, cancel the ENE
 - 6. Seat the victim by the door
 - 7. Train support staff regarding what to do if domestic violence exists
 - 8. Consider how to respond if a party asks to bring along a support person – typically, the support person should not be present during the discussion unless the other party agrees
- d. Consider options for how exchange of information will be handled:
 - 3. Assign homework – ask parties and counsel to gather the information
 - 4. Use neutral experts
 - 5. Standard discovery techniques
 - 6. Handling parties or attorneys who are skeptical about whether information will be forthcoming, such as scheduling a phone conference with the judge or sworn affidavit or agreeing to language regarding full disclosure
 - a. **Watch role play (either in person or video):** Vignette showing three ways to gather discovery. **Discovery video or FENE Demonstration Script (page 52)**
 - 7. Role Play: Participants have opportunity to try structuring discovery with parties and attorneys
 - 8. Debrief with participants:
 - a. Name three ways you learned to gather information in the FENE process.
 - b. Name one method for handling a suspicious party or attorney
 - c. Self-Represented (Pro se) litigants

9. The ENE process will likely take longer if the parties are self-represented because they don't know the process and don't have a lawyer preparing and assisting them
10. Explain that the parties will nevertheless benefit from the process because they will be gaining the opinion of an experienced neutral
11. Avoid jargon and legalese
12. Be more directive and concrete when asking questions to ensure facts relevant to legal standards at issue are fully addressed
13. Understand how personality issues may impact their ability to constructively participate
14. Address any perceived imbalances if one party has an attorney and the other does not
15. Consider whether or not to allow a self-represented person to contact a support person to discuss any proposed agreement
 - a. Reasonable accommodations including, language, interpreters, hearing impairment, handicap accessible, location of ENE session, and other special needs
 - b. Consider how to set the room
16. **Financial Evaluative Meeting**
 - a. Brief explanation of general goals for introductory comments at initial meeting:
17. Continue to assess for domestic violence
18. Discuss fee amounts, types of payments accepted, etc.
19. Explain what to expect at the FENE
20. Define the evaluator's role
21. Build trust by describing evaluator's experience
22. Discuss the role of the attorneys
23. Set tone and ground rules – setting boundaries; be respectful, don't talk over each other
24. Explain the confidential nature of the FENE process and sign confidentiality agreement (which should include a prohibition against recording the session)
 - a. **Watch role play (either in person or video):** Brief vignette demonstration on first meeting: **Video or FENE Demonstration Script (page 52)**
 - b. **Participant Role Play:** Participants have opportunity to explain the FENE process at a first meeting in groups of 5 or 6 with two being the lawyers, two being the parties, one being the evaluator and any sixth person being the observer. The participants should change roles so more than one has an opportunity to try the process.
 - c. Participants debrief with trainer(s):
25. What was the most challenging part of the process to explain?
26. How was your reaction to the parties different from your reaction to the attorneys?
27. Where was everyone's attention focused while you were explaining the process?
28. **Making sure the parties are heard**
 - a. Brief explanation of why being heard is important
 - i. Parties are more likely to participate and cooperate
 - ii. Parties may be more receptive to the evaluator's recommendation
 - iii. Evaluator will better understand the parties' perspectives

- b. Methods for making parties feel heard and ensuring evaluator has an understand of each party's perspective
 - i. Restating what they say
 - ii. Reframing what the issues are
 - iii. Empathetic listening
- c. **Watch role play (either in person):** Brief vignette showing techniques of active listening. **Active Listening Script (page 57)**
- d. Participants have opportunity to try active listening skills in FENE process.
- e. Participants debrief with trainer:
 - i. Did the parties feel heard?
 - ii. Did the evaluator feel comfortable using the listening techniques?
- f. Brief explanation of impediments to parties being heard and how to deal with them
 - i. Disruptive attorney conduct
 - ii. Disruptive client conduct
 - iii. Off-point client
 - iv. Overwrought client
 - v. Controlling client (power imbalance)
 - vi. Silent client
 - vii. Strategies for dealing with impediments
 1. In introduction, describe expectations
 2. Directly asking the attorney to let the client speak for themselves
 3. Stopping the "sidebar" discussion to inquire whether the attorney/client need time to talk
 4. Caucus with the attorney so they save face with their client
 5. Pause or halt the FENE process
 6. For silent client, use soft prompts (e.g., in a separate caucus with the party, "I notice you're not saying anything.")
 7. For overwrought clients, "It's a difficult situation, and it's common for participants to become upset. We will continue unless you need a break."
 8. For off-point parties, redirect them and give them a time management reminder
 9. For controlling parties, reminding them of the initial rules that each party needs an opportunity to talk
- g. **Role Play:** Participants role play a portion of an FENE meeting with the participants playing the clients and attorneys demonstrating the behaviors that disrupt the process. Trainer's responsibility is to ensure that participants who are playing attorneys don't go overboard – keep it "solvable" for the neutral
- h. Debrief

