

# AGENDA ITEM

September 2011

**DATE:** August 19, 2011

**TO:** Members, Board Committee on Operations

**FROM:** Patsy Cobb, Deputy Chief Trial Counsel  
Jill Sperber, Special Assistant to the Chief Trial Counsel

**SUBJECT:** Rules of Procedure of the State Bar, Proposed Amendments to Rules 2409 and 5.30 –Request to Release for Public Comment

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## EXECUTIVE SUMMARY

The Office of the Chief Trial Counsel (OCTC) has identified several areas where amendments to the State Bar's Rules of Procedure would help OCTC process its disciplinary matters more expeditiously. OCTC is seeking your Committee's authorization to release for public comment, for a period of 30 days, proposed amendments to Rules 2409 and 5.30, Rules of Procedure of the State Bar, as set forth in Attachment A.

**Eliminate automatic extension of time for member to reply.** Currently, upon receipt of a complaint being investigated, OCTC provides the member with written notice of the allegations and an opportunity to reply within two weeks. Rule 2409 provides the member with an additional two week extension of time-- beyond the initial two week period --to reply without a showing by the member that extra time is actually needed or that any need is related to the time constraints on the member's practice. (A showing of good cause is required, however, for additional extensions of time beyond the two week extension.) This provision of rule 2409 doubles the waiting period for a member's reply from two week to four weeks as a matter of right.

OCTC's proposed amendment to Rule 2409 would eliminate the automatic two week extension of time for a member to reply to OCTC's written notification of the allegations of a discipline complaint. The existing language in rule 2409 permitting the member to request additional time to reply for good cause shown in light of the time constraints of the member's practice would remain effective.

**Require prompt requests and modify evidence required for early neutral evaluation conferences.** The State Bar favors early evaluation of complaints by identifying matters at the pre-filing stage that should be closed, settle, or proceed to

formal disciplinary proceedings. Evaluation by a settlement judge facilitates this process and if successful, avoids formal disciplinary proceedings.

Rule 5.30 provides that prior to the filing of formal disciplinary charges, either party may request an early neutral evaluation conference (ENEC) conducted by a State Bar Court settlement judge. Currently, there is no ENEC notice requirement and the time frame for requesting an ENEC is open until formal disciplinary charges are filed. In addition, OCTC must provide the settlement judge with a draft notice of disciplinary charges.

Proposed amendments to Rule 5.30 would: 1) require OCTC to notify the member in writing of the right to an ENEC; 2) establish a time frame within which a party must request the ENEC; 3) provide that failure to timely request an ENEC is deemed to waive the right to an ENEC; 4) provide that failure to hold an ENEC if notice was properly given will not be the basis for dismissal of the proceeding; and 5) expand the options for documents that are required for submission by OCTC to the settlement judge, including a statement of OCTC's settlement position.

For any questions about this agenda item, please contact Jill Sperber, Special Assistant to the Chief Trial Counsel, at [jill.sperber@calbar.ca.gov](mailto:jill.sperber@calbar.ca.gov) or call (415) 538-2023.

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## **BACKGROUND**

Recently, the Board Committee on Regulation, Admissions and Discipline tasked the Office of the Chief Trial Counsel (OCTC) with identifying areas in the State Bar's rules of procedure that create delay or slow down its processing of complaints to closure, settlement or the filing of disciplinary charges. In response to this request, OCTC identified several procedural rules warranting modification to assist OCTC with processing its cases more expeditiously.

## **ISSUE**

Whether the Board Committee on Operations should authorize release for public comment, for a 30 day period, the attached proposed amendments to the rules of procedure as set forth in Attachment A.

