THE STATE BAR
OF CALIFORNIA

INTER-OFFICE
COMMUNICATION

DATE: June 23, 2009

TO: Regulation, Admission and Discipline Committee

FROM: Russell G. Weiner, Interim Chief Trial Counsel

SUBJECT: Statement from the Interim Chief Trial Counsel – Introduction and position on proposed amendments to rule 75, Rules of Procedure.

Introduction

Since I am unable to be with you in-person today, I wanted to provide this written statement to introduce myself, and offer the Office of the Chief Trial Counsel's (OCTC's) position on the proposal to amend rule 75, Rules of Procedure.

I have been with the Office of the Chief Trial Counsel for almost 21 years. I have held virtually every attorney position within the office from entry level deputy trial counsel to acting or interim chief trial counsel. As a deputy (and supervising) trial counsel, I tried cases before the Hearing Department of the State Bar Court and argued appeals before the Review Department of the State Bar Court. As a representative of OCTC, I have worked with most staff in the office and with staff in other departments within the bar.

My philosophy is simple. Focus on the basics and do the basics well. Work smart. Staff is our greatest resource. Don't lose sight of the big picture. Look to build alliances wherever possible.

The office is fully committed to its public protection mission and will continue its efforts during this interim period.

Proposed Amendments to Rule 75, Rules of Procedure

With regard to the proposed amendments to rule 75, Rules of Procedure, OCTC urges you to approve the amendments as proposed by the Office of the Chief Trial Counsel.

I want to make it clear that OCTC is not trying to do away with the early neutral evaluation conference (ENEC). That would not further our public protection goals. The ENEC process is a valuable and important part of the disciplinary process and generally promotes public protection and the prompt resolution of cases.

However, the rule as currently written has allowed some attorney respondents to use the ENEC to significantly delay the disciplinary process and abuse the system. It has placed the timing of the filing

of a Notice of Disciplinary Charges (NDC) in the control of the respondent attorney who may have no incentive for an early resolution of the matter. Because of how the current rule has been interpreted by the State Bar Court unreasonable results have occurred in the handling of the ENEC process that have resulted in significant delays of disciplinary cases and/or an inappropriate use of resources.

What we are asking for is the ability to have some say in the process and to be able to say "no" when we feel the ENEC process will not be productive or where it is being abused. As written, OCTC has no say in the process at all. OCTC cannot file a notice of disciplinary charges without an ENEC even when public protection would demand that it be filed. The amendments to the rule will have little or no effect on attorney respondents having settlement conferences in their cases or being able to settle disciplinary matters early on.

Let me give you some real examples of where the current rule and its interpretation have not worked to further public protection.

In *In the Matter of Stanley Hilton,* Case No. 05-O-04119 – PEM, et. al.,[1] the respondent, who was represented by counsel prior to the filing of a Notice of Disciplinary Charges, had a full opportunity to have an ENEC prior to the filing of the Notice of Disciplinary Charges. OCTC went to great lengths to afford the respondent an ENEC. Respondent's counsel did not request an ENEC. The notice of disciplinary charges was filed with the State Bar Court. This case was not and has never been a private reproval matter.

After the filing of the notice of disciplinary charges, *Hilton* hired new counsel to represent him.

Then, approximately three (3) months into the case, when discovery should be well underway, if not almost completed, and trial just months away, new counsel claimed his client never received an ENEC. New counsel then requested the case be dismissed so his client could have an ENEC. Under current rule 75, the notice of disciplinary charges had been properly filed as neither the respondent nor the State Bar had requested an ENEC.

Despite the fact that at this point there was nothing to be gained by dismissing the case and holding an ENEC, the hearing judge did just that. A settlement conference was available to the respondent and the State Bar to try to reach a settlement of the matter. Nothing more could be accomplished at an ENEC than could be accomplished at a settlement conference in the case. However, the hearing judge in her order dismissing the case without prejudice stated "[r]espondent was represented by counsel prior to the filing of the notice and, for whatever reason, counsel did not request the ENE although respondent desired it."

OCTC then sought interlocutory review before the Review Department of the State Bar Court. The Review Department denied the petition for interlocutory review finding no abuse of discretion and a waiver of any procedural error.

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[1] Attached are: Order Severing Cases and Granting Motion to Dismiss NDC Without Prejudice; Petition for Interlocutory Review; Order from the Review Department of the State Bar Court denying the petition for interlocutory review.

For the past ten (10) years, OCTC has had to attend every ENEC no matter the circumstances and even though it appeared highly unlikely to accomplish a settlement. For the past ten years, OCTC has had to attend every ENEC even though it was reasonable clear that the ENEC process was being used by the attorney respondent to delay the proceedings and/or "game" the system.

