



# The State Bar of California

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## **OPEN SESSION**

### **AGENDA ITEM**

**50-3 FEBRUARY 2024**

**DATE:** February 26, 2024

**TO:** Members, Board of Trustees  
Sitting as the Regulation and Discipline Committee

**FROM:** George Cardona, Chief Trial Counsel  
Michelle Cramton, Clerk of the State Bar Court

**SUBJECT:** Proposed Amendments to Rules of the State Bar Relating to Early Neutral Evaluation Conferences and Prefiling Conferences in Misdemeanor Conviction Matters (Amendments to Rules 5.30 and 5.341): Return from Public Comment and Request for Adoption

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## **EXECUTIVE SUMMARY**

At its November 2023 meeting, the Board authorized circulation for public comment of proposed amendments to State Bar Rules 5.30 and 5.341 intended to implement Ad Hoc Commission on the Discipline System recommendations to: (1) promote the use of Early Neutral Evaluation Conferences as a mechanism for arriving at settlements of State Bar disciplinary proceedings; and (2) implement optional prefiling meetings similar to an Early Neutral Evaluation Conference in misdemeanor conviction matters. After a 45-day public comment period, two comments have been received, both generally positive. This item seeks adoption of the proposed amendments.

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## **BACKGROUND**

The background of the proposed amendments is set out in the November 2023 agenda item that sought authorization to circulate for public comment (Attachment E).

## **DISCUSSION**

### **I. Early Neutral Evaluation Conference**

As discussed in more detail in Attachment E, the proposed amendments to rule 5.30 are

intended to promote the use of Early Neutral Evaluation Conferences as a mechanism for arriving at settlements of State Bar disciplinary proceedings. The proposed amendments are attached in clean text (Attachment A) and a redline showing the changes from current rule 5.30 (Attachment B). In sum, the proposed amendments to rule 5.30:

- Change the name of the conference from “Early Neutral Evaluation Conference” to “Prefiling Settlement Conference” (PSC);
- Allow the PSC to be held more than 15 days after the request is made, if both parties agree to a specific later date;
- Require the parties to meet and confer prior to the PSC;
- Require each party to lodge with the court a settlement conference statement, pursuant to the existing requirement in rule 1206 of the Rules of Practice;
- Allow the court to reschedule a PSC if either party fails to timely submit the settlement conference statement and other documentation; and
- Eliminate the requirement for the judge to give an oral evaluation of the facts and charges and the potential for imposing discipline.

During the public comment period, we received two public comments on the proposed amendments to rule 5.30, one from James Ham, whose practice includes representation of attorneys in disciplinary matters, and the other from Rachel Brewer, a conflicts attorney in the Office of General Counsel for Barnes & Thornburg LLP. Both agreed with the proposed amendments.<sup>1</sup>

Staff now recommends adoption of the proposed amendments to rule 5.30, with an effective date of July 1, 2024, to enable time for publication and the adoption of implementing procedures by the Office of Chief Trial Counsel (OCTC) and the State Bar Court (SBC). If the proposed amendments to rule 5.30 are adopted, corresponding changes will need to be made in the Rules of Practice of the SBC and in the Guidelines for Scheduling and Conducting Early Neutral Evaluation Conferences posted on the SBC website.

## **II. Pre-Transmittal Conferences in Misdemeanor Conviction Matters**

As discussed in more detail in Attachment E, the proposed amendments to rule 5.341 provide OCTC with the option to request a pre-transmittal conference in disciplinary cases based on misdemeanor criminal convictions where OCTC believes such a conference may affect its determination whether a misdemeanor conviction involves or may involve moral turpitude or other conduct warranting discipline, and hence its decision whether or not to transmit the conviction for initiation of a disciplinary proceeding. The proposed amendments to rule 5.341 are attached in clean text (Attachment C) and a redline showing the changes from current rule 5.341 (Attachment D). To enable compliance with the statutory 30-day time limit for transmittal, the proposed amendments set strict time limits for OCTC to elect to request a

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<sup>1</sup> Mr. Ham selected the option “Agree only if modified” with respect to the proposed amendments to rule 5.30, but his accompanying comments, discussed below in conjunction with the proposed amendments to rule 5.341, suggest that he seeks modification only of the proposed amendments to rule 5.341.