29. Delivering the opinion

- a. Brief explanation of techniques and guidelines in delivering an opinion
 - i. Using a range of outcomes (e.g., based upon my experience, I believe the judge will award something between \$_____and \$__.”)
 - ii. Explaining opinion to avoid argument (e.g., Use active listening skills to explain: “Husband you said this, and here are the risks and costs to you of going to court. Wife, you said this, and here are the risks and costs to you of going to court.”)
 - iii. Tone and method of delivery
 - iv. Answering questions about opinion
 - v. Evaluation should be offered orally, not in writing
- b. **Watch role play** : Brief vignette showing the delivery: **VIDEO or demonstration script scene 4 – delivering the opinion (page 52)**
- c. Participants will practice delivering an opinion
- d. Debrief
 - i. What was the most difficult aspect of delivering the opinion?
 - ii. What will you try to avoid when delivering your opinion?
 - iii. What new approaches to delivering the opinion did you learn/observe?

30. Attorneys Meet with Clients to Discuss Evaluative Opinion

31. Concluding the FENE

- a. Brief explanation of how to conclude an FENE and reach settlement after delivering your opinion
 - i. Explain options for next steps (e.g., mediation, moderated settlement conference, private mediation, special master, arbitration, traditional litigation, or other appropriate ADR)
 - ii. Do not mediate without consent of the parties
- b. Brief vignette showing an appropriate closure with move to settlement. **Video or Script Scene 5 (page 55)**
- c. Participants will try a closing
- d. Debrief:
 - i. What if anything happened to cause you to lose focus on your role as an evaluator?
 - ii. What methods did you observe that were helpful in getting the parties to settle?

32. Finalizing the agreement

- a. Brief explanation of methods to finalize an agreement
 - i. Summarize the agreement in writing or on the record
 - ii. Terms of agreement: Specific terms v. general terms depending on self-represented (pro se) or represented parties
 - iii. Avoid becoming the lawyer for the parties
 - iv. Schedule a second session or phone call, if necessary

- b. Vignette showing two methods to finalize an agreement. **Video or Script Scene 6 (page 57)**
- c. Participants will try getting the parties and counsel to agree on a method to finalize the settlement.
- d. Debrief
 - i. What was the most difficult aspect of finalizing the agreement?
 - ii. What were two methods you observed or used to reach the final agreement?

33. Questions and Answers and Wrap Up

FENE Training Agenda		
<u>Time</u>	<u>Activity</u>	<u>Presenter</u>
8:00 to 8:30	Registration	
8:30 to 8:40	Introduction <i>Introduction of presenters, class format, and expectations</i>	
8:40 to 9:05	Getting started <i>Intake, screening, phone call, etc.</i>	
9:05 to 9:35	Initial meeting <i>How to get the first meeting going, explaining the program to participants, and setting the stage for the</i>	
9:35 to 10:30	Did you hear what I said? <i>How to make sure the parties feel heard and how to remove impediments to listening and understanding</i>	
10:30 to 10:45	Break	
10:45 to 11:15	Getting the facts straight. <i>Techniques for obtaining information, valuations, and handling discovery issues</i>	
11:15 a.m. to Noon	Delivering the message without killing the messenger <i>How to deliver an evaluative opinion in a constructive manner that encourages discussion</i>	
12:00 to 1:00	Lunch	
1:00 to 1:45	Delivering the message <i>Practice and discussion of techniques to use in providing an evaluative opinion</i>	
1:45 to 2:30	Getting to Closure <i>How to conclude the FENE and reach settlement or other closure</i>	
2:30 to 2:45	Break	
2:45 to 3:15	Documenting Agreements <i>How to memorialize the agreements reached</i>	
3:15 to 4:30	Where do we go from here? <i>Panel will address practice and implementation issues of the FENE program and how to get on program rosters.</i>	

Case Scenario – Nick and Stacy Payne

FAMILY BACKGROUND:

Stacy Dixon is 41 years old. Nick Dixon is 46 years old. The couple has been married 16 years. They have been separated for 6 months. They have no children. The parties are not living together. Nick remains in the home. Stacy is living with friends.

