

AGENDA ITEM

121 December

DATE: December 7, 2011

TO: Members, Regulation, Admissions and Discipline Oversight Committee
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 Rule 5.30, subdivisions (A) and (C)-Request for Adoption following Return from Public Comment

EXECUTIVE SUMMARY

This matter is before you to approve proposed amendments to Rule 5.30, subdivisions (A) and (C) as set forth in Attachment C, following return for public comment.

OCTC proposed amendments to Rule 5.30 subdivisions (A) and (C) that 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.

On September 17, 2011, the Board Committee on Operations released proposed amendments to 5.30, Rules of Procedure of the State Bar, as set forth in Attachment A for public comment. The 30 day public comment period ended October 20, 2011. The Association of Discipline Defense Counsel ("ADDC") submitted the only public comment (Attachment B). OCTC's response to the ADDC's comment is set forth in detail in Attachment D.

At RAD's November 4, 2011 meeting, upon OCTC's request, RAD released further amendments to Rule 5.30, subdivisions (A) and (C) as set forth in Attachment C for a subsequent 30 day public comment period. The further amendments would: 1) 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) and 2) eliminate redundant language and provide greater clarity in rule 5.30(C). The deadline for public comment was December 6, 2011. No comments have been received.

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

During 2011, 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. Among the rules identified, OCTC proposed amendments to rule 5.30 to expedite and facilitate the early neutral evaluation conference (ENEC).

ISSUE

Whether the Board of Governors should adopt, upon recommendation of the Committee on Planning, Program Development and Budget, proposed amendments to 5.30, subdivisions (A) and (C), Rules of Procedure of the State Bar, as set forth in Attachment C, following return from public comment.

CONCLUSION

OCTC recommends that the Board of Governors adopt, upon recommendation of the Regulation, Admissions and Discipline Oversight Committee, the proposed further amendments to rule 5.30, subsections (A) and (C), as set forth in Attachment C. The proposed further amendments are shown as highlighted text in Attachment C.

DISCUSSION

A. Proposed Amendments to Rule 5.30 subdivision (A) to require Notice of and Timely Requests 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 the date OCTC sends written notice to the respondent; 3) establish that the failure to request the ENEC within the 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.)

On September 17, 2011, the following proposed amendment to rule 5.30 (A) was released for a 30 day 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.

The comment period ended October 20, 2011. The only public comment received was 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.

Although not raised by the public comment, OCTC recognized 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 avoid 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)."

On November 4, 2011, RAD released for an additional 30 day public comment the following proposed further amendment to rule 5.30, subdivision (A), as 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.

B. Proposed Amendments to Rule 5.30 subdivision (C) to Facilitate the ENEC.

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 of charges. In these instances, adherence to a strict requirement of submitting draft notices may unwittingly create an obstacle to early settlement through the ENEC.

OCTC believes that providing greater flexibility to permit documents other than the draft notice of disciplinary charges that OCTC must provide to the ENEC judge will encourage use of ENECs to help parties resolve matters and expedite OCTC's processing of cases. The rule would still require OCTC to submit a summary of the facts and culpability of the violations to be alleged. In addition, the proposed amendment would require OCTC to include its settlement position-not currently reflected in the required draft notice-to further facilitate the ENEC.

The following proposed amendment to rule 5.30(C) was released for public comment on September 17, 2011:

(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, at RAD's November 4, 2011 meeting, OCTC requested that several further modifications to rule 5.30(C) be released for public comment. The additional amendments would delete "a statement of the case" as being redundant with "other written summary" and substitute "documentation" for "document." RAD released these proposed further amendments for a 30 day public comment period, 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.

ADDITIONAL PUBLIC COMMENT:

No public comment was received during the additional comment period that ended December 6, 2011.

FISCAL / PERSONNEL IMPACT:

None.

RULE AMENDMENTS:

Rule 5.30-Rules of Procedure Title 5, Division 2, Chapter 1.

BOARD BOOK IMPACT:

Not applicable.

RECOMMENDATIONS

OCTC recommends adoption of the proposed amendments to rule 5.30, subdivisions (A) and (C), Rules of Procedure of the State Bar, as set forth in Attachment C, by the Board of Governors, upon recommendation by the Committee on Regulation, Admissions and Discipline Oversight, following return from public comment.

PROPOSED BOARD COMMITTEE RESOLUTIONS:

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

RESOLVED, that the Regulation, Admissions and Discipline Oversight Committee recommends that the Board of Governors adopt the proposed amendments to rule 5.30, subdivision (A) and (C), Rules of Procedure of the State Bar, as set forth in Attachment C, following return from public comment.

PROPOSED BOARD OF GOVERNORS RESOLUTION:

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

RESOLVED, that upon the recommendation of Regulation, Admissions and Discipline Oversight Committee, the Board hereby adopts the proposed

amendments to rule 5.30, subdivisions (A) and (C), Rules of Procedure of the State Bar, as set forth in Attachment C, following return from public comment.