conference, the respondent to join in the request, and the court to schedule and conduct the conference. In sum, the proposed amendments to rule 5.341:

- Allow OCTC to request a pre-transmittal settlement conference for misdemeanor convictions within three calendar days of its receipt of the record of conviction;
- Provide the respondent with three calendar days to join in the request;
- Require the court to schedule a pre-transmittal settlement conference within 14 days of the respondent's joinder in the request;
- Require the parties to meet and confer prior to the pre-transmittal settlement conference; and
- Require each party to lodge with the court a settlement conference statement, pursuant to the existing requirement in rule 1206 of the Rules of Practice;
- Authorize OCTC to proceed with the transmittal if a requested conference cannot be scheduled or conducted within the mandatory time frames.

During the public comment period, we received two public comments on the proposed amendments to rule 5.341, from Mr. Ham and Ms. Brewer. Ms. Brewer agreed with the proposed amendments. Mr. Ham agreed with the proposed amendments only if modified, explaining as follows:

The interests of justice and judicial economy are furthered by allowing a pre-transmittal conference in misdemeanor conviction matters. However, the current proposal is seriously flawed and unworkable as a practical matter. The law needs to be changed to allow OCTC more time before being hastily required to file a transmittal of a criminal record to the Review Department before OCTC has conducted an appropriate investigation into the matter.

The current 30-day time limit for transmittal is set by Business and Professions Code section 6101. The Ad Hoc Commission on Discipline recommended that the Board seek an amendment to the statute to extend this time limit. At its January 2023 meeting, however, the Board decided not to seek any change in the statutory time limit.

Staff now recommends adoption of the proposed amendments to rule 5.341, with an effective date of July 1, 2024, to enable time for publication and the adoption of implementing procedures by OCTC and the SBC. If the proposed amendments to rule 5.341 are adopted, corresponding changes will need to be made in the rules of practice of the SBC and in the Guidelines for Scheduling and Conducting Early Neutral Evaluation Conferences posted on the SBC website.

## **FISCAL/PERSONNEL IMPACT**

The proposed changes are intended to encourage settlement of more cases at the prefiling/pre-transmittal stages. If they are effective in getting more cases to settle early, it will reduce the workload of OCTC and the SBC by resolving more cases at an early stage, reducing the number of cases that go to trial. The new procedures will require some additional work on the part of

both OCTC and the SBC in the preparation for and conduct of prefiling/pre-transmittal conferences. If the proposals succeed in resolving more cases prior to filing/transmittal, however, the overall reduction in post-filing/transmittal workload is expected to offset the increased prefiling/pre-transmittal workload.

## **AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA**

Title 5, Division 2, Chapter 1, Section 5.30

Title 5, Division 6, Chapter 2, Section 5.341

## **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

## **STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS**

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

- d. 1. Align and implement recommendations of the Special Discipline Case Audit Committee and the Ad Hoc Commission on the Discipline System.

## **RECOMMENDATIONS**

**Should the Board of Trustees, sitting as the Regulation and Discipline Committee, concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that the Board of Trustees sitting as the Regulation and Discipline Committee hereby approves and adopts amendments to rule 5.30 of the Rules of the State Bar of California, as set forth in Attachments A and B, and amendments to rule 5.341 of the Rules of the State Bar of California, as set forth in Attachments C and D; and it is

**FURTHER RESOLVED**, that the effective date of the adopted amendments to rules 5.30 and 5.341 of the Rules of the State Bar of California shall be July 1, 2024.