EMPLOYMENT, BUDGETS AND INCOME:

Stacy is employed as a flight attendant. Three years ago, she earned approximately \$40,000, two years ago her income was down to \$29,000, and last year she earned \$25,000. She projects that her earnings will be \$25,000 or less. Her decline in income has been due in part to the cutbacks in the airline industry and to her own cutbacks in her work schedule.

Stacy has a BA in marketing/communication which she completed in 1994. She has worked as a flight attendant for most of the marriage.

Nick is employed at Office Depot as a Manager. His base salary is \$83,478 annually, plus he receives substantial bonuses for his stores' productivity. His earnings for the last four years have been: \$170,000; \$140,000; \$120,000; and \$200,000. Because of economic factors, Nick believes his income will be down this year to about the \$120,000 level.

Nick has monthly living expenses of about \$12,000 in the home. His expenses will go to about \$8,300 when the home sells. Stacy estimates her expenses once the house sells at about \$7,800. The monthly payments on the credit card debts are approximately \$1,300 total.

ASSETS and DEBTS:

The parties have no substantial assets. They have spent what they earned and more. The house has little equity.

Nick has a modest Office Depot retirement plan of \$38,000, which has a \$12,000 loan against it. Stacy has about \$52,000 in retirement benefits from the airlines.

The parties have credit card debts of around \$48,000 all combined for electronics, trips, clothes, recreational equipment, etc.

Scene 1: Out of Control Temporary Hearing Script

SCENE: This is a temporary hearing – the Judge and clerk are talking before the case is called.

JUDGE: What’s next on the calendar?

CLERK: The Paynes.

JUDGE: Do you mean that literally or figuratively?

CLERK: Both – their name is Payne and so far I have had three calls for “emergencies” one of which included possession of a blender, a request for a temporary hearing and a request for a contempt hearing.

JUDGE: This is not going to be fun – bring them in.

[Attorneys and clients enter arguing]

JUDGE: Come on in folks. I am Judge Smart. Now, what can we do to get this case over?

ATTORNEY FOR IRMA: I am Riley Stahl and I represent Irma Payne, the petitioner who is also here.

IRMA: Do I talk now?

ATTY STAHL: I know you are anxious to tell the Judge about the horrors you have been living through, but I think that will come later.

ATTORNEY FOR MELVIN: And I am Ally Rush, attorney for Melvin. Judge I want to start by asking you to immediately appoint a Special Master to get this case under control. Mr. Stahl is known for not paying attention to his cases and this will mire down until the business is lost if someone is not watching over him.

ATTY STAHL: There is little wonder that Ms. Rush wants to push this forward, the better to hide assets if you don’t take time to answer discovery. I agree we are going to have problems; already they are hiding assets and not cooperating with my discovery requests.

ATTY RUSH: Judge he served no less than 87 discovery requests just 2 weeks ago. It would take an entire accounting firm to answer his nonsense.

ATTY STAHL: Judge I got those discovery requests from some prominent attorneys who taught a CLE – hard to argue with their expertise.

JUDGE: Let us start with an understanding. I heard 38 arraignments this morning and after you I have the paternity calendar. I have not read the file in this case and have no intention of doing so unless I am compelled to do so in the future. I am not going to make any big decisions on a temporary basis. I really do not like setting any precedent.

Do you two have any kids?

IRMA: We have two children: Joy, 15, and Carter, 12.

JUDGE: Teenagers! Always a pain. I assume it won't be hard to agree on where they live?

STAHL: There is no agreement your honor. There are serious questions about fitness. I think we will have to have a custody evaluation.

MELVIN: These kids are old enough to decide for themselves – why do we have to spend a lot of time and money on this? These kids would be fine if they could just see their father without her interfering.

