PUBLIC COMMENTS ON PROPOSED AMENDMENTS TO RULE 75, RULES OF PROCEDURE OF THE STATE BAR

APPENDIX B

Jerome Fishkin, Member, Association of Discipline Defense Counsel

Berrio, Itzel

From: Hull, Doug
Sent: Tuesday, March 03, 2009 2:02 PM
To: Angela Joy Davis (angela.davis.ca@gmail.com); english@jeannineenglish.com; ethicsinlaw@earthlink.net; frankel@danvillelaw.com; George Davis; jbhuss3@aol.com; John J. Dutton; rheinke@akingump.com; wgailey@gaileyassociates.com; whebert@calvoclark.com
Cc: Drexel, Scott; Wong, Colin; Drexel, Scott; Berrio, Itzel; Hull, Doug
Subject: FW: Rule 75 ENEC Opposition to Sending for Public Comment

To RAD Committee members:

With the permission of your chair, I am forwarding a copy of an e-mail I received regarding RAD consent agenda item II.C. (Proposed Amendment to Rule 75, Rules of Procedure of the State Bar of California regarding Early Neutral Evaluations. Request for release for public comment. (Drexel/A. Davis)

Doug Hull
State Bar Court
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From: Fishkin Jerome [mailto:jerome@fishklnlaw.com]
Sent: Tuesday, March 03, 2009 1:46 PM
To: Richard Frankel
Cc: Hull, Doug
Subject: Rule 75 ENEC Opposition to Sending for Public Comment

This message is sent on behalf of ADDC

Dear Mr. Frankel and Members of RAD:

It is premature to send the Rule 75 change out for comment, because there is inadequate information for evaluating merits of the proposal.

According to Respondent AA, about one half of all cases settle at the ENEC. If that statistic is still good, then any appreciable number

of filings that bypass the ENEC will likely require new judges or result in trial delays for all new disciplinary cases.

There is no support for the unlikely statement that an ENEC is worthwhile only if the settlement offers are close. Defense counsel have seen substantial movement in both directions -- the judge's evaluation results in a large drop in the offer; or the judge's evaluation persuades the attorney to accept a significant level of discipline.

We believe that the natural result of this proposal would be to move a large stack of backed up cases from OCTC's statistics to the court's backlog. Therefore, before this proposal goes out for public comment, OCTC should be required to state in writing, just how many new cases it would choose to bypass the ENEC and file within the 90 days after enactment of a new ENEC Rule. Once that statistic is stated, the court should be asked to state whether new judges would be required to handle the increased workload, or there would likely be a delay in trials, due to the new group of cases would come without first going through the ENEC process.

These are factors to consider before putting the proposal out for comment. These concerns are separate from an evaluation of whether the ENEC process works as is, or whether there is any problem that needs to be fixed at all.

JEROME FISHKIN

First Vice President

Association of Discipline Defense Counsel

See the ADDC website at http://www.disciplinedefensecounsel.org/

Joanne Robbins, Member, Association of Discipline Defense Counsel

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March 4, 2009

Regulation, Admissions & Discipline Committee
Board of Governors
The State Bar of California
1149 So. Hill Street
Los Angeles CA 90015

By Email and Facsimile

Re: March Agenda Item II.C., Proposed Change to **Rule of Procedure 75 (ENEC)**

Dear Members of the RAD Committee:

I write this letter on my own behalf and not as a member of any association. I have practiced law in the area of State Bar disciplinary law for **twenty-seven (27) years**. For almost seven years, beginning in 1982, I served as a prosecutor in the Office of Trial Counsel. I was appointed as a **Hearing Judge** for the State Bar Court in 1989, and served for more than six years. For the last twelve years, I have represented attorneys before the State Bar. Because of the length and depth of my experience, I offer my thoughts and opinions regarding the Office of the Chief Trial Counsel's recent proposals for a small but dramatic change in the rules regarding the opportunity of attorneys charged with misconduct to obtain a fair and impartial evaluation of the allegations against them **before** charges are made public and posted on the State Bar's Website.

Even more pertinent to this issue is the fact that **I was a member** of Justice Elwood Lui's "Special Subcommittee for the Rules of Procedure" in 1998-1999, when **Rule 75 was first adopted**. At the time Justice Lui was appointed Special Master for the State Bar Discipline System in 1998, the State Bar had been soundly criticized for the previous few years as being too expensive, too slow and too inefficient. The impetus for the Special Subcommittee was to streamline the discipline system in general and to make it **more efficient and more cost-effective**. The thrust of all the revisions in the Rules was to allow the discipline system to become able to process the increasing number of cases more economically, without sacrificing the due process rights of **both** the parties, the State Bar and the attorneys charged.

Mr. Drexel is mistaken when he states that Rule 75 was adopted largely because

of the defense or respondent's bar. The focus of the Rule then was, as it is now, to encourage **both** parties to re-evaluate their positions and evidence, and to facilitate **either** the settlement of the entire case or a narrowing of the charges that would be filed. The involvement of a State Bar Court Judge, as a neutral and dispassionate third party, was for the purpose of providing both sides with an **opportunity to benefit from a impartial view** by a member of the Court.

The theory was based largely on the fact that the State Bar Court saw before it at that time a large number of cases in which a Notice of Disciplinary Charges was filed, which then required the participation of the Court in Status Conferences and Motions. The filing of the NDC also triggered many time limits, including discovery. In a high percentage of these cases, the matter was settled after one or more settlement conferences were held. The determination to hold a **pre-filing** settlement conference, given the name Early Neutral Evaluation Conference, was made because **the disciplinary system needed to winnow out the cases that should be settled early,** so that they would not clog up the Court's calendar and waste the scarce resources of the State Bar.

An Important Tool for Efficient and Fair Resolution

Far from being a procedure that is no longer necessary, it is even more important now than ever for this opportunity for a "last, best hope" for settlement to be afforded the parties. Far from being a waste of time, the ENEC is the **first and last opportunity** before filing for the prosecutor and the respondent to hear how a Judge of the State Bar Court views the case, an obvious indication as to the likely inclination of other judges on the Court, who might preside over the trial of the case. It can serve as a wake-up call, not only for the prosecutor, but also for the respondent. It serves as a reality check for both parties.

The ENEC has also been recognized by the Review Department of the State Bar Court as a significant opportunity to resolve a case. The Court calls them "important tools of effective court administration." The ENEC resulted in "an oral **neutral evaluation**" of the case by the Judge conducting it. The Court pointed out that during 2002 and 2003, **just over half** the cases in which ENEC's were conducted were settled before filing with the Court. [1]

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[1] *In The Matter of Respondent AA* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 721, 727.

> "Collectively, the 20-day meeting [with the prosecutor] and the ENE offer several **significant benefits to the litigants** should a resolution be reached at either of those stages. First, they permit appropriate resolutions of a case before the matter becomes public by the filing of formal charges. [ ] Next, they permit the litigants to avoid the extra work and expense of drafting and defending, respectively, the NDC; and they **save the State Bar Court time** otherwise needed to conduct a series of status and pretrial conferences and oversee discovery and related matters. Finally, even if public discipline is reached as a resolution, the [disciplinary] costs to be paid by respondent under section 6086.10 are more than $300 lower contrasted to such results reached after an NDC issues. (Ibid., emphasis added.)

The important factors cited above have become even more significant since 2004, because now an NDC containing **unproven charges** by the Office of the Chief Trial Counsel can be posted on the State Bar's **website**, without ever having been viewed by a neutral third party. In addition, the disciplinary costs have substantially increased, and are now even greater after filing of an NDC.

The ENEC Is An Important Opportunity to Narrow the Issues

The purpose of the ENEC is not just to settle cases, but to evaluate the issues involved. There are numerous matters in which some of the individual cases (separate complaints) contained in a consolidated NDC are dropped from the first draft of the NDC. Since **disciplinary costs** are charged to respondents based on the **number of cases filed**, even if they are later dismissed, this can have significant impact on the total costs to the respondent.

In other matters, even if no cases are dropped, the **individual factual allegations** may change substantially, such as eliminating charges of moral turpitude or misrepresentation. The ENEC is the sole opportunity to have a neutral party review the stated facts and inquire as to the evidence and substantiation for individual claims. Because the **NDC that is filed** is now able to be shown on the State Bar website, before there is any objective proof of the misconduct, it is more important than ever to file only charges that can withstand the scrutiny of an impartial judge. It is devastating to the reputation and career of an attorney to have claims posted on the website that allege dishonesty or deceit, when an opportunity to discuss them with a neutral third party might eliminate those damaging and possibly untrue statements.

If This Change Were Needed, It Should Be Supported by the State Bar Court

This is a proposal unilaterally submitted by the Prosecutors to change a system run

by the State Bar Court. Conspicuously absent is any statement about the **Court's opinion**, or even that they have discussed it with the Court. If this proposal is sent out for public comment without any statement by the Court, that could have a marked effect on how members of the public who might want to comment would view this Proposal.

It is premature to send this proposal out for public comment before obtaining the point of view of those in the best position to fairly judge the ENEC process, the State Bar Court Judges.

There is No Substantiation for Any Need to Change the Rule

We have statistics stated in *In The Matter of Respondent AA* , cited above, for 2002 and 2003, indicating that **over half of all ENEC cases settle** before the filing of an NDC. However, OCTC, which is in control of all the statistics on the ENEC's, has not given any statement of what the statistics are for the years 2004 and later. It is impossible for anyone outside the State Bar to have access to those figures. The OCTC statement of possible "delays of as much as six weeks" are *di minimis* compared to the value of settling a case early in the process and eliminating the time and expense for both parties, as well as the Court.

Until the Committee has the statistics for settlement of ENEC cases, it is impossible to determine the effectiveness and importance of the settlement influence of the ENEC's.

The ENEC is an Important Procedural Due Process Event

Our Supreme Court has taken a historic position regarding the importance of due process and the opportunity for attorneys to avail themselves of the full panoply of rights and protections, to insure justice and fairness in the process. The ENEC is one of those opportunities for the respondent to obtain an impartial view of the charges against him. These are attorneys that face public discipline, damage to their reputation and career, and possible loss of their license to practice law. For such an important purpose, it is a very small step for the respondent to request.

The wording of the proposed Rule gives all power and authority to OCTC to refuse to participate in an ENEC requested by the member, whether reasonable or not. It would be patently unfair and highly prejudicial to the due process rights of attorneys who are charged with misconduct to allow OCTC to **unilaterally** prevent an ENEC which has a very substantial possibility of success.

Alternative Discipline Resolution Opportunity is Encouraged by the Legislature

In 1993, the California Legislature passed into law Business and Professions Code section 6086.14, **Alternative Dispute Resolution Mediation Program**. This section authorized the Board of Governors "to formulate and adopt rules and regulations necessary to establish an **alternative dispute resolution discipline mediation program** to resolve complaints against attorneys that do not warrant the institution of formal investigation or prosecution." It is a clear indication of legislative intent that the State Bar might more efficiently dispose of some cases outside the formal State Bar Court proceedings.

Although no program has ever been implemented to establish this program, many of the same purposes have been served by the ENEC procedures. It is the best way to effectively resolve cases without expending the scarce resources of the State Bar or the respondent. For the strong possibility of such a "win-win" resolution, a few weeks delay before the filing an NDC is a very small offset.

Conclusion

There is no compelling reason why the OCTC should be able to prevent an ENEC from being held. Such a situation deprives the accused attorney of due process and occurs at a time when a reasonable and efficient resolution might be reached, saving time and money for both parties and the Court. To impose such a requirement that OCTC must agree to an ENEC will almost certainly **decrease the number of settlements** and increase the workload of the State Bar and the cost of the disciplinary system.