## **ATTACHMENTS LIST**

- A. Proposed Amendments to Rule 5.30 – Clean Version
- B. Proposed Amendments to Rule 5.30 – Redline to Current Rule 5.30
- C. Proposed Amendments to Rule 5.341 – Clean Version
- D. Proposed Amendments to Rule 5.341 – Redline to Current Rule 5.341
- E. Board Agenda Item 60-5, November 2023 Meeting (without attachments)

**Proposed Amendments to Rule 5.30 – Clean Version**

**Rule 5.30 Prefiling Settlement Conference**

**(A) Scheduling Conference.** Prior to the filing of disciplinary charges, the Office of Chief Trial Counsel will notify the attorney in writing of the right to request a Prefiling Settlement Conference. The written notice must state that the attorney may be ordered to pay costs pursuant to Business and Professions Code section 6086.10, and monetary sanctions pursuant to Business and Professions Code section 6086.13 and rule 5.137 of the Rules of Procedure of the State Bar. Within 10 days from the date of the notice, either party may request a Prefiling Settlement Conference using the court-approved form located on the court's website and following the directions provided. Failure to request a conference within that time is deemed a waiver of the right to a conference. If proper notice is provided, failure to hold a conference will not be a basis for dismissal of a proceeding. A State Bar Court hearing judge will conduct the conference within 15 days of the request unless upon agreement by both parties to a specific later date.

**(B) Meet and Confer; Settlement Conference Statements; Confidentiality.** Pursuant to Rule 5.52.4, the parties shall meet and confer prior to the Prefiling Settlement Conference. Pursuant to rule 1206 of the Rules of Practice of the State Bar Court, each party shall lodge with the court, but not file, a settlement conference statement. The statement must be clearly marked as such, may be in letter form, must indicate in the heading the date and time of the scheduled settlement conference, and must be addressed to the settlement conference judge. Settlement conference statements may, but are not required to, be served on the opposing party. The Office of Chief Trial Counsel must submit a copy of the draft notice of disciplinary charges, or other written summary of the proposed charges to the judge with the settlement conference statement. The documentation submitted by the Office of Chief Trial Counsel must include the rules and statutes alleged to have been violated by the attorney, a summary of the facts supporting each violation, and the Office of Chief Trial Counsel's settlement position, including the amount of monetary sanctions being sought and the reasons. Each party may submit documents and information to support its position with the settlement conference statement. The failure of either party to submit the settlement conference statement and other required documentation within the specified time may result in the conference being rescheduled for a later date. The content of discussions and written statements made in connection with the Prefiling Settlement Conference and the meet and confer process are confidential and subject to Rule 5.52.6.

**(C) Stipulation for Approval; Assignment of Trial Judge.** If the parties 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 prefiling settlement judge for approval or rejection. If the matter does not settle prefiling, unless otherwise stipulated by the parties, the prefiling settlement judge cannot be the trial judge in a later proceeding involving the same facts.

## Proposed Amendments to Rule 5.30 – Redline to Current Rule 5.30

### Rule 5.30 ~~Prefiling; Early Neutral Evaluation~~ Prefiling Settlement Conference

- (A) ~~Early Neutral Evaluation Scheduling Conference.~~** Prior to the filing of disciplinary charges, the Office of Chief Trial Counsel will notify the attorney in writing of the right to request ~~an Early Neutral Evaluation a~~ Prefiling Settlement Conference. The written notice must state that the attorney may be ordered to pay costs pursuant to Business and Professions Code section 6086.10, and monetary sanctions pursuant to Business and Professions Code section 6086.13 and rule 5.137 of the Rules of Procedure of the State Bar. Within 10 days from the date of the notice, either ~~Either~~ party may request an Early Neutral Evaluation a Prefiling Settlement Conference using the court-approved form located on the court's website and following the directions provided. A party will have 10 days from the date of service of 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 for dismissal of a proceeding. A State Bar Court hearing judge will conduct the conference within 15 days of the request unless upon agreement by both parties to a specific later date.
- ~~(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) (B) Evidence Meet and Confer; Settlement Conference Statements;~~** **Confidentiality.** Pursuant to Rule 5.52.4, the parties shall meet and confer prior to the Prefiling Settlement Conference. Pursuant to rule 1206 of the Rules of Practice of the State Bar Court, each party shall lodge with the court, but not file, a settlement conference statement. The statement must be clearly marked as such, may be in letter form, must indicate in the heading the date and time of the scheduled settlement conference, and must be addressed to the settlement conference judge. Settlement conference

statements may, but are not required to, be served on the opposing party. The Office of Chief Trial Counsel must submit a copy of the draft notice of disciplinary charges, or other written summary of the proposed charges to the judge with the settlement conference statement 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 submitted by the Office of Chief Trial Counsel must include the rules and statutes alleged to have been violated by the attorney, a summary of the facts supporting each violation, and the Office of Chief Trial Counsel's settlement position, including the amount of monetary sanctions being sought and the reasons. Each party may submit documents and information to support its position with the settlement conference statement. The failure of either party to submit the settlement conference statement and other required documentation within the specified time may result in the conference being rescheduled for a later date. The content of discussions and written statements made in connection with the Prefiling Settlement Conference and the meet and confer process are confidential and subject to Rule 5.52.6.