JUDGE: I do not subscribe to 12 and 15 year olds calling the shots on what they do, but in reality they vote with their feet.

IRMA: Well we are all still under the same roof – so Melvin insists that we share 50/50 time and the parent who does not have the time has to stay in the bedroom. It is awful but at least I am available if Melvin drinks too much and passes out or his anger gets out of control.

MELVIN: That is so much crap.

JUDGE: Okay – now try to keep it civil?

MELVIN: Well my attorney said not to move out until we had an agreement for joint custody – the guy at the bar said if I move out then that's abandonment and I won't get the kids.

STAHL: Judge I think it is obvious that we are going to need an emergency order on the occupancy of the house and custody and we are going to need a full blown custody evaluation. In fact, based on the concerns Ms. Payne has raised, I would say we need a guardian ad litem.

JUDGE: Counsel I don't have any evaluators. Your clients are going to have to work this out – I don't have any idea what these kids need.

STAHL: Judge we need your help.

RUSH: Judge you are right to stay out of this and let the family work some of this out. This is crazy making stuff to have you making all these decisions. Gosh, you don't have time for this – you have big stuff to handle.

STAHL: I cannot believe you would abandon this family your honor in their great time of need. You need to do something right away to get this under control!!

JUDGE: STOP – I'll have my clerk continue this for when I have more time to hear your arguments. There should be a hearing date in say three months? That will give you some time to work on these issues – I expect you to try and get this settled in the meantime.

Scene 2: ICMC and the Talk for SENE and FENE

JUDGE: Welcome. I am Judge Smart and I will be the Judge assigned to your case. My role is to help you make the important decisions you need to make about your family.

I read on your ICMC Data Sheets that parenting is an issue. I think there might be a solution for your concerns. We have a process called Social Early Neutral Evaluation. In fact we can get you started today when we are done here. This process will allow you to quickly make some parenting decisions to get you out from under the same roof and also will allow you to quickly address your parenting concerns. You would be working with a team of two evaluators who will help you make these decisions in a way that will be best for your children. You are certainly entitled to a full blown custody evaluation, but you may not need it once you talk through your concerns and get some advice. The Social Early Neutral Evaluation process takes about 30 days. The average time for a full blown evaluation is about 5 months. This process is voluntary so you both have to agree to try it. If you can resolve your issues at the Social Early Neutral Evaluation then you will have made decisions for your children that are based on good information. Otherwise, I am here to make decisions for you—but, as is often the case in family court, neither of you will likely be happy with the outcome. Now what about the Social Early Neutral Evaluation?

IRMA: I think we need help right away so if this can move fast then we should do it.

MELVIN: I need someone to get involved and bring some sanity to this – the kids are really going nuts with one of us shut up in the bedroom. I'll try it.

JUDGE: Okay, now who do you want to select as your evaluators? We're going to get that first meeting scheduled, and I will provide you with an order before you leave here today. If the Early Neutral Evaluation is not successful then I will schedule a conference call to deal with the occupancy of the home. In the interim, I can assure you Mr. and Ms. Payne that I will not entertain any claim of abandonment if one of you wanted to move out to reduce the conflict. If one of you will voluntarily consider this then we can talk about how to divide income on a temporary basis to ensure everyone is economically okay.

Now, what else do we need to do before you can settle this case?

STAHL: I need my discovery answered – there are serious non-marital tracing issues and business value issues and we need to figure out spousal maintenance.

RUSH: Your honor first, there will be no need for a business valuation because if this drags on, my client has indicated that he will just sell the business rather than work and answer all this discovery.

Also I don't see this as a spousal maintenance case – Ms. Payne can work. We would like you to immediately enter a temporary order indicating that Ms. Payne needs to quit dawdling and get to work.

JUDGE: I am not in a position to make orders on final matters without information. I am concerned however that there is no apparent cooperation between the lawyers on how to proceed to get the information you need to make good financial decisions. I agree that this case needs to move along efficiently, but I am also concerned that Ms. Payne has the information she needs to make good decisions.

We have a program that might suit your needs. If you agree, I will refer you to a Financial Early Neutral Evaluation. This is a confidential process but one which you can use to ensure your discovery gets done thoroughly and efficiently and that you get some early feedback on what might be the outcome on the spousal maintenance questions. It sounds like both parties have some strong ideas about what the law is – I think it could be helpful for you each to have a neutral reality check before you spend a great deal of time and money pursuing your theories.