Respectfully submitted,

JoAnne Earls Robbins

JoAnne Earls Robbins
Attorney at Law

Philip Feldman, Member, Association of Discipline Defense Counsel

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March14, 2009

Itzel D. Berrio, Esq.
OCTC
State Bar of CA
180 Howard St.
San Francisco, CA 94105

Re: Proposed Changes to Rule 75

QUALIFICATIONS TO COMMENT:

I am a former Examiner who reported directly to the Executive Director of the California State Bar. At that time the director also performed the role presently fulfilled by Mr. Drexel. The director personally trained me to present evidence to volunteer committees who adjudicated the disciplinary justice system in our state. Committees expected examiners to prosecute the charges in much the same manner as the present paid lawyers, investigators, analysts and other staff do today.

As an experienced trial lawyer who sat as a Judge Pro Tem for over a quarter of a century with some time in administrative law (Workers Compensation Judge) but mostly in civil law (Superior Court, CA) I have always made comparisons of the civil and administrative justice systems with the criminal justice system which I became familiar with by doing assigned appeals for the Second District of our Appellate court and trying a few capital and other felonies, as well as testifying as an expert for almost three decades on the conduct of attorneys who allegedly fail to live up the the standard of care.

Obviously, in my many years of defending attorneys in California's disciplinary justice system, I have had ample opportunity to make comparisons of that system to the other three.

COMMENT:

Quasi-substantive-THE SUPREME COURT NEEDS TO DISCOURAGE BOG'S & COMMISSION'S "BE DIFFERENT" POLICY

Changing "shall" to "must" , as proposed, exemplifies the present California approach to dealing with rules of conduct as well as rules of procedure. "Shall" has been recognized by

common law in every jurisdiction, including ours, as a mandatory injunction upon the citizen or jurist directed in statutes for centuries. The same is true for lawyer disciplinary rules and procedures in this state. Like California's present proposed approach to our five year program to change our professional conduct rules, this proposed change thumbs its nose at legal consistency which is the heart of stare decisis. It exemplifies the Board of Bar Governors' RAD Committee's sanctioning of the ludicrous notion that unless we march to different drummers of our own invention, we are somehow not going to build workable mouse-traps.

The Supreme Court of CA ought re-direct BOG towards consistency. It's direction to the committee changing our rules, to start with the goal of abiding with the American Bar Association's Rules of Professional Conduct and/or the Restatement of Law, The Law Governing Lawyers, has gone unheeded. As a consequence of "pride of authorship" tweaks, such as "must" is better than "shall" etc., California is now THE ONLY STATE IN THE UNITED STATES WHICH HAS NOT ADOPTED THE AMERICAN BAR ASSOCIATION'S RULES OF PROFESSIONAL CONDUCT. The patent inconsistency here is that the State Bar of California continues to mandate that applicants for our profession sit for and pass the multi-state examination which prepares our lawyers to "get busted" for ignoring California's unique approach to ethics and professional responsibility. In a like manner, BOG rubber-stamped approval of the notion that lawyers may be certified as specialists in legal malpractice in our state to prey upon the public even though the lawyer never took a deposition or tried a single law suit in his/her life.

Substantive: THE SUPREME COURT NEEDS TO DIRECT OFFICE OF CHIEF TRIAL COUNSEL TO ASSURE CONSISTENCY WITH PUBLIC POLICY

The fact that public protection is the primary office of any disciplinary function does not imply that all other policy factors must be cast by the wayside. At the request of OCTC, BOG has eviscerated the statutory policy of protecting the public by rehabilitating lawyers and, where appropriate, diverting them to non-disciplinary aspects of learning or re-learning professional responsibility. Due to poor rule drafting, OCTC has always held an absolute veto over the ability of Hearing Judges to accept Lawyer Assistance Program candidates into the Alternative Discipline Program since OCTC need only insist that applicants stipulate to untrue and unproven charges which are plausible but far from provable by clear and convincing evidence.

NOW, RAD HAS SANCTIONED OCTC'S PROPOSAL TO EFFECTIVELY DO AWAY WITH THE PUBLIC POLICY ENCOURAGING ALTERNATIVE DISPUTE RESOLUTION. Referrals to mediation are fast becoming the rule in the civil justice system in spite of the realization that in the absence of trial, courts can't compel adverse parties to settle. Requiring mutual consent to seek the objective and impartial views of a state bar hearing judge, in effect, defeats the whole purpose of such mediation, which is for both sides to get a reading on the validity of their position.

It's obvious that RAD and BOG have no clue as to the practical "How Mr. Drexel runs his shop" aspects which are:

1. OCTC makes a "take it or leave it" offer of penalty to the member of the bar (who they now call " Respondent" at the outset).

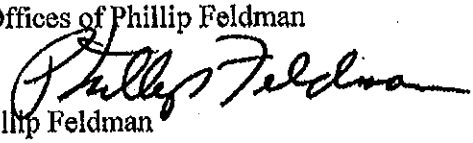
2. OCTC has previously drafted a formal Notice of Disciplinary Charges, which, upon filing, becomes a public record of discipline and which triggers the member's potential to pay ecnomic penalities to subsidize the civil servants who serve as OCTC.

3. If the member rejects the offer and fails to request an Early Neutral Evaluation Conference, OCTC files the draft by sending it to the court in the same building, usually, the same day.

4. By depriving the member of the opportunity to unilaterally take advantage of the ENEC mediation program, OCTC is re-enforcing its "take it or leave it"- "we know best"- "we protect the public" stance with no rationale basis other than to insure that more deputy trial counsel, analysts, investigators and staff are needed since decreased resolution usually means more time consuming trials.

5. Perhaps lack of imagination and not civil service hierarchy power building motivated this poorly reasoned proposal. If judges' calendars are busy wouldn't it make more sense to bring in volunteer mediator panels and take advantage of the many retired jurists and lawyers who know the field?

Law Offices of Phillip Feldman



by Phillip Feldman

*Certified, American Board of Professional Liability Attorneys in and for the American Bar Association in Legal & Medical Malpractice.

Ken Kaplan, Esq.

Berrio, Itzel

From: Ken Kaplan, Esq. [ken.kaplan_esq@yahoo.com]
Sent: Saturday, April 04, 2009 8:46 AM
To: Berrio, Itzel
Subject: Proposed Amendment to Rule 75...

To whom it may concern:

This note is in response to the State Bar request for public comment concerning the proposed amendments to Rule 75 (ENEC).

It seems to me that by requiring the consent of both parties to an ENEC, that the entire system will be effectively neutered. The Chief Trial Counsel would not be wasting public funds to the point of preparing to file charges unless he/she had a reasonable good faith belief that the charges are warranted. Only the respondent has any meaningful incentive to engage in the ENEC process, as a means to try to prevent public exposure of a Rules violation.

By requiring both sides to agree to the ENEC, the CTC can simply refuse and the respondent will have to choose to submit to the CTC's demands or defend against the charges.

The system already heavily favors the CTC, because the Rules of Professional Conduct are like the Vehicle Code: practically impossible to obey and successfully drive from point A to point B. This new proposal will not improve the flow of traffic.

Regards,

Ken Kaplan, Esq.

Ellen Pansky, Member, Association of Discipline Defense Counsel

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April 14, 2009

VIA FIRST CLASS MAIL

Board of Governors
State Bar of California
180 Howard Street, 7th Floor
San Francisco, CA 94104

Attn: Itzel D. Berrio

Re: *Proposed Changes to State Bar Rules of Procedure, Rule 75*

Dear Members of the State Bar Board of Governors:

Please accept this comment with respect to the proposed revisions to Rule 75, Rules of Procedure of the State Bar, which governs the Early Neutral Evaluation Conference program of the State Bar Court.

Attached for ease of reference is a copy of the memorandum which was distributed by the Los Angeles Office of the State Bar Court in March 1999, summarizing the history of the then interim rule 75. As the memorandum explains, in 1999 the State Bar was just recovering from a budgetary crisis, which resulted in the layoff of numerous State Bar employees, and resulted in a significant backlog of cases at the State Bar Court level. The ENEC structure was proposed by special master Elwood Lui, a retired member of the California Appellate Court, who had observed that Early Neutral Settlement Conferences were used to positive effect in both State and Federal Court systems.

The purposes of the ENEC program were several: the goal was not merely to resolve cases which would not result in public discipline, before the filing of Notice of Disciplinary Charges. In addition, a crucial feature of the ENEC process was to streamline discovery, preserve the State Bar Court's limited assets, and encourage the speedy resolution of matters before formal discovery was instituted. All of these goals are equally important today, in light of the State Bar's reported budgetary crisis, and the significant backlog at the State Bar Court which is causing cases to be double and triple set for trial.

It is important to note that the current State Bar Court system does not include an important feature specified by the American Bar Association Model Rules for Lawyer Disciplinary Enforcement: before filing a formal disciplinary proceeding, there must be a probable cause determination by a hearing officer. (ABA Model Rule 11(B)(3), attached for ease of reference.) Prior to the institution of the current full time professional California State

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R. Gerald Markle (1950-2004)

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Bar Court, the California State Bar disciplinary system included a preliminary hearing, whereby a neutral fact-finder would determine whether there was probable cause to file formal disciplinary charges, and what charges should be filed. The Early Neutral Evaluation Conference is the only process which now fulfills this important purpose. Otherwise, the decision to charge a disciplinary offense is left exclusively in the hands of the prosecutor. This is inappropriate, and directly contrary to the system which is recommended by the American Bar Association, which traditionally was used in California, and which is followed in many states.

It is discouraging, to say the least, that the lions' share of the limited State Bar budget is being devoted to a discipline system which has become ponderous, unnecessarily formalistic, and inefficient. The prosecutor's office seems to have developed a policy which requires formal discovery in a majority of cases. Notwithstanding the fact that an attorney respondent or a Bar applicant will have already provided written explanation of the conduct which forms the basis of the State Bar Court proceeding, the Office of the Chief Trial Counsel frequently insists on deposing these individuals, at great expense to the system. Additionally, the Office of the Chief Trial Counsel routinely utilizes investigative staff to sit in on depositions, and often has more than one lawyer present at deposition and at trial, even in less serious cases. The entire system has become frustratingly slow and unduly expensive. The majority of attorneys facing disciplinary action are fully cooperative with the disciplinary prosecutor, and wish to accept an appropriate disposition. It has typically been in the case (at least in the 31 years that I have been practicing before the State Bar Court) that the majority of cases settle by stipulation. Parenthetically, cooperation between the prosecution and the defense does not necessarily result in lax or improper conduct: it has recently been noted that Los Angeles' current District Attorney, Steve Cooley, is being praised and respected for his pragmatism and effectiveness in having his deputies work together with defense counsel to accomplish fair and appropriate dispositions in criminal proceedings. (See, L.A. Daily Journal article, "If Stars Align Troika of Allies May Emerge as L.A.'s Top Prosecutors," April 6, 2009.) Under District Attorney Cooley's watch, despite soaring unemployment, the crime rate is down in L.A., demonstrating that harsh prosecutorial methods are not required for a successful justice system.

The result of an approach that favors trial over settlement is that virtually no funds will remain in the State Bar budget for salutary community service projects, co-sponsorship of programs with other Bar associations, public education with respect to legal rights, and other beneficial projects for which the State Bar has long been known. It will truly be a shame if the State Bar chooses an unnecessarily wasteful disciplinary system to the virtual exclusion of equally important activities that benefit the public and legal profession.

I strongly urge the Board of Governors to reject any revision to Rule 75 which permits one party to refuse to participate in the ENEC process, and which reduces the discretion of the State Bar Court judges to determine how the ENEC shall be conducted, how many sessions are required in any particular case, or to recommend that charges being considered by the prosecutor not be filed, if there is a failure of probable cause.