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

**(C) Stipulation for Approval; Assignment of Trial Judge.** If the parties 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 prefiling settlement judge for approval or rejection. If the matter does not settle prefiling, unless ~~Unless~~ otherwise stipulated by the parties, the prefiling settlement ~~Early Neutral Evaluation~~ judge cannot be the trial judge in a later proceeding involving the same facts.



**Proposed Amendments to Rule 5.341 – Clean Version**

**Rule 5.341 Beginning Proceedings**

- (A) **Initiation of proceedings.** Conviction proceedings are initiated in the Review Department of the State Bar Court when the Office of Chief Trial Counsel files a certified copy of the record of conviction or sentence of incarceration for 90 days or more. If the conviction is not final as defined in California Rules of Court, rule 9.10(a), but becomes final later, the Office of Chief Trial Counsel must file a supplemental record of conviction containing sufficient proof that the conviction is final. Any record of conviction or sentence of incarceration for 90 days or more filed must be served on the attorney under rule 5.25.
- (B) **Optional Prefiling Settlement Conference for Misdemeanor Convictions.** For misdemeanor convictions only, prior to filing a certified copy of the record of conviction, if the Office of Chief Trial Counsel believes that a prefiling settlement conference may affect its determination whether the misdemeanor conviction involves or may involve moral turpitude or other conduct warranting discipline, the Office of Chief Trial Counsel may, but is not required to, request a prefiling settlement conference.
- (1) **Scheduling Conference.** Within three days of the Office of Chief Trial Counsel's receipt of the certified record of conviction, the Office of Chief Trial Counsel will notify the attorney in writing, via email, that the Office of Chief Trial Counsel has elected to request a prefiling settlement conference. The written notice must include the record of conviction and must state that the attorney may be ordered to pay costs pursuant to Business and Professions Code section 6086.10, and monetary sanctions pursuant to Business and Professions Code section 6086.13 and rule 5.137 of the Rules of Procedure of the State Bar. Within three days from the date of the written notice, the attorney must notify the Office of Chief Trial Counsel, in writing, via email, whether the attorney joins in the request for a prefiling settlement conference. If the attorney joins in the request for a prefiling settlement conference, then, within three days from the date of the attorney's notice of joinder, the Office of Chief Trial Counsel will request a Prefiling Settlement Conference using the court-approved form located on the court's website and following the directions provided. A State Bar Court hearing judge will conduct the conference within 14 days of the request.
- (2) **Meet and Confer; Settlement Conference Statements; Confidentiality.** Pursuant to Rule 5.52.4, the parties shall meet and confer prior to the Prefiling Settlement Conference. Pursuant to rule 1206 of the Rules of Practice of the State Bar Court, each party shall lodge with the court, but not file, a settlement conference statement. The statement must be clearly marked as such, may be in letter form, must indicate in the heading the date and time of the scheduled settlement conference, and must be addressed to the settlement conference judge. Settlement conference statements may, but are not required to, be served on the opposing

party. The Office of Chief Trial Counsel must submit a copy of the record of conviction, a summary of the facts demonstrating that the conviction involves or may involve moral turpitude or other misconduct warranting discipline, and the Office of Chief Trial Counsel's settlement position, including the amount of monetary sanctions being sought and the reasons. Each party may submit documents and information to support its position with the settlement conference statement. The failure of either party to submit the settlement conference statement and other required documentation within the specified time may result in the conference being cancelled. The content of discussions and written statements made in connection with the Prefiling Settlement Conference and the meet and confer process are confidential and subject to Rule 5.52.6.