The FENE takes about 60 days and would start right away. The evaluator would be an attorney or CPA.

MELVIN: Well I am all for it – I cannot keep up the pace of supporting everyone, running a business and then answering all of her ridiculous questions that her and that lawyer think up.

JUDGE: The ENE may be more efficient but I want to make clear that you will still be required to make full financial disclosure – this is not a way to avoid giving information to your wife and her attorney. The process is designed to make sure the disclosures are made efficiently.

IRMA: I don't think this will work – if you don't tell him to do it he won't do it. Unless he thinks he is going to jail he just will not cooperate – he already told me that he would make sure I got nothing.

STAHL: Judge I have to worry about my malpractice – I need answers to all my discovery under oath. I am very worried about the integrity of these voluntary processes. We have a court system for a reason – you carry the authority that I need.

JUDGE: I think that I have made clear to Mr. Payne that he will need to cooperate in the FENE process just as he would in my courtroom. Also if he does not cooperate the evaluator can communicate that to me.

STAHL: Well if there is some accountability it might work.

JUDGE: You are free at any time to leave the process and in fact the evaluator will suspend the process if Mr. Payne is not participating in good faith. But during the time you work with the evaluator, formal discovery is suspended and you will work with the evaluator to gather the necessary information. So are we in agreement to try the process?

[Everyone agrees]

JUDGE: Now, who do you want to select as your evaluator? We are going get that first meeting scheduled. If you move into separate houses and need to resolve temporary support you can do that in the ENE process or you can call me and we will resolve that here.

Scene 3: Social ENE Script

EVAL 1: Thank you for coming today – I know your lawyers have explained this process to you but we wanted to go over the process before we start.

EVAL 2: Irma – can you start by telling us what your concerns and questions are regarding parenting?

IRMA: Well, my biggest concern is that the children are not exposed to Melvin’s girlfriend. I don’t want my children witnessing his infidelity. I don’t know how they are ever going to overcome what their father has done. My daughter Joy will not even speak his name. I doubt she will ever be able to forgive him. Carter is worried that he will bring that woman around when he has friends over. I have always been the children’s primary caretaker. I am their base and I don’t think they will do well with Melvin. He just does not pay attention to them. He expects them to be much too grown up and take care of themselves.

EVAL 1: Can you tell us what you are proposing for parenting?

IRMA: Well, I think it is clear that he should have very restricted time based on his poor judgment – he should absolutely be restricted from having his girlfriend around the children. That would set a poor example and would really put stress on the children. They would be really uncomfortable about being around her.

EVAL2: Melvin can you tell us how you see the future parenting of your children?

MELVIN: Well the kids should be half time with each of us. But she has got them so crazy now they think I am the devil. So for now they probably should not be around her until they get straight. If she has her way she will take the kids and move to Maine and I won’t see them again. That would kill me and my kids. I know my son wants to live with me. She is so worried he is going to get in trouble she won’t even let him breathe. I am not going to do anything to hurt my children. Her claim that I don’t parent is just untrue – she schedules every minute – I treat them like independent people.

Eval 1: We are going to take a brief break now and confer. Then we will reconvene and give you some recommendations on how we see what may happen.

[Reconvene]

[Evaluators give recommendation – no need to follow comments below]

EVAL: We discussed your concerns based on what we know about child and adolescent development and the special needs of children in divorce. We know that children need both of their parents and they need their parents' attention especially during the divorce process. Based on this and based on neither of you telling us that the children have any special needs, we think it is likely that an evaluation would recommend a schedule that gave each of the children substantial time with each parent. We think that Irma has more time during the week to get the children to their activities – but if Melvin would take Carter to hockey that would give them more time together which Carter seems to want.

Melvin, we would recommend that neither of you introduce the children to any third parties until that relationship is much farther along.

There was some discussion of a move to Maine – you can talk to your lawyers about the standards for moving. At this time we did not address that issue but would caution that it would have a substantial bearing on any evaluation if the children were to be moved from their friends, school, parent, etc.

EVAL 2: We will let you talk with your attorneys now to see if you want to work with us further or if you can reach an agreement.