Respectfully submitted,

Ellen A. Pansky

Cc: Holly Fujie, President
Richard Frankel, RAD Chairperson

District 7 Governors:
Rex Heinke
Howard Miller
Michael Marcus
Angela Davis
James Aguirre

THE STATE BAR
OF CALIFORNIA

OFFICE OF THE STATE BAR COURT

1149 SOUTH HILL STREET, 6th FLOOR, LOS ANGELES, CALIFORNIA 90015-2299

(213) 765-1400

To: The Office of Chief Trial Counsel and Members of Respondents' Bar, Los Angeles Venue

From: The Los Angeles Hearing Department of the State Bar Court

Subject: Early Neutral Evaluation Conferences

Date: March 19, 1999

Newly enacted rule 75 of the Rules of Procedure of the State Bar (see attached) provides that if the parties are unable to settle a matter prior to the filing of a notice of disciplinary charges (NDC), either party may request, and a Hearing Department Judge shall hold, an Early Neutral Evaluation Conference (ENEC) within fifteen days of the request. The purposes of an ENEC are to promote early settlement, the early exchange of information and the simplification of discovery.

Even though the ENEC is an informal proceeding, certain standards should be established for the operation of these conferences. Accordingly, the Los Angeles Hearing Department judges recommend the following tentative guidelines.

Scheduling

1. Before a party contacts the court and requests a date for an ENEC, that party must first contact opposing counsel and agree upon possible dates and times. The party making the request for a conference should be prepared to provide several dates and times for the ENEC so that the court clerk will have a range to choose from.

2. The party requesting an ENEC shall complete the enclosed request ENEC form and either mail or fax it to Angela Owens at the address or fax number on the form. Judges for the conference will be assigned off of the wheel.

3. A court clerk shall telephone the requesting party and provide the date and time and the assigned judge for the ENEC. Depending upon the demands of the court, the available date and time for the conference may vary from immediate assignment to fifteen days from the request. The judges, however, will do their best to accommodate requests on short notice for an immediate ENEC.

4. After the date and time for the ENEC has been given by the court clerk and agreed upon by the party, it is the responsibility of that party to confirm the date and time with

opposing counsel or the respondent if that person is in propria persona. No written notice of the ENEC will be issued by the court clerk. It is recommended that copies of confirming letters of the ENEC be sent to the court clerk.

5. If for some reason the assigned judge is not available for the ENEC as previously scheduled, the clerk shall call the parties either to provide the name of a different judge or to reschedule the conference. This is the only situation in which the clerk shall coordinate scheduling.

6. All conferences shall take place in a designated courtroom at 1149 South Hill Street, Los Angeles.

Preparation For The Conference

Either party may submit to the court any documents which he or she believes will be informative. In addition, OCTC shall provide a copy of the proposed NDC. No formal ENEC statement is required. All submitted documents should be directed to the assigned ENEC judge and the envelope should be clearly marked "ENEC Materials." It is preferable that such writings be delivered at least one day before the scheduled conference. Exhibits or other voluminous documents which have not been provided may be referred to as necessary at the conference.

It is within the discretion of the parties whether or not to provide the opposing party with copies of those writings which have been given to the court.

Conduct Of The Conference

1. Because rule 75 does not provide guides concerning conduct at the ENEC, its procedures are flexible except that it shall be confidential and in camera discussions are permitted. Whereas settlement conferences often involve confidential discussions with one party outside the presence of the other, it is anticipated that the ENEC will be conducted more frequently with both parties being present. However, in camera proceedings will be conducted when necessary such as where a party wishes to provide for an inspection of certain documents which he or she does not want the other side to see or to discuss a theory or factual issue which at that point in time is not discoverable and should remain confidential. It is recommended, however, to further the purposes of the ENEC, that most discussions be open rather than confidential.

2. It is suggested that each party at the outset of the ENEC provide a brief synopsis of his or her case in the presence of opposing counsel.

3. If settlement is not possible, the parties may wish to seek the ENEC judge's guidance for the resolution of discovery issues and the means (such as stipulations) to shorten the trial process.

Conclusion Of The Conference

1. At the end of the conference, the parties shall tell the judge whether or not they have been able to resolve the case. If the matter has been settled, the parties shall further advise the court whether that settlement or resolution requires the filing of a document with the court. If a stipulation is to be filed, all of its basic terms should be agreed upon at the ENEC and disclosed to the ENEC judge. The filed stipulation shall include the name of the judge who mediated the ENEC.

2. At the conclusion of the conference, the judge shall fill out and provide the parties with a signed statement indicating the result reached. The statement will not contain any information about the subject matter or merits of the case. The statement shall not be filed although it will provide proof that the ENEC took place should that become an issue. It will also provide the court clerk with a record for statistical and conflict purposes.

3. The parties may, within their discretion, agree upon a discovery plan which may be attached to the ENEC statement. Although not binding, such a plan may provide the parties with guidance for the discovery process.

4. The parties may request a short continuance of the ENEC if additional facts need to be provided or discussed. Although this date may not be within the original fifteen days contemplated by rule 75(a), it will be set as soon as practicable. ENECs are not meant to delay the filing of a NDC. It is within the discretion of the judge whether or not to calendar a further ENEC.

5. If no settlement or other agreement has been reached, OCTC should advise the judge and the opposing party when the NDC will be filed. Although no specific filing date is required under rule 75, this information may have the beneficial effect of resolving the matter.

6. Each party is entitled to insist that the case, if it is filed, not be assigned to the ENEC judge. If both parties want to waive this right, they should advise the ENEC judge of their wish to do so. Upon such a waiver, that judge may be assigned to preside over all legal issues including the trial. Even if the conflict is not waived, the ENEC judge can act as the mandatory or voluntary settlement judge.

Feedback

Under rule 75(e), the State Bar Court shall provide by June 30, 1999 to the Board of Governors and Special Master Elwood Lui an evaluation of the ENEC process, with recommendations for change. The Court shall develop procedures to provide some statistical basis for this evaluation (e.g., how many conferences held, how many settlements entered into, etc.). It remains to be seen whether we will have enough experience by this June to make a valid evaluation of the process. In the meantime, we welcome all suggestions for improvements in these recommendations and how the ENEC should be conducted.

SUPPLEMENT TO RULES OF PROCEDURE

OF THE STATE BAR OF CALIFORNIA

EMERGENCY INTERIM AMENDMENTS TO

RULES OF PROCEDURE OF THE STATE BAR

Adopted by the Board of Governors

Effective February 1, 1999

Pursuant to Section 13 of the Procedure for Adoption, Amendment or Repeal of State Bar Regulations, the Board of Governors of the State Bar adopts these amendments to the Rules of Procedure of the State Bar as an emergency interim measure to restore an adequately functioning attorney disciplinary system for the protection of the public, the courts, and the legal profession and to ameliorate the harm caused by the State Bar membership fee crisis.

Since the layoff of State Bar personnel on June 26, 1998, the backlog of open complaints and investigations has grown to approximately 7,000 cases. The Board finds that this unprecedented backlog will impair the ability of the restored operations of the State Bar, as provided for by the Supreme Court (see *In re Attorney Discipline System* (1998) 19 Cal.4th 582) and the emergency funding of Rule 963 of the California Rules of Court, to investigate and adjudicate matters in a timely fashion under the current Rules of Procedure of the State Bar.

These amendments are necessary for the disposition of the backlog in a timely fashion, the protection of the public from errant attorneys, the prompt resolution of unfounded complaints against bar members, the preservation of public trust in the legal profession and judicial system, and the assurance of administrative due process.

These amendments shall become operative on February 1, 1999, and shall remain in effect until June 30, 2000, and as of such date are repealed, unless a later enacted amendment deletes or extends such date.

RULE 75. PRE-FILING, EARLY NEUTRAL EVALUATION CONFERENCE.

(a) If the Office of the Chief Trial Counsel and the member are unable to reach agreement on the resolution or disposition of a matter prior to the filing of a notice of disciplinary charges, an Early Neutral Evaluation Conference, conducted by a State Bar Court hearing judge, shall be held within fifteen (15) days of the request of either party.

(b) At the Conference, the Early Neutral Evaluation judge shall provide the parties with an oral neutral evaluation of the alleged facts and charges and the potential for the imposition of discipline. If a resolution of the matter which requires the approval of the Court is reached by the parties at the Conference, the Office of the Chief Trial Counsel shall document the resolution and shall submit it to the Early Neutral Evaluation judge for approval or rejection.

(c) In order for the Early Neutral Evaluation judge to provide a meaningful evaluation, the Office of the Chief Trial Counsel shall provide the Early Neutral Evaluation judge with a copy of the draft notice of disciplinary charges. Each party may also provide the Early Neutral Evaluation judge with such documents and information that the party believes supports his or her position. The Early Neutral Evaluation Conference shall be confidential and each party may designate any documents he or she provides for in camera inspection only and not to be exchanged with the opposing party. All documents provided to the Early Neutral Evaluation judge shall be returned to the respective parties at the conclusion of the Conference.

(d) Unless otherwise stipulated by the parties, the Early Neutral Evaluation judge shall not act as the trial judge in a subsequent proceeding involving the same facts.

(e) By June 30, 1999, the State Bar Court shall provide the Board of Governors and the Special Master with a written evaluation of the Early Neutral Evaluation Conference process and with any recommendations for changes or modifications to that process.

(f) The provisions of this rule shall apply to all proceedings in which the notice of disciplinary charges was not filed on or before January 29, 1999.

Eff. February 1, 1999.
Source: New.

RULE 108. CONSOLIDATION.

(a) Consolidation may be ordered upon motion of any party, on stipulation of the parties or on the Court's own motion with notice to the parties and an opportunity to be heard. Except where good cause is shown, motions to consolidate shall be filed within thirty (30) days of the filing of the notice of disciplinary charges or other initial pleading in the most recent of the proceedings sought to be consolidated. Proceedings may be consolidated if no substantial rights of any party will be prejudiced and if consolidation will not require the continuance of any previously

any party or any party's counsel. The decision shall be the final decision of the Court unless a timely request for review under rule 301 or 308 or post-trial motion under rules 221-224 is filed with the Clerk, or unless the decision is modified on the Court's own motion. Corrections of typographical errors or insubstantial changes not affecting the merits shall not constitute a modified decision under this rule.

(b) The Court shall file its decision within ninety (90) days of taking the matter under submission, unless a shorter period for filing the decision in an expedited proceeding is required by statute, by Supreme Court rule, or by these rules.

(c) If the Court recommends disbarment, it shall also include in its decision an order that the respondent be enrolled as an inactive member pursuant to Business and Professions Code 6007, subdivision (c)(4). The order of inactive enrollment shall be effective upon personal service or three (3) days after service by mail, whichever is earlier, unless otherwise ordered by the Court.

(d) By March 1 of each year, the State Bar Court shall prepare and submit to the Chief Justice an annual report describing the compliance of each State Bar Court hearing judge with the requirements of paragraph (b) during the preceding calendar year.

(e) Paragraphs (b) and (d) shall apply to all proceedings which are taken under submission for decision on or after February 1, 1999.

Eff. February 1, 1999
Rev. January 1, 1997; January 1, 1996; January 1, 1995.

RULE 304. ORAL ARGUMENT BEFORE REVIEW DEPARTMENT.

Except as otherwise provided in these rules, the Review Department shall give the parties an opportunity for oral argument. The parties may waive oral argument at any time, but not less than five (5) days prior to the date set for oral argument. Unless oral argument is waived or the parties agree to a shorter period of notice, written notice of the time and place of oral argument shall be served on the parties at least thirty (30) days prior to the oral argument.

Eff. February 1, 1999.
Rev. January 1, 1995.

RULE 305. ACTIONS BY REVIEW DEPARTMENT.

(a) Upon review pursuant to rule 301 of decisions of rulings of the Hearing Department, the Review Department shall independently review the record and may adopt findings, conclusions and a decision or recommendation at variance with those of the hearing judge. The Review Department may remand a proceeding to the Hearing Department for a new trial on specified issues, for a trial de novo, or for other proceedings. Proceedings on remand shall be held before the same hearing judge unless the Review Department orders otherwise or that judge is unavailable. Findings of fact of the hearing judge resolving issues pertaining to credibility of witnesses shall be given great weight.

