

OPEN SESSION

AGENDA ITEM

REGULATION AND DISCIPLINE COMMITTEE – B.2

DATE: May 17, 2018

TO: Members, Regulation and Discipline Committee

FROM: Antonia G. Darling, Chief Court Counsel, State Bar Court

SUBJECT: Request to Circulate for Public Comment Changes to the Rules regarding Early Neutral Evaluation Process (Proposal to Amend Rule 5.30, Rules of Proc. of State Bar)

EXECUTIVE SUMMARY

This proposal would amend rule 5.30, the rule which governs Early Neutral Evaluation Conferences (ENEC). The new procedures would require OCTC to provide a draft copy of the proposed Notice of Disciplinary Charges (NDC) or a written summary of the proposed charges to the judge at least 3 days prior to the conference. It would also mandate that any party requesting an ENEC do so on the State Bar Court form and provide multiple dates for the conference that have been agreed to by the opposing counsel.

This item requests that the Board circulate, for a 45-day public comment period, proposed amendments to State Bar Rules of Procedure.

BACKGROUND

The Rules of Procedure provide that OCTC, before it may file disciplinary charges against an attorney, must provide written notice to that attorney of the opportunity to participate in an ENEC conducted by a judge of the State Bar Court. Once that notice has been served, either party has 10 days to request an ENEC. It is common for both parties to do so. Once requested a State Bar Court judge is obligated by the rule to conduct the conference within 15 days of the request.

The current rule does not require that the parties agree to or discuss in advance any proposed dates for the ENEC before making the request. Nor does it require the parties to provide in the request the dates that such parties are either available or unavailable to participate in the requested conference. As a result, court staff expend considerable time and effort communicating with the parties and their counsel to determine an available and mutually agreeable date for all.

Once an ENEC has been requested and scheduled, OCTC is required by rule 5.30 to submit a copy of the draft NDC, or other written summary to the judge. This submittal must include the rules and statutes alleged to have been violated by the member, a summary of the facts

supporting each violation, and the OCTC's settlement position. The rule, however, only requires this information to be provided to the ENEC judge "prior to the conference." As a result, such information may be provided to the court on the same day as the conference or late in the afternoon on the day prior. This late disclosure prevents the court from having adequate opportunity to review, evaluate, and possibly research the contentions being made by OCTC and, equally important, the resulting disciplinary outcome being advocated by it. This, in turn, diminishes the potential value and productiveness of the ENEC and may result in a follow-up ENEC session being required. This requires additional expenditure of time by OCTC and court personnel and delays either the early resolution of the disciplinary matter by a pretrial stipulated settlement or, in the alternative, the actual filing of formal disciplinary charges.

DISCUSSION

The ENEC is important. It provides the parties to a contemplated formal disciplinary proceeding with the opportunity to have a pre-filing evaluation by a State Bar Court judge of the strengths and weaknesses of the positions of each. Of greater significance, the ENEC process more frequently results in disciplinary matters being settled by stipulation before formal charges are filed. Such pre-filing settlements result in great savings of time and expense by the parties and the court.

To best achieve the purposes of the ENEC, it is necessary for the participating judge to be provided with the OCTC's mandated submittal sufficiently in advance of the scheduled ENEC for the judge to have an adequate opportunity to assess the merits of the parties' legal and settlement positions. The more parties are educated by the court's analysis, the greater the likelihood that the case will be settled. The desired level of preparation by the court is not possible when the nature and circumstances of the case are not disclosed to the court until just before the conference itself.

The proposed amendment seeks to avoid that deficiency by requiring that OCTC's mandated submittal be lodged with the court three (3) court days prior to the scheduled ENEC.

The court's staff currently spends significant time trying to communicate with the parties and their attorneys about possible ENEC dates when each is available and/or unavailable. The proposed amendment would require a requesting party to undertake that task before the request and scheduling issue is presented to the court, rather than relying on court personnel.

Finally, requiring ENEC requests to be made on a form provided by the court ensures that the occurrence and timing of the ENEC request is made certain. The existing rule neither requires the request to be made in writing nor specifies to whom the request is to be made. These deficiencies will be corrected by the proposed amendment, while requiring the requestor to use a court form will emphasize the parties' need to meet-and-confer about possible ENEC dates.

