

## Neutral Case Evaluation Protocol

- I. *Purpose.* The Court offers Neutral Case Evaluation (NCE) as one process option for parties in a divorce or parenting case filed in the New Hampshire Circuit Court Family 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, and hear the opinion of a Judge, Marital Master, Referee, or Retired Judge or Marital Master—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, Marital Master, or Referee<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 divorce or parenting cases filed in any New Hampshire Circuit Court Family Division. This includes reopened divorce or parenting cases.
  - b. **Post-mediation.** The parties shall have attended mediation, authorized by RSA 461-A:7 or RSA 458:15-c, prior to NCE, unless mediation is not appropriate in the case.
  - c. **Appropriate use.** NCE is available to discuss one, some, or all issues in a case. Issues appropriate for NCE include, but are not limited to: child support, parenting rights and responsibilities, alimony, and division of assets/debts.
  - d. **Inappropriate use.** The Court expects parties and counsel have attempted settlement through direct communication prior to NCE, and that NCE is requested to further assist with settlement. 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. 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, Marital Master, or Referee.** The Evaluator shall be a Judge, Marital Master, Referee, or Retired Judge or Marital Master 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.
  - 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. **Request.** Parties may request assignment to NCE at any time after mediation has been completed, or, if mediation is not appropriate, at any time after filing. The Hearing Judge retains discretion to make the assignment.

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

- b. **Court assignment.** The Hearing Judge may assign appropriate cases to NCE. When evaluating appropriateness, the Hearing Judge considers the case eligibility criteria and any other relevant information.
- c. **Consent.** Regardless of method of assignment, both parties must consent to participate in NCE prior to the case being assigned to NCE. Consent may be in writing or in person at a hearing.
- d. **Location.** The NCE session shall be held at a New Hampshire Judicial Branch Court.
- 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 in the future. Assignment does not bar the filing of additional motions. The parties' choices whether to participate in NCE are not given weight 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. **Compliance with Rule 1.25(a).** Prior to the NCE session, the parties shall either exchange documents as required by Rule 1.25(a) or waive the requirement in writing.
- c. **Pre-NCE briefs.** The Evaluator may require parties to submit written communication to the Evaluator prior to the NCE. The Evaluator will have read the case file in advance.

VI. *The NCE Session*

- a. **Failure to appear.** If a party or parties fail to appear, except for good cause and at the discretion of the Evaluator, the case shall be scheduled for the next event.
- b. **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.
- c. **Additional persons.** If a party wishes to bring additional persons, including counsel, to the NCE, the party must alert the Evaluator and the other party prior to the NCE session.
- d. **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.
- e. **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.

- f. **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. The Hearing Judge may not modify the agreement without the consent of both parties.
- b. **Judicial communication.** An Evaluator shall not communicate about the NCE with the Hearing Judge.

*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.