(b) The Review Department may take action as to an issue whether or not that issue was raised in the request for review or briefs of any party. If the Review Department is considering taking action as to an

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Model Rules for Lawyer Disciplinary Enforcement

II. PROCEDURE FOR DISCIPLINARY PROCEEDINGS
RULE 11. GENERALLY

A. Evaluation. The disciplinary counsel shall evaluate all information coming to his or her attention by complaint or from other sources alleging lawyer misconduct or incapacity. If the lawyer is not subject to the jurisdiction of the court, the matter shall be referred to the appropriate entity in any jurisdiction in which the lawyer is admitted. If the information, if true, would not constitute misconduct or incapacity, the matter may be referred to the central intake office, or to any of the component agencies of the comprehensive system of lawyer regulation established by Rule 1, or dismissed. If the lawyer is subject to the jurisdiction of the court and the information alleges facts which, if true, would constitute misconduct or incapacity, disciplinary counsel shall conduct an investigation.

Upon the conclusion of an investigation, disciplinary counsel may:
(a) dismiss;
(b) refer respondent, in a matter involving lesser misconduct, to the Alternatives to Discipline Program, pursuant to Rule 11(G); or
(c) recommend probation, admonition, the filing of formal charges, the petitioning for transfer to disability inactive status, or a stay.

B. Investigation.

(1) All investigations shall be conducted by disciplinary counsel. Upon the conclusion of an investigation, disciplinary counsel may:

(a) dismiss;
(b) refer respondent, in a matter involving lesser misconduct, to the Alternatives to Discipline Program, pursuant to Rule 11(G); or
(c) recommend probation, admonition, the filing of formal charges, the petitioning for transfer to disability inactive status, or a stay.

(2) Notice to Respondent. Disciplinary counsel shall not recommend a disposition other than dismissal or stay without first notifying the respondent in writing of the substance of the matter and affording him or her an opportunity to be heard. Notice to the respondent at his or her last

known address is sufficient.
(3) Disciplinary counsel's recommended disposition shall not be subject to review upon the respondent's request for review. Disciplinary counsel's recommended disposition other than a dismissal or a referral to the Alternatives to Discipline Program shall be reviewed by the chair of a hearing committee selected in order from the roster established by the board. The complainant shall be notified of the disposition of a matter following investigation. The complainant may file a written request for review of counsel's dismissal within [thirty] days of receipt of notice of disposition pursuant to Rule 4(B)(6)(c). Disciplinary counsel's dismissal shall be reviewed by the chair upon the complainant's request for review. The chair may approve, disapprove, or modify the recommendation or appealed dismissal. Disciplinary counsel may appeal a decision to disapprove or modify his or her recommendation to a reviewing chair of a second hearing committee also selected in order from the roster established by the board who shall approve either disciplinary counsel's recommendation or the action of the first reviewer, but the decision of the second reviewing chair shall not be appealable. Any hearing committee whose chair reviews a recommendation of disciplinary counsel is disqualified from participating in further consideration of the matter.

C. Admonition or Probation Imposition.

(1) If a matter is recommended to be concluded by admonition or by probation, disciplinary counsel shall notify the respondent in writing of the proposed disposition and of the right to demand in writing within [fourteen] days that the matter be disposed of by a formal proceeding. Failure of the respondent to so demand within [fourteen] days after written notice of the proposed admonition or probation constitutes consent to the admonition or probation.
(2) If the respondent within [fourteen] days demands a formal hearing, formal charges may be instituted.

D. Formal Charges. If a matter is to be resolved by a formal proceeding, disciplinary counsel shall prepare formal charges in writing that give fair and adequate notice of the nature of the alleged misconduct.

(1) Disciplinary counsel shall file the charges with the board.
(2) Disciplinary counsel shall cause a copy of the formal charges to be served upon the respondent and proof of service to be filed with the board.
(3) The respondent shall file a written answer with the board and serve a copy on disciplinary counsel within [twenty] days after service of the formal charges, unless the time is extended by the chair of the hearing committee. In the event the respondent fails to answer within the prescribed time, or the time as extended, the factual allegations shall be deemed admitted as provided in Rule 33(A).
(4) If there are any material issues of fact raised by the pleadings or if the respondent requests the opportunity to be heard in mitigation, the [hearing committee] [board] shall serve a notice of hearing upon disciplinary counsel and the respondent, stating the date and place of hearing at least [twenty-five] days in advance thereof. The notice of hearing shall advise the respondent of the right to be represented by a lawyer, to cross-examine witnesses and to present evidence. The complainant, if any, shall have the right to make a statement to the [hearing committee] [board] concerning the respondent's alleged misconduct and the effect of the alleged misconduct on the complainant. The hearing shall be recorded. The [hearing committee] [board] shall promptly submit its report containing its findings and decision on dismissal or sanction to the [board] [court] and shall serve the report on disciplinary counsel and respondent.
(5) Information concerning prior discipline of the respondent shall not be divulged to the hearing committee until after the committee has made a finding of misconduct unless said information is probative of issues pending in the present matter.

E. Review by Board. Review by the board shall be limited to a review of the report from the hearing committee and the record below. The board shall not review a matter unless: (a) the respondent or disciplinary counsel files objections with the board within [20] days of the date of service of the

report, or (b) a majority of the full board, at its next meeting after submission of the report, votes to review the matter. If the board does not review the matter and the hearing committee has decided to dismiss the matter, the matter shall be dismissed. If the board does not review the matter and the sanction recommended by the hearing committee is not disbarment or suspension, the board shall impose the sanction upon the respondent. If the board does not review the matter and the sanction recommended by the hearing committee is disbarment or suspension, the board shall transmit the report of the hearing committee to the court with a statement that the parties have waived objections and the board has declined to review the matter. If the matter is to be reviewed by the board, the respondent and disciplinary counsel should be afforded an opportunity to file briefs and present oral argument during the review by the board. The board shall adopt rules establishing a timetable and procedure for the filing of briefs and presentation of argument.

(1) Decision by Board. Following its review, the board may approve, modify, or disapprove the recommendation of the hearing committee. The board shall prepare a written report containing its findings and decision on sanction or decision to dismiss the matter. A copy of the report shall promptly be submitted to the court and served on disciplinary counsel and the respondent. If the board determines that the matter shall be dismissed or that a sanction other than disbarment or suspension shall be imposed, and the court does not vote to review the matter, then the board shall dismiss the matter or impose the sanction upon respondent.
(2) During its review, the board shall not receive or consider any evidence that was not presented to the hearing committee, except upon notice to the respondent and disciplinary counsel and opportunity to respond. The hearing committee is the initial trier of fact; the board serves an appellate review function. If new evidence warranting a reopening of the proceeding is discovered, the case should be remanded to the hearing committee.

F. Review by the Court. The court may, within its discretion, review a matter if the respondent or disciplinary counsel files objections to the report of the board or if a majority of the court, within the time for filing objections, votes to review the matter. If the court does not review the matter and the sanction decided upon by the board or by the hearing committee with review declined by the board is suspension or disbarment, the court shall impose the sanction.

(1) The respondent and disciplinary counsel may file objections to the report of the board within [twenty] days from the date of service. Within [sixty] days after the court grants review, the respondent and disciplinary counsel may file briefs and present oral arguments pursuant to the rules governing civil appeals. Upon conclusion of the proceedings, the court shall promptly enter an appropriate order. The decision of the court shall be in writing and state the reasons for the decision. Upon final disposition at any stage of the proceedings, the written findings shall be published in an appropriate journal or reporter and a copy shall be mailed to the respondent and the complainant and to the ABA National Discipline Data Bank.
(2) During its review, the court shall not receive or consider any evidence that was not presented to the hearing committee, except upon notice to the respondent and disciplinary counsel and opportunity to respond.
(3) If new evidence warranting a reopening of the proceeding is discovered, the case shall be remanded to the hearing committee.

G. Alternatives to Discipline Program.

(1) Referral to Program. In a matter involving lesser misconduct as defined in Rule 9(B), prior to the filing of formal charges, disciplinary counsel may refer respondent to the Alternatives to Discipline Program. The Alternatives to Discipline Program may include fee arbitration, arbitration, mediation, law office management assistance, lawyer assistance programs, psychological counseling, continuing legal education programs, ethics school or any other program authorized by the court.
(2) Notice to Complainant. Pursuant to Rule 4(B)(6), the complainant, if any, shall be notified of the decision to refer the respondent to the Alternatives to Discipline Program, and shall have a reasonable opportunity to submit a statement offering any new information regarding the

respondent. This statement shall be made part of the record.
(3) Factors. The following factors shall be considered in determining whether to refer a respondent to the program:

(a) whether the presumptive sanction under the ABA Standards for Imposing Lawyer Sanctions for the violations listed in the complaint is likely to be no more severe than reprimand or admonition;
(b) whether participation in the program is likely to benefit the respondent and accomplish the goals set forth by the program;
(c) whether aggravating or mitigating factors exist; and
(d) whether diversion was already tried.

(4) Contract. Disciplinary counsel and the respondent shall negotiate a contract, the terms of which shall be tailored to the individual circumstances. In each case, the contract shall be signed by the respondent and the disciplinary counsel. The contract shall set forth the terms and conditions of the plan for the respondent and, if appropriate, shall identify the use of a practice monitor and/or a recovery monitor and the responsibilities of the monitor(s). The contract shall provide for oversight of fulfillment of the contract terms. Oversight includes reporting of any alleged breach of contract to the disciplinary counsel. The contract shall also provide that the respondent will pay all costs incurred in connection with the contract. The contract shall include a specific acknowledgment that a material violation of a term of the contract renders voidable the respondent's participation in the program for the original charge(s) filed. The contract may be amended upon agreement of the respondent and disciplinary counsel. If a recovery monitor is assigned, the contract shall include respondent's waiver of confidentiality so that the recovery monitor may make necessary disclosures in order to fulfill the monitor's duties under the contract.
(5) Effect of Non-participation in the Program. The respondent has the right not to participate in the Alternatives to Discipline Program. If the respondent does not participate, the matter will proceed as though no referral to the program had been made.
(6) Status of Complaint. After an agreement is reached, the disciplinary complaint shall be held in abeyance [dismissed] pending successful completion of the terms of the contract.
(7) Termination.

(a) Fulfillment of the Contract: The contract is automatically terminated when the terms of the contract have been fulfilled. Successful completion of the contract constitutes a bar to any further disciplinary proceedings based upon the same allegations.
(b) Material Breach: A material breach of the contract shall be cause for termination of the respondent's participation in the program. After a material breach, disciplinary proceedings may be resumed or reinstituted.

Commentary
The evaluation process eliminates those matters over which the agency has no jurisdiction. It precedes investigation, which is reserved for those matters determined to involve a lawyer subject to the jurisdiction of the agency and allegations which, if true, would constitute misconduct.

If the matter is terminated at this stage because the matter does not involve allegations of misconduct, disciplinary counsel should notify the complainant and refer him or her to the central intake office. Disciplinary counsel may refer matters to the central intake office or directly to any of the component agencies included in the comprehensive lawyer regulation system established by Rule 1, such as the lawyer assistance program (which provides assistance for impairment problems) or the fee arbitration program.

Matters terminated at the evaluation stage because they concern a lawyer not admitted to practice in the jurisdiction should be forwarded by disciplinary counsel to the agency for the jurisdiction in which the lawyer is admitted. The complainant should be notified of the disposition if a matter is concluded at the screening stage.

A stay is appropriate only in extraordinary circumstances. Disciplinary counsel must determine

whether the complainant or the respondent will suffer prejudice in the pending proceeding should the disciplinary action proceed immediately. In some cases, witnesses and evidence pertinent to both cases might not be obtainable at a later date; in other cases, the disciplinary action may be expedited by waiting for evidence to be adduced in another proceeding.

Fairness requires that no recommendation adverse to the respondent be made without providing him or her an opportunity to be heard. This does not mean that the respondent is entitled to notice immediately upon receipt of a complaint. In some instances, early notice would be harmful to the investigation. It does mean that the respondent has a right to be heard before the investigation is concluded and an adverse disposition formulated. If the matter is dismissed or stayed following investigation, respondent has no reason to appeal.