Scene 4: Financial ENE Script

EVALUATOR: Thank you all for coming today. I know that your lawyers and Judge have explained this program to you. I also sent you materials and an agreement to participate in this process. But to briefly review – this is a confidential process. If I make suggestions on how matters might be resolved, my suggestions are confidential. On the other hand if you provide documents or other information that is not confidential and can be used in future proceedings. We have 60 days to complete this process – that means that we have to move quickly and I will expect everyone to complete assignments on time.

Now, the Court order referring this case indicates that the issues to be decided are spousal maintenance, business value, and non-marital tracing. I want to commend you for already deciding to use a neutral expert to value the business. It will still be an expensive process but at least you will only be paying for one expert.

IRMA: Why is it so expensive?

EVALUATOR: Well the business appraiser has to go out and investigate all the business records and operations and then he has to write a thorough report explaining what he did.

IRMA: Isn't there a cheaper way to do it? Why do we need a written report – would it be cheaper if he just said it?

MELVIN: Irma, you are one smart woman. That makes a lot of sense.

EVALUATOR: Counsel do you have any comments?

STAHL: It seems Irma has it well in hand!

EVALUATOR: Then who is going to communicate to the neutral that you want him to only give you a verbal report?

RUSH: I'll do that.

EVAL: Now I want to turn to the spousal maintenance issue to see what we need to know in that regard. I am going to hear from each of you and then give you some ideas on what the outcome might be.

First, Irma can you tell me about your employment now?

IRMA: I just work part time as a substitute teacher – home ec was my major.

EVAL: Have you worked during the marriage?

IRMA: No, my job was to run the house and raise our children. I already have a job, I substitute teach when there is work. This gives me the flexibility to meet the children's schedule. The only time I really had a good job was when I worked for my parents. They have a business in Maine. Now they are getting old and could really use me to run the business. So if Melvin really wants me to get a job that would be a good one. I really do not have any education or training that would get me a job to support myself. I don't think I have to do that. For the last 18 years, my job has been this family – why do I have to change my job just because Melvin has an affair? Further there are no teaching jobs available—I am doing the best I can with what I have.

We had a real good life and I think that Melvin can keep supporting that life. I saw that he is claiming he only has \$30,000 of income but that is just not true, I know how we lived and it was way above \$30,000. Melvin just runs all of our expenses through his business. I think he will do anything to keep from paying me any support.

STAHL: I just want to interfere here that the case law is pretty clear that Irma does not have to go and get a different job. Further, he is hiding income which will be proven by the neutral appraiser.

MELVIN: First, I didn't know that cooking macaroni and cheese five nights a week was a full time job. I have been asking Irma to go back to work since our daughter was born but she always said she needed to be home for the children. She really needed to be home to play tennis, have lunch with her friends and go to happy hour. Irma lives in a dream world. She thinks we are rich but we are not. That's why I asked for a divorce. I am working myself into the ground to try and support the lifestyle she wants. I cannot keep doing this. We have blown through all of our savings on her clothes budget. The credit card bills are out of sight. Irma got her degree during the marriage – she has the ability to go out and earn at least \$45,000 teaching. But instead she works just a couple of days each month. The kids do not need her. I can take time off to get them where they need to go. Now she is telling you that she wants to keep living this extravagant life that we couldn't afford before. With two homes there is no way we can keep spending the way Irma does – there is just not enough money to go around. And Irma's solution is for me to work more. I cannot do it. I can tell you that I am darn sick and tired of having the sole responsibility for the financial support of this family – she needs to get off her butt and get to work. She does not need any alimony. I will always pay for my kids but I should not have to pay for her.

EVAL: I hear your strong feelings on this – We can spend a lot of time on this issue – let me give you a preliminary evaluation on what is to occur here. Irma you are a relatively young woman. Your children will emancipate in the next few years. You will still be a relatively young woman when your

children are out of the house. I hear you say that you want to maintain the high lifestyle you have enjoyed. Two problems with that – if indeed you have been deficit spending as Melvin describes, then you cannot keep doing that or you will have consumed all of your assets. Second, you now have to maintain two households so even if there was income to sustain your lifestyle, you would have to have twice the income to sustain your lifestyle now.

