

## Neutral Case Evaluation Protocol for Trust Cases

- I. *Purpose.* The Court offers Neutral Case Evaluation (NCE) as one process option for parties in trust and estate cases filed in the New Hampshire Circuit Court Probate Division.
  - a. **Opinion.** NCE is an opportunity for parties to discuss issues in their case without the formality of trial procedures, identify areas of disagreement, generate options for how to resolve those disagreements, understand what the law is, and hear the opinion of a Judge, Referee, or Retired Judge—the Neutral Case Evaluator (the Evaluator)—about how the Evaluator would decide those areas of disagreement at trial.
  - b. **Relation to mediation.** Whereas mediation leverages a mediator’s neutrality to assist parties in generating options for resolution, NCE leverages an Evaluator’s opinions to address legal issues and assist parties in generating options for resolution.
  - c. **Resources.** NCE is an opportunity to narrow issues for trial or resolve the case in entirety before trial. This saves the Court resources and time to focus on issues that are most appropriate for a Judge<sup>1</sup> to hear in a trial setting. It also saves the parties resources and time.
- II. *Case Eligibility*
  - a. **Scope.** NCE is available for trust and estate cases filed in any New Hampshire Circuit Court Probate Division. This includes reopened cases.
  - b. **Appropriate use.** NCE is available to discuss one, some, or all issues in a case.
  - c. **Inappropriate use.** The Court expects parties and counsel to have had direct communication prior to NCE. NCE is not appropriate for a party who has not begun considering what s/he wants. It is also not appropriate for an attorney who has not conducted initial discussions with the attorney’s client or with the other party. NCE is not a mini-trial, nor should it be used as a fast-track to a Judge or to the Complex Trust docket. The Court will monitor use of NCE and, if it is being used inappropriately, will consider modifications to its use.
- III. *The Evaluator*
  - a. **Judge or Referee.** The Evaluator shall be a Judge, Referee, or Retired Judge from the New Hampshire Judicial Branch. The Evaluator shall be a member in good standing with the New Hampshire Bar Association.
  - b. **Training.** The Evaluator shall have received NCE-specific training from the New Hampshire Judicial Branch.
  - c. **Relation to Hearing Judge.** The Evaluator shall not have overseen substantive hearings, ruled on substantive motions, and/or issued substantive orders related to the case. Parties may be asked whether they wish to waive an Evaluator having co-signed previous orders.
  - d. **Ruling on motions or making orders.** The Evaluator shall not rule on any motions nor make any orders related to a case for which the Evaluator will be, is, or has been an Evaluator. An exception may be made for non-substantive uncontested motions.
- IV. *Assignment*
  - a. **Court assignment.** The Hearing Judge may assign appropriate cases to NCE.
  - b. **Request.** Parties may request assignment to NCE at any time after filing. The Hearing Judge retains discretion to make the assignment.
  - c. **Opt-out.** If parties do not wish to participate in NCE after being assigned to NCE, one or both parties may petition the court to opt out. This will not affect decision-making in their case.
  - d. **Location.** The NCE session shall be held at a New Hampshire Judicial Branch Court.

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<sup>1</sup> Hereinafter referred to as “Hearing Judge.”

- e. **Time allotted.** Parties may request a time allotment. Due to the Court's schedule, that time allotment may or may not be available. The Courts' Notice of Neutral Case Evaluation shall include the time allotted for NCE.
- f. **Impact on case.** Assignment to NCE does not impact the right to a trial. Assignment does not bar the filing of additional motions. The parties' choices whether to participate in NCE are not given weight in the Hearing Judge's decision-making in the case.

V. *Pre-NCE Communication*

- a. **Telephonic contact.** The Evaluator may make telephonic and/or electronic contact with parties prior to NCE. If the Evaluator makes contact with one party, the Evaluator shall make every effort to make contact with the other party.
- b. **Pre-NCE briefs.** At the discretion of the Evaluator and with at least fourteen (14) days' notice, the parties may submit short (no more than eight (8) page), confidential briefs summarizing the main issues in the case and the party's understanding of the law as applied to those issues. These should be submitted to the Evaluator, through the Court staff. The Evaluator will have read the case file and any relevant bench memoranda in advance.