The review process preserves elements of bifurcation within the unitary system, because the recommendation of disciplinary counsel is subject to review and approval by a representative of the adjudicative body. The approval of counsel's recommendation to file formal charges by the reviewing member amounts to a finding of probable cause to proceed.

In order to prevent any possibility of forum shopping by disciplinary counsel, the hearing committee chairperson should be designated by the board. The hearing committee of which the reviewing chair is a member should be disqualified from any future consideration of the matter, in order to avoid being placed in the position of passing upon the correctness of his or her approval of the recommendation to prosecute formal charges.

The board supervises the operations of the agency. Any person dissatisfied with the action of the agency may complain to the board. The complaint should be submitted to a panel of the board, rather than the entire board, so that those members not serving on the panel will be available to participate in any future proceedings involving the matter.

If the first reviewing chairperson does not approve the recommendation, disciplinary counsel may submit the matter to a second reviewing chairperson who shall decide the issue by approving either the recommendation of disciplinary counsel or the modification thereon made by the first reviewer. The decision of the second reviewing chair shall be final within the agency.

The court, the board, or disciplinary counsel may impose probation. If probation is imposed by the board or by counsel, the consent of the respondent is required. The terms of the probation should specify periodic review of the order of probation, and provide a means to supervise the progress of the respondent.

Admonitions should be in writing and served upon the respondent. If the respondent does not consent to the admonition or probation, formal charges are instituted. The procedure is similar to the rejection of a settlement offer in a civil case or a plea bargain in a criminal case, which results in a trial.

The fact that refusal to consent to the admonition or probation subjects the respondent to formal charges and potentially more serious discipline does not violate due process any more than does the fact that a person charged with a crime is subject to conviction of a more serious offense when he or she refuses to plead to a lesser crime.

Prior discipline is relevant and material to the issue of the sanction to be imposed for the conduct which is the subject of the pending charges. Prior discipline is, except in unusual circumstances, not relevant or material to the issue of whether the conduct alleged has occurred. Consequently, introduction of evidence of prior discipline before a finding that the present charges have been sustained is prejudicial. Such records should not ordinarily be introduced until a finding of guilt has been made.

If evidence of prior discipline is necessary to prove the present charges (e.g. an allegation that the respondent continued to practice despite suspension) or to impeach (e.g. false testimony by respondent as to lack of prior discipline), it may be offered. However, it should not be used as a substitute for proving the allegations at issue.

The hearing may be recorded by any method authorized in the jurisdiction. The record will assist the hearing committee in the preparation and presentation of its report. If the matter ultimately results in a recommendation for discipline, the record should be forwarded with the findings and recommendation. The recording should be available to the respondent upon request, and a transcript provided at cost. The hearing committee is the initial trier of fact; the board serves an appellate review function. If new evidence warranting a reopening of the proceeding is discovered, the case should be remanded to the hearing committee.

Unless the decision of the hearing committee or the board is appealed or unless the board or court affirmatively decides to review a matter, cases should be disposed at the earliest possible stage. Of course, the court must retain ultimate responsibility for all disciplinary matters and, thus, must reserve the right to review any matter or even hold a de novo hearing if it so determines. This should occur only in extraordinary cases involving significant questions of law.

In all other cases, the court should rely on its disciplinary counsel, the hearing committee, and the board to dispose of matters in accordance with established disciplinary law. This will both speed up the process and reduce the burden on the court. If new evidence warranting a reopening of the proceeding is discovered, the case should be remanded to the hearing committee. Written opinions of the court not only serve to educate members of the profession about ethical behavior, but also provide precedent for subsequent cases. Moreover, this requirement is manageable; the courts in the jurisdictions with the heaviest caseloads currently write opinions in every contested disciplinary case they decide. If a matter is concluded without review by the court, the report of the board or hearing committee should be published in the official reporter. The agency should establish time guidelines for proceedings under Rule 11. Time guidelines under this Rule are directory and not jurisdictional.

The agency should establish guidelines for the following: (1) evaluation of information, investigation, and the filing and service of formal charges or other disposition of a matter; (2) hearing; and (3) review by the board. Evaluation, investigation, and the filing and service of formal charges or other disposition of routine matters generally should be completed within six months; complicated matters generally should be completed within twelve months. The period from the filing and service of formal charges to the filing of the report of the hearing committee generally should not exceed six months. The period for review by the board generally should not exceed six months. Thus, overall time periods generally should not exceed the following: eighteen months for routine matters that are reviewed by the board and twenty-four months for complicated matters that are reviewed by the board.

The overwhelming majority of complaints made against lawyers allege instances of lesser misconduct. Single instances of minor neglect or minor incompetence, while technically violations of the rules of professional conduct, are seldom treated as such. These complaints are almost always dismissed. Summary dismissal of these complaints is one of the chief sources of public dissatisfaction with the system.

These cases seldom justify the resources needed to conduct formal disciplinary proceedings. In most of these cases, the respondent's conduct does not justify imposing a disciplinary sanction. Therefore, these matters should be removed from the disciplinary system and handled administratively. It may be appropriate to compensate the client for the respondent's substandard performance by a fee adjustment or other arbitrated or mediated settlement. The respondent may need guidance to improve his or her skills or to overcome a problem with substance abuse.

A respondent has the right to refuse to participate in the Alternatives to Discipline Program. The only adverse consequence of a respondent's refusal to participate shall be that it is a factor to be considered by disciplinary counsel in determining whether to recommend the filing of formal charges. Disciplinary counsel may recommend formal charges even if the original complaint alleged lesser misconduct as defined in Rule 9(B). Disciplinary counsel, of course, retains the discretion to dismiss the complaint. If fee arbitration is mandatory in the jurisdiction, there is obviously no need for respondent's consent.

Participation in the program is not intended as an alternative to discipline in cases of serious

misconduct or in cases that factually present little hope that participation will achieve program goals. In addition, the program will only be considered in cases where, assuming all the allegations against the respondent are true, the presumptive sanctions would be less than suspension or disbarment or other restrictions on the right to practice. See Rule 9(B). After the filing and service of formal charges, a referral to any of the component agencies included in the comprehensive lawyer regulation system established by Rule 1 shall be made as written conditions pursuant to Rule 10(B).

The existence of one or more aggravating factors does not necessarily exclude participation in the program. For example, neglect cases often include a pattern of misconduct and multiple offenses, but do not involve dishonesty, bad faith, or a breach of fiduciary obligation. Thus, the existence of "a pattern of misconduct" and/or "multiple offenses" should not make a respondent ineligible for the program. A pattern of lesser misconduct may be a strong indication that office management is the real problem and that this program is the best way to address that underlying problem.

Factors that may indicate ineligibility for participation in the program include evidence of a dishonest or selfish motive, bad faith in, or the obstruction of, the disciplinary process, the submission of false evidence, or an indifference to making restitution. Both mitigating and aggravating factors should also be considered. The presence of one or more mitigating factors may qualify an otherwise ineligible respondent for the program.

The existence of prior disciplinary offenses would not necessarily make a respondent ineligible for referral to the Alternatives to Discipline Program. Consideration should be given to whether the respondent's prior offenses are of the same or similar nature, whether the respondent has previously been placed in the Alternatives to Discipline Program for similar conduct and whether it is reasonably foreseeable that the respondent's participation in program will be successful.

Each participant in the program will become a party to a contract that is specifically designed to address the alleged violations. It will be the respondent's responsibility to carry out the contract provisions. The contract provisions will indicate who is responsible to oversee the fulfillment of the terms of the contract. The person overseeing the contract must report to the disciplinary counsel any non-compliance with the contract provisions.

In order to encourage voluntary participation in lawyer assistance programs, such programs provide confidentiality. Rule 8.3(c) of the ABA Model Rules of Professional Conduct states: "This Rule does not require disclosure of information . . . gained by a lawyer or judge while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege." However, participation in the Alternatives to Discipline program differs from voluntary participation in a LAP program. The Alternatives to Discipline Rule recognizes this difference and requires the recovery monitor to make necessary disclosures in order to fulfill his or her duties under the contract.

Next - RULE 12. IMMUNITY.

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Center for Professional Development

Jerome Fishkin on behalf of the Association of Discipline Defense Counsel

April 17, 2009

TO: BOARD OF GOVERNORS, STATE BAR OF CALIFORNIA
Attn: Itzel Berio, OCTC

RE: Proposed Changes to Rule 75 (ENEC)

This is the response of ADDC (Association of Discipline Defense Counsel) to the Proposed Amendments to Rule 75 as promulgated on March 5, 2009.

OVERVIEW

The current proposal will reduce public protection, increase court caseload, and waste State Bar funds. It should be rejected in its present form.

We propose an alternate plan, attached.

SUMMARY

Most experienced trial attorneys recognize that more cases are resolved without formal trial if all cases are ordered into a mandatory settlement conference. Most experienced State Bar litigators recognize that the same result occurs when cases go to an ENEC and both sides are open to the observations of the ENEC judge. Our experience is that some of our own clients are not ready to accept discipline until a State Bar Court judge reinforces the advice we have given. Similarly, when OCTC actually considers the statements of the ENEC judge, it often looks at its own case in a different light. Finally; feedback indicates that a pro per respondent pays close attention to the ENEC judge's opinions, a third sort of case that settles at ENEC.

The ENEC process was designed to reduce court caseload. It achieved that goal, at least until recently as OCTC has become increasingly inflexible in its approach to cases. The OCTC proposal will increase court caseload at both the State Bar Court and the Supreme Court, without any real change in the ultimate outcome of cases. OCTC's proposal will result in a temporary improvement in OCTC backlog statistics. However, the price is that discipline cases will take longer to complete unless the State Bar increases the number of judges to handle the increased court caseload.

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Every case that resolves at an ENEC is completed about a year earlier than a case that requires full court processing. Thus, public protection will be reduced by lengthening the time it takes to process cases that would otherwise resolve sooner.

This proposal will increase the work of the Supreme Court. A case that resolves at the ENEC with recommend discipline, can be reviewed at the Supreme Court in a few minutes, since the entire file consists of a stipulation and a cost bill. After a full contested trial, the file now consists of a lengthy decision, exhibits, a court file, and sometimes even a transcript.

THE ENEC PROCESS WORKS

Rule 75 was initially proposed by Justice Elwood Lui (Ret.) as a way to resolve cases before they consume substantial judicial time. One then sitting State Bar Court judge pointed out that if every judge resolved as few as one case a month at the ENEC level, 60 cases would be eliminated from the court caseload, enough to save one full time judge's time.

According to Matter of Respondent AA 4 Cal State Bar Ct Rptr 721, fn 9 (2004), about half of all cases resolve at the ENEC. Thus, any appreciable number of filings that bypass the ENEC will either require new judges or result in trial delays. Any case resolved at the ENEC level with discipline means faster discipline. Prosecutors, defense counsel and judges all understand that swifter discipline cures bad behavior a lot better than slow discipline. If a case resolves at the ENEC with no discipline, then the attorney is saved time and expense, OCTC can concentrate on violators, and the ignominy of a false accusation does not go onto the website.

RESOLUTION IS UNPREDICTABLE IN ADVANCE

There is no support for the unlikely statement that only cases that are close in offer and demand should go to an ENEC. Defense counsel have seen substantial movement in both directions at the ENEC. Sometimes our own clients are skeptical of what they hear from both the prosecutor and defense counsel, until a State Bar judge corroborates the statements. Defense attorneys often need that last nudge, or push, from the judge, in order to resolve a case. Sometimes, a prosecutor does not realize the weakness in a case until the prosecutor has to draft the NDC. Sometimes the weakness of a case does not become evident until the prosecutor attempts to articulate the position out loud to an experienced trial judge who can ask follow up questions.

