



THE STATE BAR
OF CALIFORNIA

INTER-OFFICE
COMMUNICATION

DATE: February 16, 2009

TO: Members of the Board Committee on Regulation,
Admissions & Discipline Oversight

FROM: Scott J. Drexel, Chief Trial Counsel

SUBJECT: Proposed Amendments to Rule 75, Rules of Procedure re
Early Neutral Evaluation Conferences – Request for Authority
To Release for Public Comment

ISSUE

The purpose of this agenda item is to request authority from the Board Committee on Regulation, Admissions and Discipline Oversight (“RAD Committee”) for the release of the proposed amendments to rule 75 of the Rules of Procedure of the State Bar of California (“Rules of Procedure”), in the form attached hereto as Appendix A, for a 45-day public comment period.

Currently, an Early Neutral Evaluation Conference (“ENEC”) must be held before a State Bar Court Hearing Judge if requested by either party. When an ENEC has been requested, the Office of the Chief Trial Counsel may not file a notice of disciplinary charges against the respondent attorney until the ENEC has been concluded. If ultimately adopted, the proposed amendment to rule 75 will provide that ENEC may only be conducted if both the Office of the Chief Trial Counsel and the respondent attorney have requested the ENEC. It will also provide that the ENEC in a particular matter cannot be held on multiple dates without the agreement of both parties.

RECOMMENDATION

The Office of the Chief Trial Counsel recommends that the RAD Committee authorize the release of the proposed amendments to rule 75 of the Rules of Procedure for a 45-day public comment period.

DISCUSSION

Rule 75 of the Rules of Procedure, which provides for Early Neutral Evaluation Conferences conducted by State Bar Court hearing judges, was adopted by the Board of Governors effective February 1, 1999, at the request of Special Master Elwood P. Lui, as part of the regeneration of the attorney discipline system following the State Bar’s virtual shutdown from June 1998 through March 1999.

The adoption of rule 75 was largely in response to complaints from members of the Respondents Bar (now known as the “Association of Discipline Defense Counsel” or “ADDC”). Disciplinary investigations are confidential until a notice of disciplinary charges (“NDC”) is filed in the State Bar Court. (Bus. & Prof. Code, § 6086.1, subd. (b).) If the State Bar Court approves a stipulation between the parties to a private reproof prior to the filing of an NDC against the respondent attorney in the State Bar Court, the private reproof becomes part of the respondent attorney’s permanent disciplinary record but is not disclosed to the public, prospective clients, opposing counsel, courts or others. On the other hand, if the State Bar Court approves a private reproof agreed upon by the parties *after* the NDC has been filed, the reproof is not affirmatively publicized by the State Bar but information about the private reproof is available on the State Bar’s website and, upon the request of any person, the State Bar will provide the requestor with a copy of the stipulation.

At the time rule 75 was being considered, members of Respondents Bar argued that there were cases in which the respondent attorney had offered to accept a private reproof prior to the filing of the NDC but that the Office of the Chief Trial Counsel had refused on the grounds that the alleged misconduct warranted greater discipline. According to the Respondents Bar, after the NDC was filed, the Office of the Chief Trial Counsel would thereafter conclude that a private reproof was appropriate but, by that point, since the NDC had been filed, the proceeding was now public. The purported advantage of the ENEC was to allow a neutral party (i.e., the State Bar Court hearing judge), at a single ENEC, to give his or her non-binding assessment of the appropriate level of discipline to be imposed in the event culpability is established.

Over the last 10 years, Early Neutral Evaluation Conferences have been valuable in those cases in which the parties are close in their respective assessments of culpability and of the appropriate degree of discipline. In many of these cases, the ENEC judge has been successful in helping the parties reach agreement upon a stipulated disposition of the proceeding.

However, when the parties are far apart on either culpability or the appropriate degree of discipline or both, the ENEC is rarely more than an empty exercise and simply results in a sometimes significant delay in the filing of the NDC. Moreover, although rule 75 requires the ENEC to be conducted within 15 days of the request of either party, the State Bar Court has frequently been unable to schedule the ENECs within that time period. As a result, there can be delays of as much as six weeks between an ENEC request and the actual conduct of the conference. In addition, on many occasions, the ENEC judge has ordered additional ENEC conferences to be conducted in the matter on subsequent dates in an effort to encourage a stipulated disposition. However, the original concept of the ENEC was to hold a single ENEC on a single date. If the matter could not be resolved on that date, the Office of the Chief Trial Counsel, in the exercise of its independent prosecutorial discretion, is thereafter free to file the notice of disciplinary charges. While the assigned Deputy Trial Counsel may be willing to hold a subsequent ENEC in the matter if there is not a significant delay between the first and second ENEC and if it appears that a potential disposition of the matter is likely, any subsequent ENEC should only be permitted if agreed upon by both parties.

In order to address these issues, the Office of the Chief Trial Counsel recommends that rule 75 be amended to require an ENEC to be held only in those instances in which both parties (i.e., both the respondent attorney and the Office of the Chief Trial Counsel) agree that the ENEC could potentially be beneficial. Deleting the requirement for holding an ENEC if requested by only one party will (1) reduce the number of ENECs that must be held by the State Bar Court, thereby enabling the Court to hold its ENECs on a more timely basis; (2) eliminate the need for holding ENECs in cases where it has no

potential for resulting in a stipulated disposition; and (3) limit one of the reasons for delay in the State Bar's disciplinary process. In addition, the Office of the Chief Trial Counsel further recommends that rule 75 be amended to provide that the ENEC cannot be continued or held on multiple dates except upon the agreement of the parties.

Finally, other proposed amendments to rule 75 have been made. These proposed amendments are all of a minor, non-substantive nature, changing the word "shall" to "must" and eliminating the now obsolete provision of subsection (e), which provides that the requirement of an Early Neutral Evaluation Conference applies in all cases in which the NDC was not filed prior to January 29, 1999.

PROPOSED RESOLUTION

If you agree that the proposed amendments to rule 75 of the Rules of Procedure should be released for a 45-day public comment period, your adoption of the following resolution would be appropriate:

RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes the release of the proposed amendments to rule 75 of the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, for a 45-day public comment period; and it is

FURTHER RESOLVED that the release of the aforementioned proposed amendments to rule 75 of the Rules of Procedure of the State Bar does not constitute, and shall not be considered, as approval by the Board of Governors of the State Bar of California of the matters published."

SJD:dim
Attachment