- (3) **Stipulation for Approval; Assignment of Trial Judge.** If the parties 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 prefiling settlement judge for approval or rejection. If the matter does not settle prefiling, unless otherwise stipulated by the parties, the prefiling settlement judge cannot be the trial judge in a later proceeding involving the same facts.
- (4) **Failure to Conduct Requested Conference.** If, for whatever reason, a requested prefiling settlement conference is not conducted within 28 days of the Office of Chief Trial Counsel's receipt of the certified record of conviction, the Office of Chief Trial Counsel may proceed to file the certified record of conviction in the Review Department.

**Proposed Amendments to Rule 5.341 – Redline to Current Rule 5.341**

**Rule 5.341 Beginning Proceedings**

- (A) Initiation of proceedings.** Conviction proceedings are initiated in the Review Department of the State Bar Court when the Office of Chief Trial Counsel files a certified copy of the record of conviction or sentence of incarceration for 90 days or more. If the conviction is not final as defined in California Rules of Court, rule 9.10(a), but becomes final later, the Office of Chief Trial Counsel must file a supplemental record of conviction containing sufficient proof that the conviction is final. Any record of conviction or sentence of incarceration for 90 days or more filed must be served on the attorney under rule 5.25.
- (B) Optional Prefiling Settlement Conference for Misdemeanor Convictions.** For misdemeanor convictions only, prior to filing a certified copy of the record of conviction, if the Office of Chief Trial Counsel believes that a prefiling settlement conference may affect its determination whether the misdemeanor conviction involves or may involve moral turpitude or other conduct warranting discipline, the Office of Chief Trial Counsel may, but is not required to, request a prefiling settlement conference.
- (1) Scheduling Conference.** Within three days of the Office of Chief Trial Counsel's receipt of the certified record of conviction, the Office of Chief Trial Counsel will notify the attorney in writing, via email, that the Office of Chief Trial Counsel has elected to request a prefiling settlement conference. The written notice must include the record of conviction and must state that the attorney may be ordered to pay costs pursuant to Business and Professions Code section 6086.10, and monetary sanctions pursuant to Business and Professions Code section 6086.13 and rule 5.137 of the Rules of Procedure of the State Bar. Within three days from the date of the written notice, the attorney must notify the Office of Chief Trial Counsel, in writing, via email, whether the attorney joins in the request for a prefiling settlement conference. If the attorney joins in the request for a prefiling settlement conference, then, within three days from the date of the attorney's notice of joinder, the Office of Chief Trial Counsel will request a Prefiling Settlement Conference using the court-approved form located on the court's website and following the directions provided. A State Bar Court hearing judge will conduct the conference within 14 days of the request.
- (2) Meet and Confer; Settlement Conference Statements; Confidentiality.** Pursuant to Rule 5.52.4, the parties shall meet and confer prior to the Prefiling Settlement Conference. Pursuant to rule 1206 of the Rules of Practice of the State Bar Court, each party shall lodge with the court, but not file, a settlement conference statement. The statement must be clearly marked as such, may be in letter form, must indicate in the heading the date and time of the scheduled settlement conference, and must be addressed to the settlement conference judge. Settlement conference statements may, but are not required to, be served on the opposing

party. The Office of Chief Trial Counsel must submit a copy of the record of conviction, a summary of the facts demonstrating that the conviction involves or may involve moral turpitude or other misconduct warranting discipline, and the Office of Chief Trial Counsel's settlement position, including the amount of monetary sanctions being sought and the reasons. Each party may submit documents and information to support its position with the settlement conference statement. The failure of either party to submit the settlement conference statement and other required documentation within the specified time may result in the conference being cancelled. The content of discussions and written statements made in connection with the Prefiling Settlement Conference and the meet and confer process are confidential and subject to Rule 5.52.6.

- (3) Stipulation for Approval; Assignment of Trial Judge.** If the parties 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 prefiling settlement judge for approval or rejection. If the matter does not settle prefiling, unless otherwise stipulated by the parties, the prefiling settlement judge cannot be the trial judge in a later proceeding involving the same facts.
- (4) Failure to Conduct Requested Conference.** If, for whatever reason, a requested prefiling settlement conference is not conducted within 28 days of the Office of Chief Trial Counsel's receipt of the certified record of conviction, the Office of Chief Trial Counsel may proceed to file the certified record of conviction in the Review Department.