Our experience in the ENEC process is no different that our experience in the civil and criminal courts. There are trial attorneys who believe that it is a sign of weakness to propose any sort of settlement process. It does not matter if the parties are close or far apart. What matters is the ability of any party to sustain its position, and the ability of the judge to bring about resolution.

"Closeness" of position is a matter of perspective. A suspension of 60 v 90 days is very close. However, the collateral effect of the 90th day is enormous. There is only one step difference between an ALD and a private reproval, yet one results in permanent discipline and one does not. Similarly, a private vs public reproval is very close, as discussed by OCTC in its rationale. However, we do not believe that the issue over private reproval is a big statistical item in the ENEC process. On the other hand, the lack of any statistics in the proposal is an impediment to rational review.

THE SUCCESS OF ENEC's

Experience teaches us that full time prosecutors often do not recognize issues, or case weakness, until a sitting judge points them out. State Bar prosecutors are skeptical of what defense counsel argue, in much the same way that potential respondents are skeptical of what a Bar prosecutor argues. Sometimes, the judge can obtain resolution by simply being there and being neutral. Sometimes the evaluation has its true impact months down the line, at a settlement conference. Sometimes the evaluation sends the prosecutor back to the drawing board. Sometimes it is a reality check for the proposed respondent.

Under the proposal as submitted, the decision to bypass an ENEC would be made before any NDC or formal charges have been drawn up. The requirement of drafting the NDC, and justifying it to a trial judge, results in more accurate NDC's and less wasted time on cases that cannot be sustained on even a minimal challenge.

The evaluation process works. Very often the filed NDC is different from the draft NDC used at the ENEC. This change is even more important in the current era, when that NDC will be posted on the member's website listing for at least a year, often more. It is fundamentally unfair to permit false, or even overblown, charges, to remain on the website.

ENEC TIMING

The State Bar Court said it well in Respondent A, pp 727. The 20 day meeting and the ENEC "permit appropriate resolution of a case before the matter becomes public by the filing of formal charges. This, itself, is often a key motivator propelling resolution." That motivation is even more pressing today, when the NDC is placed on the member's website listing.

Much of the discipline process is hurry up and wait. OCTC spends months, sometimes years, sitting on a case. There are significant number of cases in which OCTC's file is out of date when the State Bar attorney looks at it. All of a sudden, they want that 20 day conference (see Respondent A at page 725) and that 14 day ENEC. Certainly there are cases that must be moved quickly. However, most do not have such a requirement. In many cases, the need for speed is disingenuous. Thus, we oppose a blanket rule about timing or length of an ENEC.

A survey of our own members indicates that a multiple day ENEC is very rare. They only occur when the judge believes that resolution is possible with a little more work. Once again, experienced trial attorneys know that such cases can be resolved if the dynamics work. We also know that if one side controls the process, then it won't work as well. State Bar cases are no different in that regard than civil litigation or criminal plea bargaining.

Similarly, the process does not work when one side is simply intransigent. The 50% figure cited in Respondent A probably does not apply in 2009. That is because the prosecutors are often not participating in good faith. In recent times, the prosecutors do not feel the need to justify the charges to the ENEC judge. They come into the ENEC with a take it or leave it attitude. They refuse to participate in a meaningful way in the conference, then coming to the Board to eliminate the ENEC because they allege it does not work.

THE PROPOSAL IS BASED ON FALSE RATIONALE

Rule 75 was not a proposal of the Respondent's Bar. It was made by the "Special Subcommittee for the Rules of Procedure" in 1998-1999, chaired by Retired Court of Appeal Justice Elwood Lui, who at the time had been appointed by the Supreme Court as Special Master for the State Bar Discipline System. The Committee included court personnel and prosecutors, and members of the Respondent Bar.

At that time, the State Bar had been soundly criticized for the previous few years as being too expensive, too slow, and too inefficient. The focus of Rule 75 then was, as it is now, to encourage **both** parties to re-evaluate their positions and

evidence Rule 75 was intended and to facilitate **either** the resolution of the entire case, or to narrow the charges that would be filed. The involvement of a State Bar Court Judge, as a neutral and dispassionate third party, was for the purpose of providing both sides with an opportunity to benefit from a impartial view by a member of the Court. As Respondent A states at page 727, an ENEC can save court time and can save both sides the expense of formal litigation.

The proposed change in the ENEC rule will help the State Bar revert to the previous slow and inefficient ways. The proposal will either result in trial delays or will require even higher State Bar dues to finance the extra judges to hear case.

Back in 1998, the State Bar Court judges realized that a very large number of cases resolved after a settlement conference. But that meant a full work up by both sides along with an investment of considerable judicial time. The working premise was that an ENEC would enable the court to resolve a number of cases before the consumption of a lot of court time, so that unnecessary cases would not clog up the Court's calendar. It turns out that the premise was correct.

Experience has shown that, when all participants work towards resolution, the ENEC is a win win win event – for the court, for prosecutors, for the defense. Cases do resolve at the ENEC. There is no ready way to predict which ones will resolve and which ones will not.

The March 1999 Board of Governors agenda item indicates that a review of the ENEC process would be conducted and that the Court would recommend the sort of statistics that would make the evaluation useful. We are not aware that such a detached evaluation has ever been made.

For example, the OCTC rationale for the proposal emphasizes the difference between a private reproval at the ENEC and one that occurs afterwards. We believe that the negotiations over a private reproval are a statistically small part of the larger picture. The failure to provide any statistics overstates the significance of that particular type of case.

We believe that the actual statistics would demonstrate that the discussion at page two of the proposal is simply wrong. Thus, we believe that the Board should ask both for statistics to support OCTC's proposal.

OCTC and the Court are uniquely in a position that we are not in. They can determine how many ENEC's have been held, what the relative positions of the parties were before, how they turned out. The records also exist to demonstrate how many ENEC's take that mysterious six weeks to complete, or how many took multiple days. The records exist to indicate how a case that did not resolve at the ENEC turned out, and how that outcome compares to the position taken by OCTC and the proposed respondent. We believe that a true statistical survey will demonstrate that the ENEC is a valuable tool for the Court.

A BACKLOG STATISTICAL SHIFT

We believe that the natural result of this proposal being adopted would be to move a large stack of backlogged cases from OCTC's statistics to the court's backlog. OCTC should be required to state in writing, just how many cases it presently has that area ready for filing, and for which OCTC would skip the ENEC process if this proposal passes. In turn, the court should be asked to estimate the number of new judges required to handle the workload, or in the alternative, how much delay the new group of cases would cause in the usual processing of cases.

OUR AFFIRMATIVE PROPOSAL

We believe the ENEC process works when all sides participate in good faith. We propose that it be strengthened as follows. Major changes are noted below.

Rule 75 (*a) If the Office of the Chief Trial Counsel and the member are unable to reach agreement on the resolution or disposition of a matter prior to the filing of a notice of disciplinary charges, the State Bar shall offer an Early Neutral Evaluation Conference to all attorneys against whom the State Bar proposes to file disciplinary charges.*

Rather than require affirmative action of one side or the other, the ENEC should be expanded to all cases, other than those where the attorney has not participated in the investigation process. This is a small shift from the present. Currently the State Bar sends a "20 day" letter to all potential respondents, and in that letter, notifies them of the ability to ask for an ENEC.

Under this proposed revision to the Rule, everyone who has been engaged in the investigation process would be offered an ENEC. Remember, there is an old fashioned belief that merely asking for a settlement conference shows weakness. This change in the rule would get rid of that now discredited belief.

Rule 75 (b) An Early Neutral Evaluation Conference (ENEC) shall be conducted by a State Bar Court hearing judge, or by members of the State Bar designated by the Executive Committee of the State Bar Court.

ENEC conferences are currently held by sitting judges and by selected court attorneys designated as judges pro tem. We envision a day when a tag team of one prosecutor and one defense attorney could perform the ENEC, much as Superior Courts now obtain such tag teams to resolve civil litigation.

We understand that one of the biggest stumbling blocks at the ENEC involves the pro per. The ENEC helps. We believe it would be even more helpful if that pro per had the perspective of both a prosecutor and defense attorney.

Rule 75 (c) The Early Neutral Evaluation Conference shall be held within fifteen (15) days of the request of either party, unless otherwise ordered by the hearing judge.

The primary purpose of the ENEC is to save judicial time. Thus, judges are much better positioned to determine when a delay, if any, would assist them. Furthermore, in those cases where OCTC waits one or more years to prepare to file charges, the need for speed simply does not ring true. There is bound to be a case or two that does not fit the norm, so the judges and the parties can work them out.

Rule 75 (d) At least 5 days prior to the ENEC, the State Bar shall lodge with the ENEC judge, and provide to the member, a draft of the proposed charges to be filed. The State Bar is not bound by this draft and may make such changes as it deems, if subsequent charges are filed.

Under the current system, the proposed respondent has received one or more letters of inquiry. The first letters list the allegations of the complainant, as interpreted by an investigator. The 20 day letter typically lists only the rules and code sections that will be alleged, not any factual summary. The attorney is left to guess what the charges will be. Sometimes the 20 day letter introduces new allegations that the attorney is not aware of. So the ENEC is the first opportunity for the attorney to see, in black and white, what the accusations are.

The ENEC process does not work well if the State Bar withholds the draft NDC from the proposed respondent. On the other hand, most lawyers recognize that the actual drafting of a legal document clarifies thinking. As proposed by OCTC, the decision to skip the ENEC is made before anyone in OCTC actually tries to craft the accusation against the proposed respondent.

ASSOCIATION OF DISCIPLINE DEFENSE COUNSEL

BY: _____/s/_____
JEROME FISHKIN
First Vice President

http://www.disciplinedefensecounsel.org/

Proposed changes to State Bar Rule 75
Proposed by ADDC
April 17, 2009

Proposed additions in underscore
Proposed deletions in strikeover
Proposed changes based on current rule

(a) If the Office of the Chief Trial Counsel and the member are unable to reach agreement on the resolution or disposition of a matter prior to the filing of a notice of disciplinary charges, the State Bar shall offer an Early Neutral Evaluation Conference to all attorneys against whom the State Bar proposes to file disciplinary charges.

(b) An Early Neutral Evaluation Conference (ENEC) shall be conducted by a State Bar Court hearing judge, or by members of the State Bar designated by the Executive Committee of the State Bar Court.

(c) The Early Neutral Evaluation Conference shall be held within fifteen (15) days of the request of either party, unless otherwise ordered by the hearing judge.

(d) At least 5 days prior to the ENEC, the State Bar shall lodge with the ENEC judge, and provide to the member, a draft of the proposed charges to be filed. The State Bar is not bound by this draft and may make such changes as it deems, if subsequent charges are filed.

(e) Each party may also provide the Early Neutral Evaluation judge with such documents and information that the party believes supports his or her position.

(~~b~~f) At the Conference, the Early Neutral Evaluation judge shall provide the parties with an oral neutral evaluation of the alleged facts and charges and the potential for the imposition of discipline. If a resolution of the matter which requires the approval of the Court is reached by the parties at the Conference, the Office of the Chief Trial Counsel shall document the resolution and shall submit it to the Early Neutral Evaluation judge for approval or rejection.

~~(c) In order for the Early Neutral Evaluation judge to provide a meaningful evaluation, the Office of the Chief Trial Counsel shall provide the Early Neutral Evaluation judge with a copy of the draft notice of disciplinary charges. Each party may also provide the Early Neutral Evaluation judge with such documents and information that the party believes supports his or her position.~~

(g) The Early Neutral Evaluation Conference shall be confidential and each party may designate any documents he or she provides for in camera inspection only and not to be exchanged with the opposing party. All documents provided to the Early Neutral Evaluation judge shall be returned to the respective parties at the conclusion of the Conference.

(~~d~~h) Unless otherwise stipulated by the parties, the Early Neutral Evaluation judge shall not act as the trial judge in a subsequent proceeding involving the same facts.

(e) The provisions of this rule shall apply to all proceedings in which the notice of disciplinary charges was not filed on or before May 1, 2009 ~~January 29, 1999~~.

