

Early Neutral Evaluation Firmly Rooted in Southern District of California

The Southern District of California adopted an Early Neutral Evaluation Conference program, or ENE, in the early 1990s. ENE responded to a Civil Justice Reform Act requirement that each district develop a plan to reduce expenses and delays. ENE was the brainchild of then-Magistrate Judge Barry Ted Moskowitz, who is now the chief judge of the district. Judge Moskowitz drafted the local rule instituting the program as part of our district's CJRA plan.



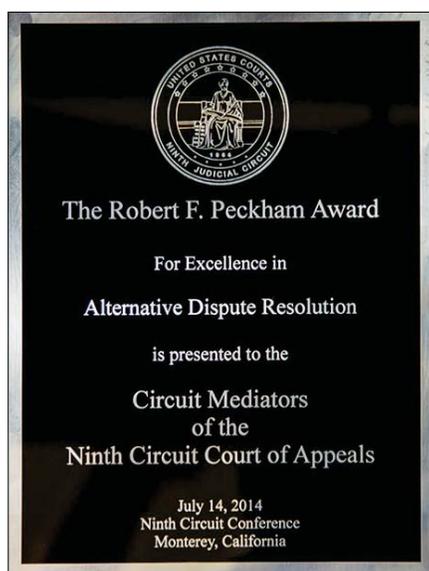
Jan Adler is a magistrate judge in San Diego

Pursuant to Local Civil Rule 16.1.c, the majority of civil cases are referred to an ENE within 45 days of the filing of an answer. Counsel and the parties must appear at the ENE before the assigned magistrate judge to discuss the parties' claims and defenses and explore settlement options. All discussions during the ENE are informal, off-the-record, privileged and confidential. Exempted cases include habeas corpus petitions, administrative appeals, Social Security cases, default proceedings, bankruptcy appeals and Section 1983 prisoner cases.

In the event an ENE is scheduled before all of the defendants have answered, the magistrate judge

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Peckham Award Winners Announced



The Mediation Office at the United States Court of Appeals for the Ninth Circuit has been selected as the recipient of the 2014 Robert F. Peckham Award, which recognizes outstanding achievement in the field of alternative dispute resolution.

The Mediation Office, which consists of nine attorney-mediators and support staff, is credited with settling thousands of appeals brought before the court in recent years.

U.S. District Judge Ricardo S. Martinez, chair of the Ninth Circuit ADR Committee, presented the award to Chief Circuit Mediator Claudia Lynn Bernard and five of her fellow mediators on Monday, July 14, 2014, during the opening session of the 2014 Ninth Circuit Judicial Conference. More than 600 judges and attorneys working in the federal courts of the western states were in attendance at the event, held in Monterey, California.

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can defer the ENE to a later date. Although prisoner cases are exempted under the rule, the magistrate judges in our district normally hold an early telephonic conference with the prisoner and defense counsel to begin discussing settlement and thereafter hold periodic settlement conferences.

Each magistrate judge issues an ENE order providing that all named parties, all counsel and any other person(s) whose authority is required to negotiate and enter into settlement shall appear in person at the conference; shall be prepared to discuss the claims and defenses; and shall be legally and factually prepared to discuss and resolve the case. The individuals present at the ENE must have the unfettered discretion and authority to fully explore all settlement options and agree to any settlement terms acceptable to the party, change the settlement position of a party during the ENE, and negotiate a settlement without any predetermined level of authority. While governmental entities may appear through litigation counsel only, as to all other parties, retained outside counsel is not permitted to appear as the representative with settlement authority.

Over the past 10 years, dismissal rates have risen as high 18 percent within 30 days, 39 percent within 60 days, and 47 percent within 90 days in a given year.

The ENE is a settlement conference in the true sense of the term and the assigned magistrate judge uses a variety of mediation techniques which, in his or her judgment, will best assist the parties in resolving the case. It is within the discretion of the assigned magistrate judge to require the parties to lodge confidential ENE statements or exchange them; some magistrate judges give the parties the option to do either.

The ENE program is deeply ingrained in the culture of the Southern District of California. Litigants and counsel from other districts around the country have been equally enthusiastic about the program. It is extremely popular with litigants and counsel because it gives the parties an early opportunity to discuss the case before a judge in an informal setting. It provides the opportunity to settle the case or position it for further negotiations, and begin to discuss case management in the event the case does not settle. Litigants can also request a pre-answer ENE if they believe the case has a good chance of being resolved at that juncture.

