

AGENDA ITEM

JULY 124

Rules of Procedure of the State Bar – Proposed Amendments
Modifying Rule Relating to
Early Neutral Evaluations

Date: June 18, 2009

To: Members of the Board Committee on Regulation,
Admission and Discipline

From: Russell G. Weiner, Interim Chief Trial Counsel

Subject: Proposed Amendments to Rule 75 – Request for
Approval Following Public Comment

EXECUTIVE SUMMARY

Currently, pursuant to rule 75 of the Rules of Procedure of the State Bar of California (“rule 75”) 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 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.

Ten public comments were received during the 75-day public comment period and two public comments were received prior to the commencement of the public comment period. The 12 public comments oppose the proposed amendments.

The Office of the Chief Trial Counsel recommends the adoption of the proposed amendments to rule 75.

BACKGROUND

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 many cases so the rule change is not intended to eliminate the ENEC process. In these cases, the ENEC judge has been successful in helping the parties reach agreement upon a stipulated disposition of the proceeding.

However, in some cases the ENEC has not been productive and has resulted in the unnecessary, unreasonable and excessive delay in the filing of disciplinary charges. In some cases the ENEC process has been misused by respondent attorneys who have not participated in the disciplinary process in good faith. As a result, there can be delays of six weeks to as much as several months or more in the filing of an NDC. 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 NDC. 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 little or 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.

PUBLIC COMMENT

There were ten public comments received during the public comment period and two public comments received prior to the commencement of the public comment period. Copies of the 12 public comments are attached hereto as Appendix B.

In summary, the public comments were as follows:

Jerome Fishkin, Member, Association of Discipline Defense Counsel: In an email dated March 3, 2009 and sent to RAD Committee Chair Richard Frankel, attorney Fishkin states that the Association of Discipline Defense Counsel holds the position that it was premature to send the proposed amendments to rule 75 out for public comment, arguing that there was inadequate information for evaluating the merits of the proposal.

Joanne Robbins, Member, Association of Discipline Defense Counsel: In a letter dated March 4, 2009 and addressed to the RAD Committee, attorney Robbins argues that there is no compelling reason to adopt the proposed changes to rule 75.

Philip Feldman, Member, Association of Discipline Defense Counsel: In a letter dated March 14, 2009, attorney Feldman urges the Supreme Court to take various actions in opposition to the proposal.

Ken Kaplan, Esq.: In an email dated April 4, 2009, attorney Kaplan argues that the Rules of Professional Conduct are like the Vehicle Code in that they are “practically impossible to obey and successfully drive from point A and point B.” He opposes the proposed amendments because they “will not improve the flow of traffic.”

Ellen Pansky, Member, Association of Discipline Defense Counsel: In a letter dated April 14, 2009, attorney Pansky urges the Board of Governors to reject the proposal and any proposal to rule 75 that “permits one party to refuse to participate in the ENEC process and which reduces the discretion of the State Bar Court judges” with respect to certain enumerated actions.

Jerome Fishkin on behalf of the Association of Discipline Defense Counsel: In a letter dated April 17, 2009, Jerome Fishkin states that the Association of Disciplinary Defense Counsel urges the RAD Committee to reject the current proposal, arguing that it will reduce public protection, increase court caseload, and waste State Bar funds and, instead, proposes an alternate plan.

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Trudy C. Levindofske, Executive Director, Orange County Bar Association, on behalf of the Orange County Bar Association: In a letter dated April 24, 2009, attorney Levindofske states that the Orange County Bar Association opposes the adoption of the proposed amendments, finding that they attempt to lessen delay in the ENEC process at the expense of respondent attorneys.

Jerrilyn T. Malana, President, San Diego County Bar Association, on behalf of the San Diego County Bar Association: In a letter dated May 18, 2009, attorney Malana states that the San Diego County Bar Association oppose the proposed amendments to rule 75 on the grounds that the proposed amendments discourage efficiency.

Katherine M. Forster, President, Women Lawyers Association of Los Angeles, on behalf of the Women Lawyers Association of Los Angeles: In a letter dated May 12, 2009, attorney Forster states that the Women Lawyers Association of Los Angeles joins the letter of Ellen A. Pansky and urges the Board of Governors to reject any revision to rule 75 that permits one party to participate in the ENEC process or that reduces the discretion of State Bar Court judges in connection with ENECs.

Danette E. Meyers, President, Los Angeles County Bar Association, on behalf of the Los Angeles County Bar Association: In a letter dated May 19, 2009, attorney Meyers states that the Los Angeles County Bar Association opposes the proposed amendments to rule 75 and urges the Board of Governors to reject them.

Christine Burdick, Executive Director & General Counsel, Santa Clara County Bar Association, on behalf of the Santa Clara County Bar Association: In an email sent on May 20, 2009, attorney Burdick states that the Santa Clara County Bar Association strongly opposes the proposed changes because they unduly favor the Office of the Chief Trial Counsel.

The Bar Association of San Francisco ("BASF") Legal Ethics Committee with the endorsement of BASF's Board of Directors: In a letter dated May 20, 2009, the Bar Association of San Francisco Legal Ethics Committee opposes the proposed amendments to rule 75 and states that the Bar Association of San Francisco's Board of Directors joins in its opposition.

PROPOSED BOARD COMMITTEE RESOLUTION

The Office of the Chief Trial Counsel has recommended to the Board Committee on Regulation, Admissions and Discipline Oversight ("RAD Committee") that it adopt the following resolution:

RESOLVED, following expiration of the public comment period and having considered the public comments that were received, the Board Committee on Regulation, Admissions and Discipline Oversight, hereby recommends to the Board of Governors that it adopt 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, effective immediately.

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This item is on the RAD Committee's agenda for its scheduled meeting on Thursday, July 16, 2009. The Committee's recommendation will be reported to you at your meeting on Friday, July 17, 2009.

PROPOSED BOARD RESOLUTION

RESOLVED, following expiration of the public comment period and having considered the public comments that were received, and upon the recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight, the Board of Governors hereby adopts 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, effective immediately.

RGW:idb
Attachments