Scene 5: FENE Disruptive Party/Attorney Script

Scene: *[Stacy's attorney is talking to her during this dialogue in a low but distracting conversation.]*

Evaluator: Well we have had some time to explore the education options for Stacy and also some options for consolidation of your debts, Nick. I think now we need to discuss how that information can be used to meet everyone's needs.

Evaluator: Attorney, do you need a few moments to speak with Stacy in private.

Stacy's attorney: No, we are fine thanks.

Evaluator: Stacy can you tell us what you found out from the career counselor?

Stacy: Well, she said that based on my age and education and job experience, I was a good candidate for transition.

Nick's attorney: How fast can you get to work? We are not interested in funding another personal journey.

Stacy's attorney: You are not helping this process. You are just creating problems. You need to follow the model and cooperate with her rather than being so uncooperative.

Evaluator: Let's reserve your comments and analysis until we have heard Stacy's plan. Nick, I want you to help me listen carefully so we can answer any questions you have once Stacy has finished telling her about her findings.

Stacy: The most promising program is a two year plan.

Nick: *[jerks around, shaking his head "no" in a very dramatic way]*

Evaluator: *[puts hand on Nick's arm]* Remember we are listening for information, to hear what Stacy learned, we don't have to judge the information at this point.

Stacy's attorney: This will not resolve if Nick doesn't get realistic. He cannot just keep saying "no" and bullying her by cutting off.

Nick: Well she sure didn't have any trouble doing that to me.

Stacy's attorney: The reasons your marriage is ending are not relevant to this process. This is a no fault state.

Nick's attorney: Well that wasn't helpful at all.

Evaluator: Stacy and Nick, this is a very tense time. I believe it may be that you are each feeling angry and sad over the loss of your marriage because you are having difficult staying focused on planning your futures. So let's take a quick break during which I want to speak with your attorneys.

[Nick and Stacy leave]

Evaluator: There is a lot of information that I need in order to analyze the strengths and weaknesses of your respective cases for spousal maintenance. I need to hear more from your clients before I can do my job. It would be great if you could help me focus them.

Scene 6: Demonstration of Active Listening

Evaluator: You have been very helpful and patient while we identified the assumptions regarding your incomes, budgets and assets and debts. Now, it's time to get to the hard question of what each of you thinks we should do about the payment of support to Stacy. Nick, do you want to start and tell me your thoughts?

Nick: It's obvious I am going to get the shaft. I'll be living in a basement of someone's grandmother before this is done. There is nothing about this process that is fair, men just get screwed.

Evaluator: I'm not sure I understand what your perception is on fairness, could you say more about the issue of fairness from your perspective?

Nick: I got married, took all the crap at work to pay the bills and now I am not good enough to be married to but I still have to keep paying her bills until I die. Tell me what is fair about that.

Nick's attorney: Nick, I explained to you the difference between permanent and temporary spousal maintenance.

Evaluator: I think what you were telling me is that you are worried about how you will be able to provide for yourself comfortably and plan for your future if you have to pay support to Stacy. Is that a fair statement of what you were feeling?

Nick: Yeah but also she does not have to set up and deal with all the jerks I do.

Evaluator: By jerks, do you mean jerks at work or jerks as in customers?

Nick: The jerks I work with, the customers are fine.

Evaluator: You seem frustrated and angry about your job setting. Are you concerned also that you won't be able to change jobs in the future if you are paying support?

Nick: Yeah exactly, how can I quit this job if Stacy will not support herself?

Evaluator: Stacy - what do you think should be done?

Stacy: He wouldn't leave that job for anything - the job is his life. I cut back to run the house and be there to support him while he built his career. Now he is booting me out and he wants to

ignore what I gave him. He thinks it is ok for me to have to live with friends so he can keep paying for toys. This is the same as in our marriage. He incessantly spends money on computers, TV's and other stuff before he will spend money on me. I was trying to make due on what we had while he was running up the credit cards on his toys. Now he wants me to pay for all of them.

Evaluator: Would it be accurate to say that you are angry about the debt because you did not share in the spending and activities for which it was incurred?

Stacy: Angry? I am beyond anger at the mess he got us into. Now he can't support me because he has to dig out of the credit card debt he caused. It seems like I am paying twice for his lousy behavior.

Evaluator: Do I understand you to say that you are worried about your support because it may be reduced to pay the debt?