

OPEN SESSION AGENDA ITEM

54-122 SEPTEMBER 2018 REGULATION AND DISCIPLINE COMMITTEE AGENDA ITEM II.B-2

DATE: September 14, 2018

TO: **Members, Board of Trustees
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) - Return from Public Comment and Request for Approval.

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.

At the May 2018 meeting, the Regulation and Discipline Committee resolved to send for public comment the proposed amendments to the Rules of Procedure. The close of the 60 day public comment period was July 30.

Public Comments were received from two sources: The Association of Discipline Defense Counsel, and attorney Ellen Pansky. Both are discussed below, but neither objects to the specific proposed rule change.

BACKGROUND

The current Rules of Procedure provide that the Office of the Chief Trial Counsel ("OCTC"), must provide written notice to that attorney of the opportunity to participate in an early neutral evaluation conference ("ENEC") conducted by a judge of the State Bar Court before it may file disciplinary charges against an attorney. 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. It also 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 a process unique to the State Bar. When requested, 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. The ENEC process may result in disciplinary matters being settled by stipulation before formal charges are filed. Such pre-filing settlements may result in a savings of time and expense by the parties and the court, and in the case of private reproofs, ensures the result is in fact private.

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.

PUBLIC COMMENTS

OCTC staff made suggestions on the draft before it was published, some of which were incorporated in the proposed language.

Two public comments were received during the comment period. Neither commentator objects to the proposed amendments by the court – rather both propose additional changes they believe will improve or strengthen the ENE process. The court is willing to revisit the entire ENEC process and consider what ways it can be improved, but that will take more time than is contemplated now. Therefore the court suggests that its proposed rule amendment be approved as suggested, leaving the consideration of a complete revamp of the ENEC process for another day.

The first comment was from the Association of Discipline Defense Counsel (“ADDC”). The Court’s proposal was to put a specific time for the parties to submit their statements to the Judge before the conference, as no date is specified in the current rule. The ADDC suggested that staggered response dates be imposed: that OCTC must submit their statement 5 days before the conference, and respondent must submit theirs 3 days before, so they could react to OCTCs. The current rule however does not require that the statements be sent to the other side, and OCTC may not wish to share their theory of the case with the respondent. The Respondent is not required to file any statement, and may not. The suggested change reduces the time for OCTC to prepare, but doesn’t ensure that there be any benefit by doing so- such as requiring that the respondent answer. The court therefore does not think this suggestion should be considered now.

The ADDC also suggested that a provision be added requiring that OCTC trial counsel have a person able to approve settlement terms available at the time of the ENEC, similar to the proposal the court made in the settlement process. Again, while this may be a concept worth considering, it was not part of the proposed rule change. OCTC has not had any opportunity to consider it or provide input and therefore should be considered later during a complete review of the ENEC process.

The other public comment was received from respected defense counsel, and former State Bar trial counsel, Ellen Pansky. Her comments do not object to the court’s proposal but instead address the time deadlines already set forth in the rule, asserting that they are too short for both respondents and their counsel. Specifically, she states that the 10 day time frame within which a party must request an ENEC is too short, particularly if mailed; that the requirement that the ENEC be held within 15 days is difficult for Respondent’s counsel to schedule; that many respondents do not retain counsel immediately, cutting into the time to prepare; and that requiring OCTC to submit their statement only three days before the conference does not allow counsel sufficient time to prepare for the conference.

In conclusion, while these are real concerns about the efficiency and effectiveness of the ENEC process, they do not deal with the rule proposal. The court commits to conducting a review the entire ENEC process with all stakeholders in the near future, but for now the court suggests that the proposed rule change be approved as is.

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 Board of Trustees approve the following resolution:

RESOLVED, that following the 60 day public comment period, the Board of Trustees hereby adopts the amendments to Rule 5.30 of the Rule of Procedure of the State Bar, as set forth in Attachment A; and it is

FURTHER RESOLVED, that the amendments to the Rules of Procedure of the State Bar are effective January 1, 2019.

ATTACHMENT(S) LIST

- A.** Proposed language of Rule 5.30 (Clean version).
- B.** Proposed language of Rule 5.30 (Redline version).
- C.** Public Comment from Ellen Pansky
- D.** Public Comment from Association of Discipline Defense Counsel

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. 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 prior to the conference. 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. ~~The time is not extended by the method of computing time set forth in Rule 5.28(A).~~ 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.