OCTC staff made suggestions, some of which were incorporated. Additional suggestions are under consideration.

FISCAL/PERSONNEL IMPACT

Court staff are anticipated to spend less time trying to schedule Early Neutral Evaluation Conferences and the participating judge will have sufficient information to prepare.

RULE AMENDMENTS

Title 5, Division 2, Chapter 5, Rules 5.30, Rules of Procedure of the State Bar.

BOARD BOOK AMENDMENTS

None.

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

RECOMMENDATION

It is recommended that the Regulation and Discipline Committee approve the following resolution:

RESOLVED, that staff is authorized to make available, for public comment for a period of 45-days, proposed amendments to:

Title 5, Division 2, Chapter 5, Rule 5.30 of the Rules of Procedure of the State Bar;

and it is

FURTHER RESOLVED, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed amended Rules of Procedure or Board policy.

ATTACHMENT(S) LIST

- A.** Proposed language of Rule 5.30 (Clean version).
- B.** Proposed language of Rule 5.30 (Redline version).

ATTACHMENT A
Proposed Revised Rule of Procedure 5.30
Clean version

Rule 5.30 Prefiling; Early Neutral Evaluation Conference

- (A) Early Neutral Evaluation Conference.** Prior to the filing of disciplinary charges, the Office of 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 the notice to request a conference. To schedule a conference, a requesting party must use the court-approved form located on the court's website and must submit it to the proper venue by facsimile, email, or mail. In the request, the party must supply multiple dates agreed to by opposing counsel for the 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 of dismissal of a proceeding. A State Bar Court hearing judge will conduct the conference within 15 days of the request.
- (B) Judicial Evaluation.** At the conference, the judge must give the parties an oral evaluation of the facts and charges and the potential for imposing discipline. If the parties then resolve the matter in a way that requires court approval, the Office of Chief Trial Counsel must document the resolution and submit it to the Evaluation judge for approval or rejection.
- (C) Evidence.** The Office of Chief Trial Counsel must submit a copy of the draft notice of disciplinary charges, or other written summary to the judge no later than three court days prior to the conference. Failure to do so within the specified time may result in the conference being rescheduled for a later date. The 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 Chief Trial Counsel's settlement position. Each party may submit documents and information to support its position.
- (D) Confidentiality.** The conference is confidential. A party may designate any document it submits for in camera inspection only.
- (E) Trial Judge.** Unless otherwise stipulated by the parties, the Early Neutral Evaluation judge cannot be the trial judge in a later proceeding involving the same facts.

ATTACHMENT B

Proposed Revised Rule of Procedure 5.30

Redline version Rule 5.30 Prefiling; Early Neutral Evaluation Conference

- (A) **Early Neutral Evaluation Conference.** Prior to the filing of disciplinary charges, the Office of 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 the notice to request a conference. **To schedule a conference, a requesting party must use the court-approved form located on the court's website and must submit it to the proper venue by personal delivery, facsimile, email, or mail. In the request, the party must supply multiple dates agreed to by opposing counsel for the 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 of dismissal of a proceeding. A State Bar Court hearing judge will conduct the conference within 15 days of the request.
- (B) **Judicial Evaluation.** At the conference, the judge must give the parties an oral evaluation of the facts and charges and the potential for imposing discipline. If the parties then resolve the matter in a way that requires court approval, the Office of Chief Trial Counsel must document the resolution and submit it to the Evaluation judge for approval or rejection.
- (C) **Evidence.** The Office of Chief Trial Counsel must submit a copy of the draft notice of disciplinary charges, or other written summary to the judge **no later than three court days** prior to the conference. **Failure to do so within the specified time may result in the conference being rescheduled for a later date.** The 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 Chief Trial Counsel's settlement position. Each party may submit documents and information to support its position.
- (D) **Confidentiality.** The conference is confidential. A party may designate any document it submits for in camera inspection only.
- (E) **Trial Judge.** Unless otherwise stipulated by the parties, the Early Neutral Evaluation judge cannot be the trial judge in a later proceeding involving the same facts.