Trudy C. Levindofske, Executive Director, Orange County Bar Association, on behalf of the Orange County Bar Association

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April 24, 2009

Itzel D. Berrio
Office of the Chief Trial Counsel
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Amendments to Rule 75 subdivision (a) Rules of Procedure re Early Neutral Evaluation Conferences

Dear Ms. Berrio:

Founded in 1901, the Orange County Bar Association ("OCBA") has over 6500 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by its Administration of Justice Committee.

The following comments refer solely to amendments proposed to Rule 75 subdivision (a), Rules of Procedure of the State Bar.

As proposed, the amendments operate to place unwarranted discretion in the hands of the Office of the Chief Trial Counsel ("Office"), to the degree that the Early Neutral Evaluation Conference ("ENEC") process would be, at the least, changed or, at the worst, undermined and, ultimately, the neutral evaluator role of the State Bar Court Hearing Judge largely usurped.

Due to the benefit inherent in the process, let alone the fact that currently, no notice of disciplinary charges ("NDC") may be filed prior to its conclusion, virtually no respondent attorney would fail to request or agree to an ENEC. Accordingly, in requiring the consent of the Office to the ENEC, the amendment makes the Office the sole arbiter as to whether an ENEC will take place. The Office claims that it needs this control over the process and in effect, over the respondent attorney, because, "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." But what constitutes "far apart?" This determination, potentially foreclosing the process to a respondent attorney, would be wholly up to the assigned Deputy Trial Counsel. There would be no predictable, uniform standard by which respondent attorneys

could determine if the ENEC process would be available to them, a process which was believed due all respondent attorneys when it was devised in 1999.

By setting the Office in this gatekeeper role, it is effectively allowed to substitute a predisposed view and evaluation for the neutral evaluation required of the State Bar Court Hearing Judge by the process. This predetermination would operate not only on cases in which the Office unilaterally determines positions too "far apart" to merit an ENEC, but on the balance of cases as well, for a State Bar Court Hearing Judge conducting an ENEC in any particular case will know that but for the Office's view that it should or will settle, there would be no conference held. Any measure which would so empower a party to skew a process sounding in early neutral evaluation, confounds that process.

Likewise, the amendment to allow the Office alone to determine whether an ENEC may be continued, apparently even where such is in the nature of a postponement requested by the State Bar Court Hearing Judge, or held on multiple days, is inappropriate. As the Office notes, "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." Regardless of what allegedly may have been the original concept of the ENEC, the State Bar Court Hearing Judges are the neutrals here and, as such, provide the process. Who better to assess the situation and their skills, and determine the need for an additional day? Additionally, to accord to the assigned Deputy Trial Counsel the power to terminate the conference and so, trigger the NDC filing, would introduce a negotiating dynamic throughout, and not conducive to, a process intended by its design to lead to mutually acceptable resolution.

The Office is seeking these amendments in an effort to limit "one reason" for delay in the disciplinary process which delay, apparently, is often occasioned by the State Bar Court. It is at the expense of the respondent attorneys, however, that these amendments attempt to lessen delay in the ENEC process by curtailing its availability or altering its design. This seems an inappropriate approach and, for the foregoing reasons, it is respectfully urged that the proposed amendments to Rule 75 subdivision (a) not be adopted.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Michael G. Yoder
2009 President

Jerrilyn T. Malana, President, San Diego County Bar Association, on behalf of the San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

May 18, 2009

VIA FACSIMILE (415.538.2214) and U.S. MAIL

Itzel D. Berrio
Office of the Chief Trial Counsel
The State Bar of California
180 Howard St.
San Francisco, CA 94105

Re: *Opposition to Proposed Amendment to Rule 75, California State Bar Rules of Procedure*

Dear Ms. Berrio:

I write on behalf of the San Diego County Bar Association in response to the request for public comment regarding the proposed amendment to Rule 75 of the State Bar's Rules of Procedure. After careful review of the issue, we *oppose* the Office of Chief Trial Counsel's proposed amendment to Rule 75.

Currently, an Early Neutral Evaluation Conference (ENEC) can be held prior to the contemplated filing of disciplinary charges against an attorney in State Bar Court on the request of either party, if they cannot reach a pre-filing resolution on their own. The proposed amendment would require that both parties (the respondent attorney and the State Bar, represented by the Office of Chief Trial Counsel) request the ENEC.

The ENEC process was adopted following the shutdown of the discipline system in 1998. The purpose of the ENEC was to address the large backlog of cases that had accumulated during the shutdown by instituting an alternative dispute resolution (ADR) process to resolve discipline cases before filing without compromising public protection under the guidance of a State Bar Court judge. The ENEC program has been very successful. In 2002 and 2003, half of all discipline matters that were heard at an ENEC resulted in a settlement without litigation in State Bar Court. *In the Matter of Respondent AA (Review Dept 2004)*, 4 Cal State Bar Ct. Rptr. 721, 727, fn. 9.

In light of the financial difficulties that the State Bar is suffering, efficiency should been encouraged rather than discouraged. ADR is encouraged in civil litigation, and there is no reason why discipline cases should be different.

The Office of Chief Trial Counsel's (OCTC) rationale for requiring both parties to agree to an ENEC is not convincing. While some respondents may use the ENEC to delay the filing of discipline charges, there is no statistical information cited by OCTC

to show that this is a significant problem. Even if no settlement is reached, a delay of a few weeks is not significant given the proven benefits of the ENEC process. Moreover, OCTC's assessment of the appropriate discipline in any given case is not infallible and in many cases that may be the obstacle to settlement, an obstacle that should be addressed before the case is filed.

We appreciate your consideration of our opposition to the proposed amendment to Rule 75.

Sincerely,

Jerrilyn T. Malana
President, San Diego County Bar Association

cc: Board of Directors, San Diego County Bar Association
David C. Carr, SDCBA member and Legal Ethics Committee member

Katherine M. Forster, President, Women Lawyers Association of Los Angeles, on behalf of the Women Lawyers Association of Los Angeles

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May 12, 2009

Board of Governors
State Bar of California
180 Howard Street, 7th Floor
San Francisco, CA 94104

Attn: Itzel D. Berrio

Re: *Proposed Changes to State Bar Rules of Procedure, Rule 75*

Dear Members of the State Bar Board of Governors:

The Women Lawyers Association of Los Angeles (WLALA) joins in the letter of attorney Ellen A. Pansky attached hereto and urges the Board of Governors to reject any revision to Rule 75 that permits one party to refuse to participate in the ENEC process or that reduces the discretion of the State Bar Court judges in connection with ENEC. Such changes would increase the number of weak cases brought by OCTC, wasting State Bar resources at a time when the Bar faces financial challenges.

Statistics show that the vast majority of discipline cases involve minor offenses and do not warrant either lengthy suspension or disbarment. These cases can and should be settled, just as the vast majority of both civil and criminal cases are settled.

WLALA urges the Board of Governors to direct discipline bar counsel to seek to settle discipline cases at the earliest stage and to work with the State Bar court and with lawyers who are facing disciplinary charges to resolve cases fairly and appropriately, without engaging in litigation where reasonable settlements can be accomplished. The monetary savings of such an approach will allow the State Bar to continue its long history of public service, as well as facilitating the rehabilitation of errant lawyers who have committed disciplinary violations.

Respectfully submitted,

Katherine M. Forster
WLALA President

7784695.1

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April 14, 2009

VIA FIRST CLASS MAIL

Board of Governors
State Bar of California
180 Howard Street, 7th Floor
San Francisco, CA 94104

Attn: Itzel D. Berrio

Re: *Proposed Changes to State Bar Rules of Procedure, Rule 75*

Dear Members of the State Bar Board of Governors:

Please accept this comment with respect to the proposed revisions to Rule 75, Rules of Procedure of the State Bar, which governs the Early Neutral Evaluation Conference program of the State Bar Court.

Attached for ease of reference is a copy of the memorandum which was distributed by the Los Angeles Office of the State Bar Court in March 1999, summarizing the history of the then interim rule 75. As the memorandum explains, in 1999 the State Bar was just recovering from a budgetary crisis, which resulted in the layoff of numerous State Bar employees, and resulted in a significant backlog of cases at the State Bar Court level. The ENEC structure was proposed by special master Elwood Lui, a retired member of the California Appellate Court, who had observed that Early Neutral Settlement Conferences were used to positive effect in both State and Federal Court systems.

The purposes of the ENEC program were several: the goal was not merely to resolve cases which would not result in public discipline, before the filing of Notice of Disciplinary Charges. In addition, a crucial feature of the ENEC process was to streamline discovery, preserve the State Bar Court's limited assets, and encourage the speedy resolution of matters before formal discovery was instituted. All of these goals are equally important today, in light of the State Bar's reported budgetary crisis, and the significant backlog at the State Bar Court which is causing cases to be double and triple set for trial.

It is important to note that the current State Bar Court system does not include an important feature specified by the American Bar Association Model Rules for Lawyer Disciplinary Enforcement: before filing a formal disciplinary proceeding, there must be a probable cause determination by a hearing officer. (ABA Model Rule 11(B)(3), attached for ease of reference.) Prior to the institution of the current full time professional California State

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R. Gerald Markle (1950-2004)

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Bar Court, the California State Bar disciplinary system included a preliminary hearing, whereby a neutral fact-finder would determine whether there was probable cause to file formal disciplinary charges, and what charges should be filed. The Early Neutral Evaluation Conference is the only process which now fulfills this important purpose. Otherwise, the decision to charge a disciplinary offense is left exclusively in the hands of the prosecutor. This is inappropriate, and directly contrary to the system which is recommended by the American Bar Association, which traditionally was used in California, and which is followed in many states.

It is discouraging, to say the least, that the lions' share of the limited State Bar budget is being devoted to a discipline system which has become ponderous, unnecessarily formalistic, and inefficient. The prosecutor's office seems to have developed a policy which requires formal discovery in a majority of cases. Notwithstanding the fact that an attorney respondent or a Bar applicant will have already provided written explanation of the conduct which forms the basis of the State Bar Court proceeding, the Office of the Chief Trial Counsel frequently insists on deposing these individuals, at great expense to the system. Additionally, the Office of the Chief Trial Counsel routinely utilizes investigative staff to sit in on depositions, and often has more than one lawyer present at deposition and at trial, even in less serious cases. The entire system has become frustratingly slow and unduly expensive. The majority of attorneys facing disciplinary action are fully cooperative with the disciplinary prosecutor, and wish to accept an appropriate disposition. It has typically been in the case (at least in the 31 years that I have been practicing before the State Bar Court) that the majority of cases settle by stipulation. Parenthetically, cooperation between the prosecution and the defense does not necessarily result in lax or improper conduct: it has recently been noted that Los Angeles' current District Attorney, Steve Cooley, is being praised and respected for his pragmatism and effectiveness in having his deputies work together with defense counsel to accomplish fair and appropriate dispositions in criminal proceedings. (See, L.A. Daily Journal article, "If Stars Align Troika of Allies May Emerge as L.A.'s Top Prosecutors," April 6, 2009.) Under District Attorney Cooley's watch, despite soaring unemployment, the crime rate is down in L.A., demonstrating that harsh prosecutorial methods are not required for a successful justice system.

The result of an approach that favors trial over settlement is that virtually no funds will remain in the State Bar budget for salutary community service projects, co-sponsorship of programs with other Bar associations, public education with respect to legal rights, and other beneficial projects for which the State Bar has long been known. It will truly be a shame if the State Bar chooses an unnecessarily wasteful disciplinary system to the virtual exclusion of equally important activities that benefit the public and legal profession.

I strongly urge the Board of Governors to reject any revision to Rule 75 which permits one party to refuse to participate in the ENEC process, and which reduces the discretion of the State Bar Court judges to determine how the ENEC shall be conducted, how many sessions are required in any particular case, or to recommend that charges being considered by the prosecutor not be filed, if there is a failure of probable cause.