VI. *The NCE Session*

- a. **Telephonic participation.** At the discretion of the Evaluator and with at least fourteen (14) days' notice, a party may request to participate telephonically.
- b. **Failure to appear.** If a party or parties reschedules within seven (7) business days or fails to appear, except for good cause and at the discretion of the Evaluator, the case shall be scheduled for the next event.
- c. **Caucus.** The Evaluator may choose to meet with a party individually, outside the presence of the other party. Prior to such meeting, the Evaluator should discuss with both parties any confidentiality afforded such meetings. If the Evaluator meets with one party individually, the Evaluator should meet with the other party individually.
- d. **Additional persons.** If a party is represented by counsel, counsel must be present at NCE. If the party wishes for any other third-party to attend, the party must alert the Hearing Judge, who will make the determination about attendance, prior to the NCE.
- e. **Agreement.**
  - i. Full agreement. If the parties come to agreement on all essential issues, the agreement shall be in writing and signed by the parties. The signed agreement becomes an order when it is approved by the Hearing Judge or other appropriate judicial officer. The parties or the Evaluator may draft the agreement. If the Evaluator drafts the agreement, the Evaluator shall read the agreement back to the parties to ensure the accuracy of the agreement prior to the parties signing the agreement.
  - ii. Partial agreement. Parties may come to agreement on any matters at issue, even if the agreement does not resolve all issues in the case. This includes coming to agreement on the next event in the case. The agreement shall be in writing and signed by the parties. The signed agreement becomes an order when it is approved by the Hearing Judge or other appropriate judicial officer.
  - iii. Legal Review. The Evaluator shall encourage all parties to seek legal review of the agreement prior to signing it. If a party or parties wish to seek legal review, the Evaluator shall request the parties alert the Court as to the status of the agreement no more than 30 days after the NCE session.
- f. **Additional sessions.** If both parties agree that further NCE would be beneficial, the parties may request an additional session. The Evaluator retains discretion to hold an additional session.
- g. **No agreement.** If the parties do not come to agreement, the case shall be scheduled for the next event, if not scheduled already. The Evaluator shall complete the ADR

Report indicating, “Case did not settle; court to schedule next hearing,” without further comment.

*VII. Post-NCE Communication*

- a. **Approval of agreements.** If a written agreement is made, the agreement shall be returned to the Hearing Judge. The Hearing Judge may review and approve or reject the agreement.
- b. **Judicial communication.** An Evaluator shall not communicate about the substance of the NCE with the Hearing Judge or any Judicial Branch staff. The Judicial Branch will not conduct additional research about issues that arose solely out of the NCE.

*VIII. Nature of Proceedings*

- a. **Non-binding evaluation.** No evaluation, opinion, or statement made during the NCE process is binding upon the parties.
- b. **Inadmissible communication.** No communication—oral, written, or otherwise non-verbal—made by the Evaluator or either party in preparation for or during NCE may be disclosed at a subsequent court proceeding. The exceptions are:
  - i. If abuse or neglect of a child is disclosed in the NCE, then any person in the NCE is required to report it to the appropriate authorities;
  - ii. If a party is alleged to have made a material misstatement of fact in the NCE, which would have constituted perjury if made under oath;
  - iii. If an attorney engages in a violation of the New Hampshire Rules of Professional Conduct; or
  - iv. If the Evaluator has received information about a felony, suicide, or misdemeanor that is about to be committed.
- c. **Not shared with Hearing Judge.** No communication—oral, written, or otherwise non-verbal—made in NCE may be shared with the Hearing Judge. This includes impressions of the Evaluator as to the likelihood of settlement, issues still to be resolved, or reasonableness of the parties.
- d. **Subpoenas.** Per the Neutral Case Evaluation Participation Agreement, the Evaluator may not be subpoenaed by any court of competent jurisdiction in this state for any subsequent court proceeding of the case in which the Evaluator served, including any proceeding if the case is reopened.
- e. **Immunity.** Per RSA 490-E:5, no mediator, arbitrator, or other neutral party involved in dispute resolution under contract with the New Hampshire Judicial Branch shall be held liable for civil damages for any aspect of Judicial Branch dispute resolution processes, unless such person acted willfully.