## **DISCUSSION**

### **A. Proposal to amend Rule 2409 to eliminate automatic extension of time to reply to charges.**

**Current procedure:** Rule 2409, Rules of Procedure of the State Bar, requires OCTC, prior to the filing of disciplinary charges, to notify the member in writing of the allegations forming the basis of a complaint or investigation and provides for a period of at least two weeks to respond. The written notice to the member is referred to as the

“TR” (“To Respondent”) letter. The TR letter is issued by OCTC to the member early in the process upon investigation of a complaint. Typically, this notice is the first time that a member learns of the State Bar’s receipt of a complaint. Rule 2409 requires that the member be provided “not less than two weeks” to submit a written explanation. In addition, Rule 2409 mandates that upon request, OCTC grant a member an additional two weeks to respond. The rule contains no requirement that the member show that extra time is actually needed or that any need is related to the time constraints of the member’s practice.<sup>1</sup>

**Proposal:** In keeping with the policy that OCTC’s cases should be processed as expeditiously as possible, OCTC believes that two weeks is generally sufficient time for a member to respond to a disciplinary complaint. The rule’s provision of an entire month for a member to address allegations of a complaint without need is an overcorrection and should be eliminated. Under the remaining language of rule 2409, the member retains the right to request additional time “...for good cause shown as to the specific constraints on the member’s practice which are claimed to necessitate the additional time.”

OCTC recommends amending rule 2409 to delete the automatic extension of two weeks to reply, retaining the member’s right to request additional time if necessitated by the time constraints of his or her practice as follows:

#### **Rule 2409. Member’s Response to Allegations**

- (a) Prior to the filing of a Notice of Disciplinary Charges, the Office of the Chief Trial Counsel shall notify the member in writing of the allegations forming the basis for the complaint or investigation and shall provide the member with a period of not less than two weeks within which to submit a written explanation. An extension of time for submission of the member’s written explanation shall be granted only upon written request to the Office of the Chief Trial Counsel and for good cause shown as to the specific constraints on the member’s practice which are claimed to necessitate the additional time. This rule does not prohibit the Office of the

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<sup>1</sup> Business and Professions Code section 6068(i) imposes the duty to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding. The statute provides that the member’s duty to comply with a request for information or other matters is not to be construed to expect compliance “...within an unreasonable period of time in light of the time constraints of the attorney’s practice.”

The duty of a member to provide information to OCTC in response to a request for information established by and qualified in Section 6068(i) is distinguishable, however, from the opportunity to reply to allegations covered by rule 2409. In contrast to responding to specific requests by OCTC for information, rule 2409 provides the member with notice and an opportunity to respond to allegations of a complaint. In an apparent effort to recognize that the member should also have additional time to respond to the complaint, rule 2409 borrows language from section 6068(i)’s accommodation for members who have legitimate law practice reasons for requesting additional time to respond to specific requests for information.

Chief Trial Counsel from contacting a member by telephone for purposes of resolution of minor matters or investigation.

**B. Require timely requests and modify requirements for an Early Neutral Evaluation Conference (ENEC).**

- 1. Current Policy on Requesting ENEC:** Rule 5.30, Rules of Procedure, provides for an early neutral evaluation conference (ENEC) to attempt to resolve matters with a State Bar Court settlement judge before disciplinary charges are filed. The State Bar favors early neutral resolution of complaints to conserve OCTC resources, help reduce court caseloads, avoid the expense of litigation, and resolve matters that should not be the subject of formal disciplinary proceedings.

The ENEC is voluntary and not required. Either party may request the ENEC. Although rule 5.30 provides that the court has 15 days to conduct the conference following a request, there is no notice requirement of the right to request an ENEC or a time frame within which a party must make a request. As a result, considerable delay often surrounds the ENE request process.

**Proposal:** Before disciplinary charges are filed, OCTC will send to the respondent written notice of its intent to file charges. The letter will notify the member of the right to request an ENEC within ten days of the date of service of the letter. If proper notice is given, failure to request the ENEC within that time would constitute a waiver of the right to request an ENEC. New language would also provide that, if proper notice was given, the absence of an ENEC shall not constitute grounds for dismissal of the proceeding.