# The State Bar of California

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ATTACHMENT E

## OPEN SESSION AGENDA ITEM 60-5 NOVEMBER 2023

**DATE:** November 16, 2023

**TO:** Members, Board of Trustees  
Sitting as the Regulatory and Discipline Committee

**FROM:** George Cardona, Chief Trial Counsel  
Michelle Cramton, Clerk of the State Bar Court

**SUBJECT:** Proposed Amendments to Rules of the State Bar Relating to Early Neutral Evaluation Conferences (Rule 5.30) and Prefiling Conferences in Misdemeanor Conviction Matters (Rule 5.341): Request to Circulate for Public Comment

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### EXECUTIVE SUMMARY

Consistent with Board direction at its January and September 2023 meetings, this item seeks authorization to circulate for public comment amendments to the State Bar Rules intended to implement Ad Hoc Commission on the Discipline System recommendations to: (1) promote the use of Early Neutral Evaluation Conferences as a mechanism for arriving at settlements of State Bar disciplinary proceedings; and (2) implement optional prefiling meetings similar to an Early Neutral Evaluation Conference in misdemeanor conviction matters.

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### BACKGROUND

The Board established the Ad Hoc Commission on the Discipline System in November 2020 to assess reforms implemented by the State Bar to further the efficiency, effectiveness, and fairness of the discipline system and to identify any additional improvements needed. On September 22, 2022, the Board received the commission's final report and recommendations and directed staff to issue those recommendations for a 60-day public comment period. The commission convened on December 5, 2022, to review public comments received. The commission modified certain recommendations, and asked staff to draft new recommendations, based on that public comment.

The Board received the commission's revised recommendations and staff's suggested amendments and additions at its January 19, 2023, meeting. As relevant to this agenda item, the Board directed staff to:

1. "work with stakeholders to propose revisions to all applicable rules to promote the use of Early Neutral Evaluation Conferences as a mechanism for arriving at settlements of State Bar disciplinary proceedings"; and
2. "work with stakeholders to study possible revisions to all applicable rules to determine the feasibility of conducting a pre-transmittal meeting similar to an Early Neutral Evaluation Conference in misdemeanor conviction matters subject to Rule 5.340–5.347 that would determine whether or not the facts and circumstances underlying the misdemeanor conviction involve moral turpitude or other misconduct warranting discipline, and if appropriate, evaluate a potential disposition of the matter"

The Board received staff's update on its work on these directives at its September 20, 2023, meeting. As reported, with respect to revising the rules to promote use of Early Neutral Evaluation Conferences (ENECs) as a mechanism for arriving at settlements, a State Bar Court (SBC) working group had developed a proposal for changes to rule 5.30, solicited input on that proposal from both the Office of Chief Trial Counsel (OCTC) and the Association of Discipline Defense Counsel (ADDC), and made several revisions in response to this input to arrive at a revised proposal. After discussion, the Board directed staff to proceed with this revised proposal.

As also reported, with respect to pre-transmittal meetings in misdemeanor conviction matters, in light of the Board's prior decision at its January 2023 meeting not to seek any change to the statutory 30-day time limit for transmittal by OCTC of any conviction that "involves or may involve" moral turpitude (see Business and Professions Code section 6101), two options were presented for consideration: (a) amendments to the rules to provide OCTC with the option of requesting a pre-transmittal conference in those circumstances where it believes such a conference might affect its determination whether a misdemeanor conviction involves or may involve moral turpitude or other conduct warranting dismissal and so its decision whether to transmit; or (b) amendments to the rules to require OCTC to request a pre-transmittal conference in all misdemeanor conviction matters. After discussion of stakeholder feedback, including OCTC's and the State Bar Court's practical concerns over the ability to schedule and hold conferences within the required 30-day time frame, the Board appeared to favor staff proceeding with proposed amendments to implement an optional request for pre-transmittal conferences.