ATTACHMENT C

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July 30, 2018

VIA EMAIL: sbrulescomment@calbar.ca.gov
AND FIRST-CLASS MAIL

Antonia G. Darling, Chief Court Counsel
The State Bar Court
180 Howard St.
San Francisco, CA 94105

Re: Public Comment – Rule 5.30 re Early Neutral Evaluation Conference

Dear Ms. Darling:

Please accept this letter as this office's public comment on the State Bar Court's consideration of revisions to Rule 5.30 of the Rules of Procedure, regarding early neutral evaluation conferences ("ENEC").

As a preliminary matter, I am a strong proponent of the ENEC process, and it is my practice to request an ENEC in nearly every case in which I represent attorneys before the State Bar. However, the scheduling deadlines currently set forth in Rule 5.30 for requesting and conducting an early neutral evaluation conference ("ENEC") are too restrictive and not practical.

The requirement that a request for an ENEC must be made within 10 days of service of notice of right to request an ENEC – which is included with the Office of Chief Trial Counsel's ("OCTC") notice of intent to file disciplinary charges – should be changed to require that the parties meet and confer to identify available dates within the 10-day deadline, rather than mandating that request be submitted for a particular date within 10 days of the date of the notice. Although Rule 5.30 states the request must be made within 10 days of *service* of the notice, the standard "Notice of Intent" letter that is mailed by OCTC states that the ENEC request must be made within 10 days "from the date of this letter." The Notice, which is sent only by regular mail, can take a few days to be actually delivered, which reduces the time to request an ENEC. Sometimes it takes several days and multiple correspondence and/or telephone calls to select dates and times that are mutually available for OCTC, respondent, and respondent's counsel if respondent is represented. In reality, often times more than 10 days pass after the Notice is sent before mutual dates are selected and submitted to the Court for consideration, and the current deadlines are honored more in the breach than in the observance.

The 10-day deadline to request an ENEC can be even more problematic when a respondent who responded to OCTC's investigation on his or her own does not decide to retain counsel until after receiving OCTC's Notice of Intent to File Disciplinary Charges, which as stated above usually occurs days after the letter is mailed. In such a situation, it may take a respondent several days to find and

retain discipline defense counsel, who would then communicate with OCTC in selecting mutually workable dates to schedule an ENEC. If the respondent, the OCTC counsel or respondent's counsel is in trial, on vacation, or otherwise out of the office, the 10-day period may pass before reasonably prompt action can be taken to request the ENEC

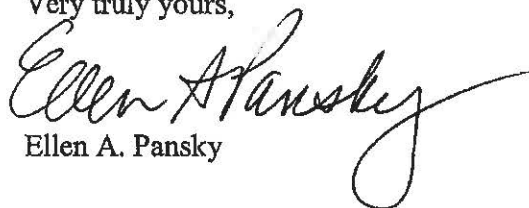
The provision in Rule 5.30 that an ENEC must be conducted within 15 days of the date of the request for an ENEC is nearly impossible to comply with. Due to scheduling conflicts among respondent, respondent's counsel, OCTC, and the Court, it is virtually never possible to schedule an ENEC within 15 days of the request. This will become even more problematic with the upcoming vacation of three State Bar judge positions and what appears to be a growing backlog of cases within OCTC.

Moreover, the State Bar Court requires parties to submit an ENEC statement (also referred to as an ENEC brief) at least three days before the ENEC, which typically allows only days to prepare and submit an ENEC statement. This can be difficult and impractical when, as commonly occurs, weeks or months have passed since the respondent's responsive explanation was submitted to the State Bar, resulting in a lack of opportunity to anticipate the receipt of the Notice of Intent to File and ENEC invitation; or where for respondent's counsel is retained by a respondent only after OCTC sends the Notice of Intent to File. Often counsel has pre-existing professional obligations, and it is unfeasible in a 10-day period for counsel to sufficiently communicate with the respondent, obtain and analyze OCTC's non-privileged documents, gather additional evidence, including mitigating evidence, engage in meaningful informal settlement discussions with OCTC, and prepare and submit an ENEC statement. While OCTC attorneys generally are cooperative in scheduling, practically speaking, it makes little sense to retain a time limitation that cannot be complied with in most cases.

It is of great benefit to the public and the administration of justice for State Bar disciplinary cases to be resolved as quickly and efficiently as possible. Settling cases at the ENEC stage accomplishes these goals. It would be far more cost-effective and effective to adopt more flexible time constraints in order to afford the parties and the court a more complete and comprehensive ENEC process, which will result in a greater percentage of cases settling before the filing of a Notice of Disciplinary Charges.

