

AGENDA ITEM

121 November

DATE: October 21, 2011

TO: Members, Regulation, Admissions and Discipline Oversight
Members, Board of Governors

FROM: Jayne Kim, Acting Chief Trial Counsel
Patsy Cobb, Deputy Chief Trial Counsel
Jill Sperber, Special Assistant to the Chief Trial Counsel
James Fox, Special Assistant to the Chief Trial Counsel

SUBJECT: Rules of Procedure of the State Bar, Proposed Amendments to
Rules 2409 and 5.30-Request for Approval of Rule 2409
following Return from Public Comment and Release of Further
Amendments to Rule 5.30 for Public Comment

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. On September 17, 2011, the Board Committee on Operations approved OCTC's request for release for public comment its proposed amendments to Rules 2409 and 5.30, Rules of Procedure of the State Bar, as set forth in Attachment A. The 30 day public comment period ended October 20, 2011. The Association of Discipline Defense Counsel ("ADDC") submitted the only public comment (Attachment B), as discussed below.

The proposed amendment to Rule 2409(a) 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 in effect. OCTC requests that the RAD Committee recommend to the Board that it approve this rule amendment.

Proposed amendments to Rule 5.30 subdivisions (A) and (C) would: (1) require OCTC to notify the member in writing of the right to an ENEC; (2) establish a 10 day period 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; (5) expand the options for documents that are required for submission by OCTC to the

settlement judge; and (6) require a statement of OCTC's settlement position for the ENEC judge.

To avoid potential ambiguity surrounding the term "service" in the proposed amendment to rule 5.30(A), OCTC recommends further modification to clarify that the time for requesting an ENEC is not extended by the method for computation of time set forth in rule 5.28(A), Rules of Procedure. Additionally, OCTC proposes further modifications to rule 5.30(C) to eliminate redundant language and provide greater clarity. OCTC requests the RAD Committee to release these additional proposed amendments to rule 5.30 for a 30 day public comment period.

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

BACKGROUND

Recently, the Board Committee on Regulation, Admissions and Discipline Oversight 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 rule changes that would assist OCTC with processing its cases more expeditiously.

ISSUE

Whether the Board of Governors should approve, upon recommendation of the Committee on Regulation, Admissions and Discipline Oversight, proposed amendments to 2409 and 5.30, Rules of Procedure of the State Bar, as set forth in Attachment A, following their return from public comment.

CONCLUSION

OCTC recommends that the Board of Governors approve, upon recommendation of the Committee on Regulations, Admission and Discipline Oversight, the proposed amendment to 2409, Rules of Procedure of the State Bar, as set forth in Attachment A, following its return from public comment. OCTC also recommends that additional modifications to the proposed amendments to 5.30 subsections (A) and (C), as set forth in Attachment C, be released for an additional 30 day public comment period. The additional proposed modifications are shown as highlighted text in Attachment C.

DISCUSSION

A. **Proposal to amend Rule 2409(a) to eliminate automatic extension of time to reply to charges.**

Current rule 2409, subdivision (a), Rules of Procedure of the State Bar, requires the Office of the Chief Trial Counsel (OCTC) 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. OCTC sends the TR letter to the respondent early in the process of an investigation of a complaint. Typically, this notice is the first time a respondent learns of the State Bar’s receipt of a complaint.

Rule 2409(a) requires that the member be provided “not less than two weeks” to submit a written explanation. In addition, upon request, OCTC must grant a member an additional two weeks to respond. The rule contains no requirement that the member show that this extra time is actually needed or that any need for extension be related to the time constraints of the member’s practice.

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 a showing of actual need for this time should be eliminated. Under the remaining language of rule 2409(a), the member would retain 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.”

On September 17, 2011, the following proposed amendment to rule 2409(a), deleting the automatic extension of two weeks to reply, but retaining the member’s right to request additional time if necessitated by the time constraints of his or her practice, was released for public comment:

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. ~~Upon request, the Office of the Chief Trial Counsel shall grant the member an additional two weeks within which to submit the written explanation. Thereafter,~~ ~~a~~Any further 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 Chief Trial Counsel from contacting a member by telephone for purposes of resolution of minor matters or investigation.

The public comment received does not address this rule amendment and OCTC requests the Board's approval of same upon recommendation by the RAD Committee.

B. Proposal to Amend Rule 5.30 to require Timely Requests and Modify Requirements for an Early Neutral Evaluation Conference (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 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 for the parties and not required by the Court. Either party may request the ENEC. Although rule 5.30(A) provides that the court has 15 days to conduct the conference following a request, currently, 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 ENEC request process.

OCTC proposes a rule amendment to rule 5.30(A) to: 1) require OCTC to send to the respondent written notice of its intent to file disciplinary charges; 2) provide that a request for an ENEC must be made within ten days from when OCTC sent written notice to the respondent; 3) establish that the failure to request the ENEC within that ten-day time period would constitute a waiver of the right to request an ENEC; and 4) provide that, if proper notice was given, the absence of an ENEC shall not constitute grounds for dismissal of the proceeding.

This proposed 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 prompt 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. Should the member fail to request an ENEC and disciplinary charges are filed, the parties retain their pre-existing right to request a voluntary settlement conference. (Rule 1230, Rules of Practice.)