This agenda item follows up on the discussion and guidance from the September 2023 meeting and seeks authorization to circulate for public comment proposed rule amendments developed in accordance with the Board's prior guidance and direction.

## **DISCUSSION**

### **I. EARLY NEUTRAL EVALUATION CONFERENCE**

Currently, rule 5.30 of the State Bar Rules of Procedure requires OCTC, prior to the filing of disciplinary charges, to inform the attorney in writing of the right to request an ENEC. Either side may request an ENEC within 10 days of the service of the notice, and the SBC is required to conduct the conference within 15 days of the request. OCTC is required to submit a copy of the draft NDC or a written summary of the proposed charges to the court at least three court days before the conference. Documentation must include the rules and statutes alleged to have been violated, a summary of the facts supporting each alleged violation, and OCTC's settlement position. At the conference, the judge must give the parties an oral evaluation of the facts and charges and the potential for imposing discipline.

As noted in the SB 211 Case Processing Standards Proposal (October 28, 2022, revised November 4, 2022), the ENEC process, in which a prefiling conference overseen by a State Bar Court judge is mandated, is unique to California. The three subject matter experts (SMEs) consulted by the State Bar in developing the SB 211 case processing standards proposal noted that the ENEC process can significantly slow the charging stage, an observation consistent with State Bar research showing that cases with ENECs have longer overall case processing times (through filing). The SMEs suggested eliminating a mandatory prefiling ENEC (leaving the parties free to pursue settlement discussions on their own before filing) and instead having a mandatory evaluation/settlement conference conducted with the court post-filing. Alternatively, one SME, noting that a prefiling ENEC adds time to case processing, advised considering cases completed by OCTC for purposes of the time standards before the ENEC. Ultimately, the SB 211 case processing standards proposal adopted the latter approach.

The SBC working group developed its proposal based on the view that ENECs contribute to fairness and efficiency by helping to resolve appropriate cases at an early stage. Potential delays in filing resulting from ENECs may become less significant with an increased focus on case processing time for the entirety of the life of a case, not just through the time of filing—changes to encourage settlements using ENECs may decrease overall average case processing time. Although delays in filing occasioned by ENECs may continue to somewhat delay public notice of disciplinary charges, public protection should benefit from making ENECs a more effective tool for reaching settlements, allowing resources to be focused on the most serious and difficult cases.

Proposed amendments to rule 5.30 intended to promote the use of Early Neutral Evaluation Conferences as a mechanism for arriving at settlements of State Bar disciplinary proceedings are attached in clean text (Attachment A) and a redline showing the changes from current rule 5.30 (Attachment B). To make it clear to parties that the purpose of the conference is to help the parties determine if a settlement can be reached, the proposed amendments rename ENECs as “Prefiling Settlement Conferences” (PSCs). The proposed amendments also implement changes intended to ensure that both sides come to the PSC better prepared with the information they need to determine if a settlement can be reached. The State Bar Court judge overseeing the PSC will still act as a mediator, assisting the parties in determining

whether a settlement can be reached. In this role, the State Bar Court judge may still express views regarding the facts and charges and the potential for imposing discipline. The proposed amendments, however, remove the requirement that in all cases the State Bar Court judge overseeing the PSC must provide an oral evaluation of the facts and charges and the potential for imposing discipline, based on the SBC working group's finding that this is not generally useful in helping the parties reach settlement and often calls upon the ENEC judge to make determinations without having sufficient information.<sup>1</sup>

Specifically, the proposed amendments to rule 5.30:

- Change the name of the conference from “Early Neutral Evaluation Conference” to “Prefiling Settlement Conference;”
- Allow the PSC to be held more than 15 days after the request is made, if both parties agree to a specific later date;
- Require the parties to meet and confer prior to the PSC;
- Require each party to lodge with the court a settlement conference statement, pursuant to the existing requirement in rule 1206 of the Rules of Practice;
- Allow the court to reschedule a PSC if either party fails to timely submit the settlement conference statement and other documentation; and
- Eliminate the requirement for the judge to give an oral evaluation of the facts and charges and the potential for imposing discipline.