The success of the program is demonstrated by statistics gathered by our clerk of court. For example, in 2012, 12 percent of cases were dismissed within 30 days of the ENE, 28 percent within 60 days, and 39 percent within 90 days. Over the past 10 years, dismissal rates have risen as high 18 percent within 30 days, 39 percent within 60 days, and 47 percent within 90 days in a given year. Certain types of cases are more susceptible of early resolution than others, of course, and the increasingly complex nature of the district's caseload (e.g., class actions and patent cases) has impacted the statistics, but even in complex matters, significant progress has been made and many cases have been resolved at the ENE or shortly thereafter.

If a case is not resolved during the ENE, but significant progress has been made toward settlement, the magistrate judge may discuss with the parties whether an informal exchange of key documents, initial disclosures or limited discovery may facilitate an early resolution; if so, the magistrate judge may schedule a follow-up telephone conference and/or settlement conference within a relatively short period (e.g., 30-60 days). If settlement is not in the offing and it appears initial disclosures followed by a full discovery schedule will be necessary before the parties can meaningfully discuss settlement, the magistrate

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On hand for the presentation of the Robert F. Peckham Award were, from left, attorney-mediators Peter Sherwood and Margaret Corrigan; District Judge Ricardo S. Martinez of Seattle, chair of the ADR Committee; Chief Mediator Claudia L. Bernard; and attorney-mediators Lisa Jaye, Ann Julius and Stephen Liacouras. Not present were attorney-mediators Chris Goelz, Roxane Ashe and Lew Ross.

“The effectiveness and productivity of the circuit mediators over the years have been truly remarkable. They are really deserving of this recognition,” Judge Martinez said.

The Ninth Circuit Court of Appeals has made use of mediation as an alternative to litigation for more than 25 years. The service is offered at no cost because it helps resolve disputes quickly and efficiently and can often provide a more satisfactory result than continued litigation.

Circuit mediators are currently settling between 1,000 and 1,500 appellate cases annually. Cases range from basic contract and tort actions to complex public policy matters and death penalty cases. Since 2005, the mediators also have handled immigration cases, which constitute a large portion of the court’s docket. They work regularly with the Office of Immigration Litigation in the

U.S. Department of Justice to identify appropriate cases and encourage mediation.

In addition to appellate work, the mediators have assisted federal trial courts, including the U.S. District Court in Arizona, which declared a judicial emergency in 2011 following the slaying of its chief judge in a mass shooting in Tucson. Mediators also regularly teach courses and provide training to law students, lawyers and judges in mediation, mediation advocacy and establishing mediation programs.

The Peckham award was established in 2001 by the Judicial Council of the Ninth Circuit, governing body of the federal courts in the West. The award is named for the late Judge Peckham, a former chief district judge of the Northern District of California, who helped pioneer use of legal means other than court trials to resolve disputes. ●

judge issues a post-ENE order with Rule 26 compliance dates and sets a date for a Rule 16(b) Case Management Conference.

Each case is assessed on its own circumstances to develop a case management plan most conducive to early resolution. If the case does not settle during or shortly after the ENE, the magistrate judge renews the topic of settlement each time (s)he has contact with counsel while managing pretrial proceedings. The magistrate judge may also convene an interim settlement conference before the mandatory settlement conference scheduled to take place after rulings on dispositive motions. The parties may also attend a private mediation prior to the MSC. The philosophy behind the system is to be proactive about settlement throughout the process, thereby materially increasing the chances of early resolution.

A slightly different format is used in patent cases. Pursuant to Patent Local Rule 2.1.a, the ENE takes place within 60 days of the defendants' first appearance. The parties are required to hold the Rule 26(f) conference and submit a joint case management plan before the ENE; if the case does not settle at the ENE, the magistrate judge issues a case management schedule. This ensures the parties will be better versed in the infringement and invalidity issues, thereby facilitating further settlement discussions as the case progresses. As is true of non-patent cases, the magistrate judge can convene a settlement conference whenever it appears the parties are ready for meaningful discussions.

The ENE program has more than realized the goals envisioned by Chief Judge Moskowitz when he created it nearly 25 years ago. The Southern District of California is justifiably proud of the contributions the ENE program has made to the administration of justice in our district. ●

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