



# The State Bar *of California*

## AD HOC COMMISSION ON THE DISCIPLINE SYSTEM

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To: Members, Ad Hoc Commission on the Discipline System

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Subject: Adoption of Early Neutral Evaluation Conference Recommendations

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### EXECUTIVE SUMMARY

The Ad Hoc Commission on the Discipline System (AHCDS) was created to review the changes that have been proposed and implemented in the Office of Chief Trial Counsel since 2016 and evaluate their impact on public protection. The 26 member AHCDS focused on the impact of these reforms on a number of key aspects of the discipline system, including:

- Procedural justice and the experiences and perceptions of the system by complaining witnesses and respondents;
- Workload and operational efficiency of case processing;
- Case prioritization and differentiated case-flow management; and
- The efficacy of the system for preventing future attorney misconduct.

The AHCDS divided into two subcommittees, fairness and effectiveness, and then further into working groups to review specific areas of focus and come up with recommendations to be reviewed by the full commission. The four-member Early Neutral Evaluation Conference (ENEC) Working Group was tasked with reviewing the ENEC process and determining whether changes in that process could be made to improve fairness or efficiency. With respect to fairness, the working group looked at whether changes could be made to allow for an ENEC in criminal conviction cases. With respect to efficiency, the working group examined whether there should be time standards established between the first and subsequent ENECs. No consensus was reached among working group members regarding these issues.

## BACKGROUND

The narrative below gives background information on topics explored by the working group.

### EARLY NEUTRAL EVALUATION CONFERENCE

The Early Neutral Evaluation Conference (ENEC) is a settlement conference held prior to the Office of Chief Trial's (OCTC) filing of Notice of Disciplinary Charges (NDC). [State Bar Rule of Procedure 5.30\(B\)](#) states that "At the conference, the judge must give the parties an oral evaluation of the facts and charges and the potential for imposing discipline." Prior to filing an NDC, OCTC notifies a respondent of their right to request an ENEC and the respondent must respond to the notice within 10 days with a request to exercise this right. The conference is to take place within 15 days of the request. Judges may order multiple ENECs.

An analysis of 442 cases filed in State Bar Court between March 2019 through October 2021 found that cases that had an ENECs took, on average, 659 days to file compared with 485 days for cases that did not have an ENEC. Around one third of cases that had an ENEC required two sessions and 24 percent required three or more.<sup>1</sup>

More information on ENECs can be found [here](#).

### CRIMINAL CONVICTION MATTERS

OCTC receives notices of criminal conviction matters from attorneys ([Business and Professions code 6068\(o\)\(4\), \(5\)](#)), prosecutors ([Business and Professions code 6101\(b\)](#)), and courts ([Business and Professions code 6101\(c\)](#)).<sup>2</sup> OCTC also learns of criminal conviction through Criminal Offender Record Information (CORI). These cases, referred to as "CORI cases" are the result of Rule of Court, rule 9.9.5, requiring all licensed attorneys to be re-fingerprinted by December 2019. The State Bar now regularly receives Subsequent Arrest Notification and Records of Arrest and Prosecution sheets from the Department of Justice. State Bar staff evaluate these RAP sheets to ensure that OCTC is made aware of any criminal charges and convictions against attorneys that had not been previously reported.

OCTC has 30 days to transmit criminal conviction cases to the State Bar Court Review Department if it determines that the case may or does involve moral turpitude.<sup>3</sup> Transmittal to the Review Department makes the case public. In criminal conviction cases with a misdemeanor conviction involving moral turpitude the Review Department, on its own motion or on the motion of any party, may direct the Hearing Department to conduct a hearing to resolve whether the case involves moral turpitude.

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<sup>1</sup> Data limitations prevented an analysis of the impact of multiple ENECs on case age.

<sup>2</sup> For example, [Business and Professions code 6101\(c\)](#) instructs clerks of courts in which an attorney is convicted of a crime to send the conviction to OCTC within 48 hours of the conviction.

<sup>3</sup> [SB 176](#), Jackson (2019) extended the amount of time OCTC has to transmit criminal conviction cases that involve or may involve moral turpitude from 5 days to 30 days.

An analysis of criminal conviction cases transmitted to State Bar Court between March 3, 2019, and February 28, 2022, found that the majority of cases transmitted were CORI cases and nearly all of these cases were based on misdemeanor convictions. In contrast, 29 percent of non-CORI criminal conviction cases were based on felony convictions. The analysis also found that 45 percent of cases where the underlying charge was a misdemeanor resulted in non-disciplinary action and nearly all of those cases were dismissed pre-trial. Of those dismissed pretrial, more than half were dismissed by OCTC.<sup>4</sup>

## RECOMMENDATIONS

The working group met several times to explore the ENEC process. Their discussions settled on two topics: 1) extending the deadline to transmit criminal conviction matters in misdemeanor case to allow for an ENEC and, 2) establishing timelines between subsequent ENECS. No consensus was reached among working group members regarding the following recommendations.

**The Ad Hoc Commission on the Discipline System recommends seeking a statutory amendment to extend the deadline for the transmission of criminal conviction matters in misdemeanor cases to allow for an Early Neutral Evaluation Conference.**

Proponents of offering an ENEC to respondents in criminal conviction cases state that doing so would have many benefits for the respondent and the State Bar including:

- The current process does not allow for criminal conviction cases to be resolved prior to the notification of the public, even in cases where the case ultimately results in non-disciplinary action or the ultimate discipline is a private reproof. Allowing respondents an opportunity to present a response to the allegation that a misdemeanor conviction involves moral turpitude prior to the case becoming public would increase fairness in the system and save resources;
- The ENEC process provides the respondent with an early assessment of the matter and can alert them to its seriousness; and
- Research found that nearly half of all criminal conviction cases where the underlying charge was a misdemeanor resulted in non-disciplinary action and nearly all were dismissed pre-trial.

The counter view is based on the following arguments:

- CORI cases comprise the majority of criminal conviction matters transmitted to the State Bar Court in recent years and will soon become a small minority as OCTC works through the influx of cases the State Bar received in 2019 and 2020 as a result of the re-fingerprinting requirement and automated reporting of criminal convictions;

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<sup>4</sup> In contrast, only 5 percent of cases where the underlying charge was a felony resulted in non-disciplinary action.

- The analysis described above found that 80 percent of non-CORI cases result in public discipline. Allowing respondents to resolve criminal conviction cases with an ENEC would delay public notification of attorney criminal convictions, thus compromising public protection;
- Criminal convictions are already a matter of public record and there are opportunities to settle cases during pre-trial and even the trial phase;
- Offering ENECs in criminal conviction cases would overburden an already strained resource; and
- Modifying the criminal conviction transmittal timeline would require a legislative change. Given the 2019 extension of time to transmit criminal conviction cases from 5 to 30 days, the legislature is unlikely to extend this timeline further.

**The Ad Hoc Commission on the Discipline System recommends that the State Bar establish timelines for subsequent Early Neutral Evaluation Conferences.**

Proponents for establishing timelines between the initial and subsequent ENEC's seek to address the lack of time constraints between multiple conferences. They assert:

- The lack of time constraints delays the public notification of the pending charges against respondents;
- Rule 5.30 calls for the first ENEC to be held within 25 days of the notice to the respondent. This shows Board intent to conduct the process quickly; and
- Multiple ENECs do not increase the likelihood of settlement. Overall, 26 percent of all ENECs result in settlement; this does not vary much by the number of conferences held.

The counterview is that multiple ENECs occur when the judge believes settlement is possible and is in the best interests of all parties. Therefore, judicial discretion in the ENEC process must be maintained.