

**ADDC to State Bar Rules 5.30 and 2409
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State Bar Office of the Chief Trial Counsel

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This letter contains the comments of the Association of Discipline Defense Counsel (“ADDC”) on the **Proposed Amendments to Rules 5.30 and 2409, Rules of Procedure of the State Bar.**

SUMMARY

ADDC has doubts that the current proposal will cause cases to move faster at OCTC, but it is likely to shift the backlog to the State Bar Court because the proposed rule changes may make the ENEC process less effective. We believe that the proposal could be modified to increase the likelihood that more cases will settle before they are filed. This will save the Court and OCTC, as well as attorneys and their counsel, considerable time and resources.

ADDC recommends that the current proposal be modified to require that a draft Notice of Disciplinary Charges (or a reasonably detailed statement of the charges sufficient for a stipulated set of facts) be served upon the Respondent along with the 10 day notice; that OCTC provide the Respondent at that time with all non-privileged materials in OCTC’s possession relating to the proposed charges; and that the time within which to schedule the ENEC not begin to run until the foregoing information is provided. This information is necessary to allow Respondent an opportunity to meaningfully to prepare for, and thus conduct, a meaningful and effective ENEC. Cases are less likely to settle if Respondents are required to attend ENEC’s unprepared or with an inadequate understanding of the charges and the facts upon those charges are based.

DISCUSSION

The basic premise of the rule change is that OCTC has reviewed a case and has decided to prosecute the case. For over a decade now, Respondents have been sent an invitation to meet with the prosecutor to discuss the charges (the “20 day letter.”). OCTC offers the Respondent a copy of OCTC’s discovery prior to the 20 day meeting. If the case does not settle at the 20 day meeting, the Respondent has a right to request an ENEC. This process has been in effect ever since the ENEC was required, and the entire process has resulted in numerous settlements.

The current proposal is to make the 20 day meeting optional, with the Respondent given 10 days to request an ENEC. OCTC has already implemented the proposal. As a practical matter, at the present time, the ENEC is set before OCTC provides its discovery file, and a draft NDC is often not provided until just a couple of days before the ENEC. This makes it difficult for the Respondent to evaluate the charges and gather documents and information necessary to explain, clarify or refute the charges. The less time a Respondent has to prepare for an ENEC, the less effective the settlement conference will be, and the more likely it will be that cases will be filed unnecessarily.

The heart of ADDC’s proposed amendment is this: if OCTC is ready to prosecute the case, OCTC should provide a draft NDC so the Respondent can see what the actual charges are. Let Respondent review the evidence before deciding whether to ask for an ENEC. Under our proposal, Respondent can request a meeting with OCTC, and OCTC can decide whether to agree.

Respondents are not given fair warning of the charges against them and the facts supporting those charges if they are simply given a list of the Rule or Code sections allegedly violated. If Respondents are required to attend ENEC’s unprepared and unable to point out factual errors and legal deficiencies in the claims being asserted, the settlement process will not be effective.

We do not believe all complaints can be processed the same way or at the same speed. This lesson was learned by the Superior Courts when they first enacted the Trial Delay Reduction Act. Some cases are simple, while others are legally and factually complex. One size does not fit all. When OCTC has a matter which has taken 6 to 12 months or more to investigate, it is unrealistic to require an attorney to prepare and conduct a settlement conference on 10 days' notice. . On the other hand, a 2 month investigation of a one count matter can move quickly. Every case that settles at an ENEC takes a burden off of the State Bar Court as well as OCTC.

We believe the Board of Governors should consider the teaching of *Matter of Respondent AA* (2004) 4 Cal State Bar Court Reporter 721, whose holding proposed Rule 5.30(a) threatens to to overturn.

“ENE's generally are seen as important tools of effective court administration. Our ENE's occur *before* formal charges are issued, as one of the key aims of this process is to offer both sides an objective view of the consequences of filing those charges. . .[¶] **Any deprivation of the opportunity of either party to request a 20–day meeting or an ENE should be subject to the court's scrutiny in an appropriate manner.** [Emphasis added.]”

And from footnote 1 of the same opinion

¹ “The court’s own research “shows that for the years 2002 and 2003 combined, ENE conferences were conducted by this Court's hearing judges in a total of 248 cases. A resolution was reached in the State Bar Court, or outside of the court, in 128 of the cases—representing just over a 50 percent resolution rate****

We invite a dialogue with OCTC and Court Counsel over these issues.

Text of **ADDC's proposed changes to OCTC's Proposed Rule 5.30**

Rule 5.30 Prefiling, Early Neutral Evaluation Conference

(A) **Early Neutral Evaluation Conference** Prior to the filing of disciplinary charges, the Office of the Chief Trial (OCTC) will notify the member in writing of the right to request an Early Neutral Evaluation Conference and the right to secure from OCTC, a copy of nonprivileged papers pertaining to the charges. OCTC shall also provide to the member, a statement of facts or a draft Notice of Disciplinary Charges. Either party may request an Early Neutral Evaluation Conference. A party will have 10 days from the date of service of the nonprivileged papers ~~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 for dismissal of a proceeding. A State Bar Court hearing judge, or judge pro tem, will conduct the conference within 15 court days of the request. For good cause, the judge may extend the 15 days.

(B) **Judicial Evaluation.** At the conference, the judge must give the parties an oral evaluation of the fact 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 the Chief Trial Counsel must document the resolution and submit it to the Evaluation judge for approval or rejection.

(C) **Evidence.** The Office of the Chief Trial Counsel must submit a copy of the draft notice of disciplinary charges or statement of the facts, ~~a statement of the case, or other written summary~~ to the judge prior to the conference. The document 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 the 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.