The following proposed amendment to rule 5.30 (A) was released for public comment period:

(A) Early Neutral Evaluation Conference. ~~If the Office of the Chief Trial Counsel and the member cannot agree on the resolution or disposition of a matter before disciplinary charges are filed,~~ 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. ~~either party may request an Early Neutral Evaluation Conference.~~ A State Bar Court hearing judge ~~must~~ will conduct the conference within 15 days of the request.

C. Public Comment Received and OCTC's Response.

The only public comment received is from the Association of Discipline Defense Counsel ("ADDC"). The ADDC's comment expresses concerns that OCTC's proposal will "shift the backlog to the State Bar Court" and recommends that the current proposal be modified to require OCTC to provide additional materials to the respondent at the time it provides written notice of the right to request an ENEC within ten days of the notice. More specifically, the ADDC proposes that OCTC be required to provide a draft Notice of Disciplinary Charges (or reasonably detailed statement of the charges) and full discovery (all non-privileged materials) at the time it sends written notice of the respondent's right to request an ENEC. The ADDC's public comment is attached here as Attachment B.

Such requirements, however, would be an unnecessary resource drain for the State Bar and likely produce unintended consequences. ENECs are voluntary and, thus, only held if a party requests one. To require pre-filing discovery production in every case at this pre-filing stage-regardless of whether a respondent is requesting discovery-is unreasonable. A more detailed response to ADDC's public comment is attached here as Attachment D.

D. Request for Release for Public Comment Further Modifications to Rule 5.30.

1. Further proposed modification to rule 5.30(A).

Although not raised by the public comment, OCTC recognizes a potential ambiguity by the term "service" in the third new proposed sentence of Rule 5.30(A):

"A party will have 10 days from the date of service of notice to request a conference."

The ENEC letter is mailed prior to the filing of charges and is not a pleading that would be served with a proof of service under Code of Civil Procedure section 1013a (Rule 5.27, Rules of Proc.) and carry the same extension of time afforded by that code's statutory scheme. (Rule 5.28(A), Rules of Proc.) To remove potential ambiguity by use of the word "service," OCTC recommends a further modification to rule 5.30(A) to expressly state that "[t]he time is not extended by the method of computing time set forth in Rule 5.28(A)."

OCTC requests that the following further modification to the proposed amendment to Rule 5.30(A) be released for a 30 day public comment (and set forth in Attachment C):

Rule 5.30 Prefiling, Early Neutral Evaluation Conference

(A) **Early Neutral Evaluation Conference.** ~~If the Office of the Chief Trial Counsel and the member cannot agree on the resolution or disposition of a matter before disciplinary charges are filed, e~~ 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. The time is not extended by the method of computing time set forth in Rule 5.28(A). 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. ~~either party may request an Early Neutral Evaluation Conference. A State Bar Court hearing judge must~~ will conduct the conference within 15 days of the request.

2. Further proposed modifications to rule 5.30(C).

Rule 5.30 currently requires OCTC to submit a copy of a draft notice of disciplinary charges to the ENEC settlement judge. Although OCTC recognizes the utility of providing draft notices, in some matters, 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 for filing. In these instances, adherence to a strict requirement of submitting draft notices may unwittingly create an obstacle to early neutral settlement conferences.

OCTC believes that providing for greater flexibility of documents that OCTC may provide to the settlement judge for the ENEC will encourage use of ENECs to help parties resolve matters and expedite OCTC's processing of cases. That said, the rule would still require OCTC to submit a summary of the facts and culpability of the violations to be alleged. 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.

The following proposed amendment to rule 5.30(C) was released for public comment:

(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.

While not raised by the public comment received, OCTC wishes to make several further modifications to rule 5.30(C) to delete “a statement of the case” as being redundant with “other written summary.” In addition, OCTC recommends a stylistic improvement by substitution of “documentation” for “document.” These proposed further modifications are set forth in Attachment 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~~ documentation 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.

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.

RECOMMENDATIONS

OCTC recommends approval of the proposed amendments to rules 2409, Rules of Procedure of the State Bar, as set forth in Attachment A, by the Board of Governors, upon recommendation by the Committee on Regulation, Admissions and Discipline Oversight, following its return from public comment.

OCTC further recommends that the proposed further modifications to rule 5.30, Rules of Procedure, as set forth in Attachment C, be released by the Committee on Regulation, Admissions and Discipline Oversight, for a 30 day public comment period.

PROPOSED BOARD COMMITTEE RESOLUTIONS:

Should the Committee on Regulation, Admissions and Discipline Oversight agree with the above recommendations, the following resolutions would be appropriate:

RESOLVED, that the Committee on Regulation, Admissions and Discipline Oversight recommends that the Board of Governors approve the proposed amendment to rule 2409, Rules of Procedure of the State Bar, as set forth in Attachment A, following its return from public comment and it is

FURTHER RESOLVED, that the Committee on Regulation, Admissions and Discipline hereby authorizes the release of additional proposed amendments to rule 5.30, Rules of Procedure of the State Bar, as set forth in Attachment C, for a 30 day public comment period and it is

FURTHER RESOLVED, that the release of the proposed amendments to rule 5.30 set forth in Attachment C 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.

PROPOSED BOARD OF GOVERNORS RESOLUTION:

Should the Board concur with the Committee on Regulation, Admissions and Discipline Oversight's recommendation, the following resolution would be in order:

RESOLVED, that upon the recommendation of the Committee on Regulation, Admissions and Discipline Oversight, the Board hereby approves the proposed amendment to rule 2409, Rules of Procedure of the State Bar, as set forth in Attachment A, following its return from public comment.