Respectfully submitted,

Ellen A. Pansky

Cc: Holly Fujie, President
Richard Frankel, RAD Chairperson

District 7 Governors:
Rex Heinke
Howard Miller
Michael Marcus
Angela Davis
James Aguirre

Danette E. Meyers, President, Los Angeles County Bar Association, on behalf of the Los Angeles County Bar Association

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May 19, 2009

Via email to itzel.berrio@calbar.ca.gov

Itzel D. Berrio
Office of the Chief Trial Counsel
The State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: OPPOSE – Proposed Amendments to State Bar Rule 75, Rules of Procedure re Early Neutral Evaluation Conferences (ENEC)

Dear Members of the Board of Governors:

Founded in 1878, the Los Angeles County Bar Association (LACBA) membership includes over 26,000 California lawyers, making it the nation's largest local voluntary bar association. For more than 130 years LACBA has remained dedicated to improving the administration of justice, serving the public, and advancing the interests of the legal profession.

The Office of Chief Trial Counsel (OCTC) has proposed amendments to Rule 75, seeking to require that both the OCTC and the investigated member request an ENEC, and also to create a requirement that a State Bar Court hearing judge hold that ENEC within 15 days of such joint request without any ability to continue the Conference beyond that time frame. The reason behind these amendments, presented by the OCTC's representative to this Association's Executive Committee, revolve primarily around the desire to reject an ENEC when the OCTC feels that the investigated member is egregiously abusing the discipline review process, including the current availability of an ENEC upon one party's request. The Executive Committee also heard from the respondents' bar, which claims that such abuses are rare, the Court itself is capable of addressing any perceived "abuse," and that all parties, including the State Bar Court, benefit greatly from this preliminary ENEC.

You have heard in detail from others responding in opposition to the proposed amendments the many reasons why ENECs positively affect the efficiency of the State Bar disciplinary system, so we won't repeat them here. LACBA's Executive Committee speaking on behalf of its Board of Trustees, having reviewed and discussed the presentations made to it by both sides of the issue, opposes any amendment to State Bar Rule 75. We urge the Board of Governors to reject the proposed amendments and allow ENECs to continue to be held at the request of either party.

Respectfully yours,

Danette E. Meyers

Danette E. Meyers
President

cc: Members of the State Bar Board of Governors
LACBA Trustees
Joel A. Osman, Chair, LACBA Professional Responsibility and Ethics Committee

Christine Burdick, Executive Director & General Counsel, Santa Clara County Bar Association, on behalf of the Santa Clara County Bar Association

Berrio, Itzel

From: Chris Burdick [chrisb@sccba.com]
Sent: Wednesday, May 20, 2009 4:02 PM
To: Berrio, Itzel
Cc: Richard Frankel; Patti White (E-mail)
Subject: SCCBA Opposes Proposed Amendments to Rule 75
Attachments: image001.jpg

Dear Itzel,

Below please find comments from the Santa Clara County Bar Association regarding the proposed amendments to Rule 75 og of the State Bar Rules that govern early neutral evaluations in attorney disciplinary matters.

The Santa Clara County Bar Association (SCCBA) strongly opposes the proposed changes for the reasons set forth below. The SCCBA supports the use of early neutral evaluation wherever at least one of the parties believes it would be beneficial.

First, and foremost, the proposed change to require both parties to consent to ENE gives the Office of Chief Trial Counsel a disproportionate ability to block ENE when requested by the alleged offending attorney. ENE ought to be available whenever one of the parties believes it would be valuable in trying to resolve the disciplinary matter. That should be the policy of the State Bar, particularly, when the ENE request is made by the attorney. The Office of Chief Trial Counsel should not have exclusive authority to determine if an ENE should be scheduled when requested. Presumably, the Office of Chief Trial Counsel could oppose the ENE and set forth their reasons in opposition. The State Bar hearing judge could, then, exercise his/her discretion in scheduling the ENE. In any event, the procedures should favor resolution of disciplinary matters short of formal disciplinary charges and proceedings. The proposed change promotes that policy only when the Office of Chief Trial Counsel believes it would be worthwhile. The opportunity for negotiation and discussion should not rest upon one party's arbitrary discretion as to what constitutes a "worthwhile" probability of resolution; rather, the State Bar should promote continued communication between the parties to provide every opportunity for the Office of Chief Trial Counsel to hear the defenses of the alleged offending attorney and provide incentive for formal and informal cooperation in resolving claims.

The proposed change to eliminate the ability of the State Bar hearing judge to continue or control the scheduling of the ENE seems also to undermine a policy of resolving a disciplinary matter short of formal disciplinary charges. Again, the proposed change seems to unduly favor the Office of the Chief Trial Counsel since their availability for an ENE may be more flexible than the hearing judge or the attorney. This proposed change appears to address scheduling issues that are best addressed by the State Bar court and left to the discretion of the assigned hearing judge. This appears to be an heavy handed approach to address the efficient processing of disciplinary matters. Eliminating the hearing judges' discretion in scheduling or continuing an ENE may force matters through formal disciplinary proceedings when they could be resolved short of that. Again, the procedures should advance the policy of resolution of these matters short of formal disciplinary charges whenever possible.

Thank you for the opportunity to comment. If there are any questions regarding the SCCBA position, please do not hesitate to contact me.

Regards,

Christine Burdick
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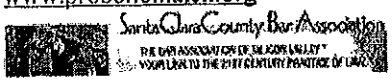

The Bar Association of San Francisco ("BASF") Legal Ethics Committee with the endorsement of BASF's Board of Directors

May 20, 2009

Via email to itzel.berrio@calbar.ca.gov

Itzel D. Berrio
Office of the Chief Trial Counsel
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: **OPPOSE – Proposed Amendments to State Bar Rule 75, Rules of Procedure re Early Neutral Evaluation Conferences (ENEC)**

Dear Members of the Board of Governors:

This letter is provided by the Bar Association of San Francisco's ("BASF") Legal Ethics Committee, and is endorsed by BASF's Board of Directors. The letter is submitted in response to the Office of Chief Trial Counsel's ("OCTC") proposed amendments to State Bar Rule 75 regarding Early Neutral Evaluation Conference ("ENEC") procedures before a Notice of Disciplinary Charges ("NDC") is filed. The Committee, with the Board's endorsement, *opposes* the proposed amendments to Rule 75 for the reasons discussed below.

Summary of Proposed Amendments

Under the present version of Rule 75, an ENEC must be held before a State Bar Court Hearing Judge if requested by *either party*. Once an ENEC has been requested, the OCTC may not file a NDC against the respondent attorney until the ENEC has been concluded. There is no requirement under the present rule that an ENEC be concluded in one session.

OCTC's proposed amendments to Rule 75 provide that an ENEC can only be conducted if *both* the OCTC and the respondent attorney request the ENEC. In addition, the proposed amendments provide that an ENEC in any given matter may not be held on multiple dates without the agreement of both parties.

OCTC's Rationale for the Proposed Amendments

OCTC's memorandum, accompanying its Request for Authority to Release Proposed Amendments to Rule 75 for Public Comment (the "Request"), articulates three primary reasons OCTC believes the proposed amendments are appropriate.

First, OCTC states that, while ENECs are valuable in cases in which the parties are close in their respective assessments of culpability or the appropriate degree of discipline or both, when the parties are not close "the ENEC is rarely more than an empty exercise and simply results in a sometimes significant delay in the filing of the NDC."

Second, OCTC states that While 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, resulting in delays of up to six weeks between an ENEC request and the actual conference.

Third, OCTC states that 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.

Analysis of Proposed Amendments

The Review Department of the State Bar Court of California has described ENECs as a significant procedural opportunity for both parties, and an important tool for effective court administration. (*In the Matter of Respondent AA*, 2004 WL 2335349, pp. 4-5.)

ENEC processes have significantly reduced the number of cases filed before the State Bar Court, and have helped both OCTC and the Court manage their caseloads. As of 2004, settlements had been reached in over half of the matters in which an ENEC was requested. (See *In the Matter of Respondent AA*, p.4, fn. 9 - for the years of 2002 and 2003 combined, ENE conferences were conducted by the court's hearing judges in 248 cases. A resolution was reached in the State Bar Court, or outside of the court, in 128 of the cases.) Without mandatory participation in ENEC at an early stage, when requested by one of the parties, more cases are likely to go to trial or settle at a much later date, thereby imposing increased financial burdens and time commitments on the parties and the Court.

By lengthening the time it will take to process cases that might otherwise resolve sooner, public protection is also reduced, and imposition of appropriate discipline is delayed. The time to prosecute an action once a NDC is filed can significantly exceed the up to "six week" delay OCTC states can sometimes occur between an ENEC request and the actual ENEC conference.

ENECs promote fairness, help to avoid unnecessary litigation and benefit both sides in objectively evaluating their case. (See *In the Matter of Respondent AA*, p. 4 – "one of the key aims of [the] process is to offer both sides an objective view of the consequences of filing those [NDC] charges.") As the State Bar Court has noted, the process helps focus a pending case "as efficiently as possible for fair disposition by settlement or trial." (*In the Matter of Respondent AA*, p. 4, fn. 10, quoting *GTE Directories Services, Corp. v. Pacific Bell Directory* (N.D.Cal. 1991) 135 F.R.D. 187, 190, fn. 1.)

The primary function of an ENEC would be undermined if participation by OCTC becomes optional. Many cases settle despite the fact parties have significantly disparate viewpoints. The use of a neutral forces each party's critical consideration of their case, early on, and of issues they may not have previously contemplated. The process also provides both parties with a preview of how their respective positions might be received by a State Bar Court Judge. (*In the Matter of Respondent AA*, p. 4.) This can be particularly helpful where the central facts are largely undisputed (not an uncommon situation) and the parties' primary disagreement centers on legal issues and/or the appropriate level of discipline.

ENECs significantly lower the litigation costs for all involved. (See *In the Matter of Respondent AA*, p. 4 – "they permit the litigants to avoid the extra work and expense of drafting and defending, respectively, the NDC; and they save the State Bar Court time otherwise needed to conduct a series of status and pretrial conferences and oversee discovery and related matters.") The costs imposed against a respondent rise dramatically upon the filing of an NDC, as do the costs to the State Bar in prosecuting the action. Resolution at the ENEC stage also "permit[s] appropriate resolutions of a case before the matter becomes public by the filing of formal charges." (*In the Matter of Respondent AA*, p. 5.) The confidentiality of a potential disposition can oftentimes be a key motivator in facilitating early resolution. (*Ibid.*)

Even when the parties do not reach a pre-filing disposition, ENECs are beneficial and promote efficient use of court resources. As noted in *AA*, the process provides an objective view of the consequences of the filing of a NDC. (*In the Matter of Respondent AA*, p. 4.) The ENEC Judge can advise the OCTC of weaknesses in their case that OCTC may not have recognized. Similarly, an ENEC Judge can assist respondent's counsel (or an *in pro per* respondent) in advising the respondent about the seriousness of the potential charges and the consequences of failing to arrive at a stipulated disposition. In doing so, the process helps focus litigation that moves forward to trial and/or reduce the additional time expended before the parties arrive at a pre-trial disposition.

Finally, the proposed requirement that a second ENEC session be subject to approval of *all* parties, unnecessarily interferes with the independent judgment of the Court and its ability to help resolve a matter before a NDC is filed. If an ENEC Judge feels that the parties are making progress and coming closer to resolution, she should be permitted to require the parties to attend another session. The fact the Judge would want a second session is an indication that, in the neutral's objective judgment, there are benefits and efficiencies to be obtained by continuing to pursue a disposition. Allowing a party to veto that judgment invades the province of the Court and the central purpose of the ENEC process.

Conclusion

For the foregoing reasons, the Committee opposes the proposed amendments to Rule 75, and BASF's Board of Directors joins in that opposition.

Respectfully yours,

On Behalf of The Legal Ethics Committee

With the Endorsement of the BASF Board of Directors