Should the member fail to request an ENEC and a notice of disciplinary charges is filed, the parties retain their pre-existing right to request a voluntary settlement conference. (Rule 1230, Rules of Practice.) The proposed rule amendment would advance a number of State Bar policies: help OCTC reclaim its accountability for the time it takes to process a case, encourage parties to be proactive in case evaluation, promote transparency of proceedings, and advance judicial economy. By encouraging use of the ENEC, OCTC believes that this proposal will foster greater use of a significant pre-notice filing settlement opportunity. (*In the Matter of Respondent AA* (Review Dept. 2004), 4 Cal. Bar Ct. Rptr, 721, 727, fn. 9 [in 2002 and 2003, half of all discipline matters that were heard at an ENEC resulted in a settlement without litigation.]

OCTC recommends amending rule 5.30 (A) as follows:

- (A) Early Neutral Evaluation Conference.** Prior to the filing of disciplinary charges, the Office of the Chief Trial Counsel will notify the member in writing of the right to request an Early Neutral Evaluation Conference. Either party may request an Early Neutral Evaluation Conference. A party will have 10 days from the date of service of notice to request a conference. Failure to

request a conference within that time is deemed a waiver of the right to request a conference. If proper notice is provided, failure to hold a conference will not be a basis for dismissal of a proceeding. A State Bar Court hearing judge will conduct the conference within 15 days of the request.

## **2. Current Policy on Requirements for ENEC.**

Rule 5.30 requires OCTC to submit a copy of a draft notice of disciplinary charges. Although some notices may be straightforward, notice drafting may not be required or necessarily involve the most efficient use of time as long as the parties diligently prepare for meaningful settlement discussions. For example, OCTC may wish to rely on pre-existing investigator statements of a case, especially if the parties are close to a settlement. In addition, OCTC may wish to advance pending incomplete investigations to the ENEC for the purpose of achieving a global settlement with matters involving the same member that are ready to be filed. In these instances, adherence to a strict requirement of presenting draft notice may unwittingly create an obstacle to early settlement conferences.

**Proposal:** OCTC believes that providing for greater flexibility of documents that OCTC may furnish to the settlement judge for the ENEC will enhance the parties' use of ENECs to help them resolve matters. In addition, OCTC will include its settlement position-not currently reflected in the required draft notice-to enhance the settlement judge's preparation for the ENEC.

Amend rule 5.30(C) as follows:

(C) **Evidence.** The Office of the Chief Trial Counsel must submit a copy of the draft notice of disciplinary charges, a statement of the case, or other written summary to the judge prior to the conference. The document must include the rules and statutes alleged to have been violated by the member, a summary of the facts supporting each violation, and the Office of the Chief Trial Counsel's settlement position. Each party may submit documents and information to support its position.

## **REQUEST FOR 30 DAY PUBLIC COMMENT PERIOD**

OCTC requests release of the proposed public comment for a 30 day period. The reason for requesting less than the standard 45 day public comment period is to return this item to the Board's November meeting for consideration. A longer comment period would preclude this item from being ready for the November meeting agenda, resulting in delay until the Board's following meeting in January 2012. A slightly shorter than standard comment period is warranted in view of the immediate State Bar policy and OCTC operational goals that would be advanced by these proposals.

**FISCAL / PERSONNEL IMPACT:**

None.

**RULE AMENDMENTS:**

Rule 2409-Rules of Procedure Title III, Division II, Chapter 4.  
Rule 5.30-Rules of Procedure Title 5, Division 2, Chapter 1.

**BOARD BOOK IMPACT:**

Not applicable.

**RECOMMENDATION**

The Office of the Chief Trial Counsel recommends that the Board Committee on Operations release the proposed amendments to rules 2409 and 5.30, Rules of Procedure, as set forth as Attachment A, for a 30-day public comment period.

**PROPOSED BOARD COMMITTEE RESOLUTION:**

Should this Board Committee agree with the above recommendation, the following resolution would be appropriate:

**RESOLVED**, that the Board Committee on Operations hereby authorizes the release of the proposed rules of procedure attached as Attachment A and it is

**FURTHER RESOLVED**, that the release of the attached policy statement set forth in Attachment A for public comment does not constitute, and shall not be considered, approval of the Board of Governors of the State Bar of the matters published.