Thank you for considering my input.

Very truly yours,



Ellen A. Pansky

EAP/ab

ATTACHMENT D

ASSOCIATION OF DISCIPLINE DEFENSE COUNSEL

July 24, 2018

VIA EMAIL: sbcrulescomment@calbar.ca.gov

Attn: Antonia G. Darling, Chief Court Counsel

Re: Public Comment – Rule 5.30 re Early Neutral Evaluation Conferences

Dear State Bar Court:

On behalf of the Association of Discipline Defense Counsel (“ADDC”), we thank you for the opportunity to comment on the proposed changes to Rule 5.30 re Early Neutral Evaluation Conferences.

We agree with the additional language proposed by the Court to Rule 5.30 of the State Bar Rules of Procedure. However, we propose additional language to Rule 5.30, as provided in the enclosed attachments to this letter: Attachment “A” is the clean version, and Attachment “B” is the redline version with the Court’s original edits maintained in red, and the edits proposed by ADDC in purple. We understand and appreciate the Court’s revisions and the need for a clear rule to ensure the Court receives the Office of Chief Trial Counsel’s (“OCTC”) draft notice of disciplinary charges (“NDC”) and/or statement in sufficient time to prepare for a scheduled Early Neutral Evaluation Conference (“ENEC”). However, to ensure that the discussions at the ENEC are meaningful and fruitful, we believe Rule 5.30 should also provide respondent or respondent’s counsel with an opportunity to be on the same page as OCTC and the Court.

When OCTC gives notice of its intent to file an NDC, most respondents usually have a general understanding of the disciplinary issues. However, sometimes a general understanding is not enough, and sometimes OCTC will refocus its potential disciplinary charges after respondent has responded to the State Bar’s investigation. The “Notice of Intent to File NDC” letter by OCTC provides only a brief and vague reference to the rule or statutory violations that OCTC is considering charging. Often those references do not provide sufficient detail to respondent. Therefore, just as it is important for the Court to receive OCTC’s ENEC statement in sufficient time before the ENEC, it is equally important for respondent to receive the same well in advance of the ENEC and before respondent’s deadline to submit his/her ENEC statement, so that respondent may have a clear understanding as to the issues that need to be addressed before preparing respondent’s statement.

In the proposed transition of the Rules of Practice into the Rules of Procedure – which is a separate issue that is not addressed by this comment, the Court has proposed to revise the rule applicable to voluntary settlement conferences regarding OCTC’s settlement authority. ADDC proposes to incorporate a similar provision into Rule 5.30 regarding OCTC’s settlement

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authority at an ENEC.

The additional proposed revisions by ADDC do not conflict with the Court's proposed changes, and will not prejudice any party. The proposed changes will only serve to aid in moving pre-filing matters more smoothly, efficiently, and effectively, without requiring any significant more effort from anyone.

Sincerely,

A handwritten signature in black ink, appearing to read 'Zachary D. Wechsler', with a long horizontal flourish extending to the right.

Zachary D. Wechsler
President, ADDC

Enclosures

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.** However, failure to obtain the agreement of multiple dates by opposing counsel shall not be deemed a waiver of the right to request a conference if the inability to agree to multiple dates is attested to by the requesting party. 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. To the extent reasonably possible, the conference will be conducted. A State Bar Court hearing judge will conduct the conference within 15 days of the request or on such later date as agreed to by the parties and the court.
- (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 and member, -no later than three-five court days prior to the conference so member will have a reasonable time to respond, and the court will also have sufficient time to review the parties' documents before the conference. Member shall file the response, if any, no later than three court days prior to the conference. Failure to do so within the specified time may result in rescheduling-in the conference being rescheduled for a later date. This provides the court with needed flexibility to reschedule a conference as necessary where the complexity of the issues requires additional preparation. The documentation provided by the Office of Chief Trial Counsel 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) **Settlement Authority.** Because cases simply cannot be settled without the input of a person with authority to settle, given the significant new information that can be developed during the settlement conference OCTC must have an attorney available at the time of the ENEC with the discretion and authority to settle the case.

~~(D)~~(E) **Confidentiality.** The conference is confidential. A party may designate any document it submits for in camera inspection only.

~~(E)~~(F) **Trial Judge.** Unless otherwise stipulated by the parties, the Early Neutral Evaluation judge cannot be the trial judge in a later proceeding involving the