If the proposed amendments to rule 5.30 are adopted, corresponding changes will need to be made in the Rules of Practice of the SBC and in the Guidelines for Scheduling and Conducting Early Neutral Evaluation Conferences posted on the SBC website.

## **II. PRE-TRANSMITTAL CONFERENCES IN MISDEMEANOR CONVICTION MATTERS**

The rules governing criminal conviction proceedings are set out in the State Bar Rules of Procedure, rules 5.340 to 5.347. Rule 5.341 governs transmission. Neither rule 5.341 nor rule 5.30 currently has any provision for a pre-transmission conference equivalent to a PSC. The proposed amendments to rule 5.341 provide OCTC with the option to request a pre-transmission conference in those cases where OCTC believes such a conference may affect its determination whether a misdemeanor conviction involves or may involve moral turpitude or other conduct warranting discipline. The proposed amendments to rule 5.341 are attached in clean text (Attachment C) and a redline showing the changes from current rule 5.341 (Attachment D). To enable compliance with the statutory 30-day time limit for transmittal, the proposed amendments set strict time limits for OCTC to elect to request a conference, the respondent to join in the request, and the court to schedule and conduct the conference.

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<sup>1</sup> OCTC remains of the view that this requirement should be retained, but does not object to the proposed amendments, subject to recognition that the State Bar Court will continue to express views regarding the facts and charges and potential for imposing discipline where appropriate in its role as a mediator seeking to encourage the parties to arrive at settlements at the PSC if possible.



Specifically, the proposed amendments to rule 5.341:

- Allow OCTC to request a pre-transmittal settlement conference for misdemeanor convictions within three calendar days of its receipt of the record of conviction;
- Provide the respondent with three calendar days to join in the request;
- Require the court to schedule a pre-transmittal settlement conference within 14 days of the respondent's joinder in the request;
- Require the parties to meet and confer prior to the pre-transmittal settlement conference;
- Require each party to lodge with the court a settlement conference statement, pursuant to the existing requirement in rule 1206 of the Rules of Practice; and
- Authorize OCTC to proceed with the transmittal if a requested conference cannot be scheduled or conducted within the mandatory time frames.

If the proposed amendments to rule 5.341 are adopted, corresponding changes will need to be made in the rules of practice of the SBC and in the Guidelines for Scheduling and Conducting Early Neutral Evaluation Conferences posted on the SBC website.

## **FISCAL/PERSONNEL IMPACT**

The proposed changes are intended to encourage settlement of more cases at the prefiling/pre-transmittal stages. If they are effective in getting more cases to settle early, it will reduce the workload of OCTC and the SBC by resolving more cases at an early stage, reducing the number of cases that go to trial. The new procedures will require some additional work on the part of both OCTC and the SBC in the preparation for and conduct of prefiling/pre-transmittal conferences. If the proposals succeed in resolving more cases prior to filing/transmittal, however, the overall reduction in post-filing/transmittal workload is expected to offset the increased prefiling/pre-transmittal workload.

## **AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA**

Title 5, Division 2, Chapter 1, Section 5.30

Title 5, Division 6, Chapter 2, Section 5.341

## **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None.

## **STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS**

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

- d. 1. Align and implement recommendations of the Special Discipline Case Audit Committee and the Ad Hoc Commission on the Discipline System.

## **RECOMMENDATIONS**

**Should the Board of Trustees, sitting as the Regulation and Discipline Committee, concur in the proposed action, passage of the following resolution is recommended:**

**RESOLVED**, that the Board of Trustees sitting as the Regulation and Discipline Committee authorizes staff to make available for public comment, for a period of 45 days, proposed amendments to rule 5.30 of the Rules of the State Bar of California, as set forth in Attachments A and B, and proposed amendments to rule 5.341 of the Rules of the State Bar of California, as set forth in Attachments C and D; 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 amendments to the Rules of the State Bar of California.

## **ATTACHMENTS LIST**

- A.** Proposed Amendments to Rule 5.30 – Clean Version
- B.** Proposed Amendments to Rule 5.30 – Redline to Current Rule 5.30
- C.** Proposed Amendments to Rule 5.341 – Clean Version
- D.** Proposed Amendments to Rule 5.341 – Redline to Current Rule 5.341