

OCTC's Response to Public Comment Received.

1. The Respondent has ample opportunity to learn OCTC's case, access the non-privileged contents of its file, and reach a settlement before the ENEC.

The ENEC process occurs prior to the filing of formal disciplinary charges but always takes place after Investigations has notified the respondent by letter of the allegations of the complaint and offered an opportunity to submit a written reply. This TR letter describes the allegations of a complaint and generally satisfies OCTC's obligation to ensure the member has received a "fair, adequate and reasonable opportunity" to deny or explain the charges before a notice of disciplinary charges is filed. (Rule 2604, Rules of Proc.) Ostensibly, OCTC's failure to satisfy these pre-filing requirements could be subject to a respondent's request for dismissal should formal charges proceed. In sum, the ADDC's characterization that respondents don't receive fair warning of the charges against them and the facts supporting them does not fairly describe actual practice.

OCTC recently streamlined its pre-notice filing process to eliminate a "20 day conference" between trial counsel and the respondent before an ENEC takes place with a settlement judge. An ENEC letter advises the respondent of OCTC's intent to file disciplinary charges and makes clear that a copy of the non-privileged contents of its file and informal settlement discussions with trial counsel are available upon request before the ENEC. This offer provides an additional opportunity for a respondent to learn about OCTC's case and/or obtain a copy of its file in advance of the ENEC.

The ENEC letter specifically advises the respondent that a copy of the file (except for privileged documents) will be provided to the respondent upon request. In addition to evidence and correspondence, the file typically includes an investigative statement of the case or summary setting forth the evidence of the attorney's conduct and connecting it to specific violations of the Rules of Professional Conduct or the State Bar Act.

Moreover, the ten-day period is merely the time frame to submit a request for ENEC to the State Bar Court. Thereafter, the State Bar Court will schedule an ENEC within 15 days from receiving the request.

2. Current Rule 5.30 assumes *ex parte* submission of ENEC materials to the settlement judge and does not require their exchange by the parties.

It bears noting that ENECs are not required but voluntary upon request of a party. OCTC points out that current rule 5.30 does not require OCTC to provide the respondent with ENEC materials prior to the ENEC. The draft notice of disciplinary charges currently required by rule 5.30(C) must be submitted to the ENEC judge. (Rule 5.30(C), Rules of Proc.) In addition, rule 5.30(C) permits the parties to submit documents and information to the judge to support their positions. Parties are not required, however, to exchange documents prior to the ENEC.

However, as the State Bar Court has recognized in earlier guidelines for the ENEC,¹ the parties are encouraged to exchange documents prior to the ENEC to make the process more productive. In fact, OCTC embraced this concept in its standing policy to provide the respondent with a copy of the draft notice in addition to any ENEC statement and OCTC's file (except for privileged documents), upon a party's request, to facilitate the ENEC. This policy will remain in effect regardless of approval of subsequent rule amendments. OCTC will continue to provide the respondent with a copy of the matters being submitted to the ENEC judge and the non-privileged contents of its file upon request, unless OCTC designates a document for in camera inspection only, as authorized by rule 5.30 (D).

3. The ADDC's proposal that OCTC serve a copy of its non-privileged and ENEC-related materials to respondent irrespective of a request poses an unnecessary and inefficient resource drain for the State Bar.

A rule requiring OCTC to disclose its ENEC materials and file is not only unnecessary; it may also have several unintended consequences. For example, if the case does not settle at the ENEC, investigation of the complaint may continue up to the time of filing the notice of disciplinary charges. Occasionally, new representations made by respondent at the ENEC or perspectives offered by the ENEC judge result in further investigation before charges are filed. Adherence to a formulaic ENEC disclosure rule could subject OCTC to a claim of withholding information and possible evidentiary sanctions at trial.

In addition, after a notice of disciplinary charges is filed, the parties are required to exchange witness lists and all documents. (Rule 5.65, Rules of Proc.) As such, respondents who proceed to trial are entitled to full disclosure of OCTC's evidence before trial. In addition, the ENEC process is designed to encourage the parties to settle early and avoid formal proceedings. Requiring pre-filing disclosure applied unilaterally to require only OCTC's disclosure for the ENEC would create misplaced formalities in a process that should remain informal to maximize its effectiveness as an early neutral resolution vehicle.

In OCTC's view, the objectionable aspect of the ADDC's proposal is frontloading the requirement of producing a copy of the file and the ENEC related materials irrespective of a request by the respondent for same or stated interest in an ENEC. By tying the ten day time period to request the ENEC to service by OCTC of these materials, OCTC will be forced to undertake a time-consuming, resource intensive exercise in what may well

¹ Under rule 5.30's prior iteration-rule 75, Rules of Procedure- the State Bar Court Hearing Department issued Guidelines for Scheduling and Conducting Early Neutral Evaluation Conferences (ENECs). The court requested from OCTC a draft notice of disciplinary charges and from the parties, a brief statement of the case, including their settlement positions. The Guidelines stated, "[i]n order to increase productivity, the court encourages the parties to exchange documents prior to the ENEC." State Bar Court Hearing Department Guidelines effective February 15, 2004.

amount to futility. Of the 587 disciplinary cases² filed from January 1, 2011 through September 8, 2011, only 90 ENECs were held. This suggests that the great majority of respondents either don't care to request an ENEC or are headed towards a default.

In addition, in 2011 to date, OCTC has filed a total of 54 motions requesting entry of the respondent's default after formal charges have been filed. Again, this demonstrates a predictable rate of non-participation by a number of respondents, particularly those in *pro per*. Given this fairly consistent pattern of non-cooperation or lack of interest by some respondents facing formal disciplinary proceedings, an inflexible mandate by rule that copies of all file and ENEC materials be presented to the respondent regardless of a request for same and despite whether the respondent is even interested in an ENEC would be an inefficient and often wasteful use of limited resources.

For these reasons, OCTC's standing policies of written notice of the complaint in the investigations phase, open file discovery, informal settlement options, and disclosure of its ENEC materials (currently, a draft notice of disciplinary charges and its settlement position) adequately address ADDC's concerns about adequate preparation for the ENEC. The rule amendments proposed here do not compromise these policies and actually expand OCTC's obligations by expressly requiring OCTC to notify the respondent of the right to an ENEC and provide the judge with a statement of its settlement position. The policy advanced by OCTC's proposed rule amendments-to help it move cases more expeditiously- should be approved subject to further modifications to proposed amendments and public comment as requested in the RAD agenda item.³

² These cases involve conviction referrals, original discipline matters, rule 9.19 violations, other jurisdiction referrals (Bus. & Prof. Code §6049.1), rule 9.20 violations, and probation revocation motions.

³ During the public comment period, OCTC informally polled members of the National Organization of Bar Counsel (NOBC). Of the replies received, no state bar representative replied that his or her jurisdiction even offers an early neutral evaluation conference with a settlement judge prior to the filing of formal disciplinary charges. Florida has a probable cause hearing before a Grievance Panel to determine whether probable cause exists to file formal charges. Under Florida's disciplinary scheme, the respondent is entitled to review the materials presented by the State Bar to the Grievance Panel.