Consider, for example, a respondent who has three or four prior records of discipline, has never been willing to admit to any wrongdoing or to even stipulate to undisputed facts. This same respondent has had an ENEC in each case, settlement conferences along the way to trial and has never shown any recognition of wrongdoing or a desire to settle. The current charges against this respondent attorney involve the same type of misconduct as in one or more of the prior disciplinary matters and are very serious. The respondent has again taken the position that there is no misconduct in the new matter despite bank records or court records and other evidence establishing the misconduct by clear and convincing evidence. In this situation, OCTC does not believe that the filing of the notice of disciplinary charges should be delayed so the respondent can participate in yet another ENEC. Yet, under the current rule, OCTC has no choice (and the State Bar Court has no choice), but to participate in another ENEC before the NDC can be filed.

Currently, OCTC cannot file the notice of disciplinary charges without an ENEC even if there will be unreasonable delays (sometime delays of many months) and the public remains unprotected.

As a result, under the current rule OCTC is not able to file an NDC until the Respondent is ready to have it filed.

It may be suggested that if the attorney respondent is such a threat to the public OCTC could file a petition under Bus. and Prof. Code section 6007(c) to enroll the respondent attorney to inactive status pending disciplinary proceedings. However in many cases brought to the attention of the State Bar a Bus. and Prof. Code. Section 6007 (c) proceeding is not likely to be successful because the reported misconduct is more than a year old. The State Bar Court rarely grants a 6007(c) inactive enrollment petition unless the misconduct is presently ongoing or has occurred within the past twelve months. However, such misconduct can be very serious. Yet under the current rule, OCTC's hands are tied and the NDC cannot be filed unless the respondent gets an ENEC first. This was never the intent of rule 75, Rules of Procedure.

The defense bar will try to claim that this amendment will do away with the ENEC process. Nothing could be farther from the truth. OCTC has no reason not to attend an ENEC in most cases and OCTC has at least as much interest in settling cases as early as possible as the respondent attorney has to settle the case.

The defense bar may ask why fix something that is not broken? But the ENEC rule is clearly broken as shown by what occurred in the *Hilton* matter discussed above.

The ENEC was meant to be a reality check for the parties prior to the filing of the NDC, but it has been used by respondent attorneys to delay the filing of the NDC. It was not intended to cause a delay in the filing of the NDC or interfere with the discretion of OCTC to file charges.

Please approve the proposed amendments to rule 75, Rules of Procedure.

Finally, please feel free to call me at 213.765.1268 anytime if you want to discuss this issue or to discuss anything else.

I hope to personally meet each of you soon. Thank you for taking the time to read this statement and for giving it your consideration.

ATTACHMENTS
Documents from the *Stanley Hilton* Matter

1) Order Severing Cases and Granting Motion to Dismiss NDC (Notice of Disciplinary Charges) Without Prejudice;
2) Petition for Interlocutory Review;
3) Order from the Review Department of the State Bar Court denying the Petition for Interlocutory Review.

PUBLIC MATTER

FILED
APR 3 0 2009
STATE BAR COURT CLERK'S OFFICE
SAN FRANCISCO

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **STANLEY G. HILTON** **Member No. 65990** A Member of the State Bar.	))))))))	Case No.: **05-O-04119-PEM; 06-O-14935 07-O-12717; 07-O-14195; 08-C-10286 (Cons.)** **ORDER SEVERING CASES AND GRANTING MOTION TO DISMISS NDC WITHOUT PREJUDICE**

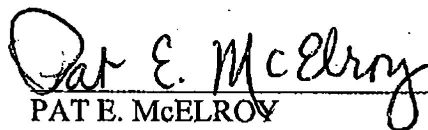
On April 7, 2009, respondent Stanley G. Hilton, through counsel, William M. Balin, filed a motion to dismiss the notice of disciplinary charges (NDC) because respondent had not had the opportunity to participate in the Early Neutral Evaluation (ENE) process as set forth in rule 75, Rules Proc. of State Bar. On April 21, 2009, the Office of the Chief Trial Counsel, by Robert A. Endries, filed opposition thereto.

On the court's own motion, case no. 08-C-10286 is severed from the other matters.

Having considered the parties' contentions, the court GRANTS the motion. Respondent was represented by counsel prior to the filing of the notice and, for whatever reason, counsel did not request the ENE although respondent desired it. Respondent, therefore, was unable to participate in the ENE process. (*In the Matter of Respondent* AA (Review Dept. 2004) 4 Cal.State Bar Ct. Rptr. 721.) Accordingly, the NDC is dismissed without prejudice.

All dates scheduled remain on calendar as to case no. 08-C-10286.

IT IS SO ORDERED.



Dated: April 29, 2009

PAT E. McELROY
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on April 30, 2009, I deposited a true copy of the following document(s):

ORDER SEVERING CASES AND GRANTING MOTION TO DISMISS NDC WITHOUT PREJUDICE

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

WILLIAM M BALIN
345 FRANKLIN ST
SAN FRANCISCO, CA 94102

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

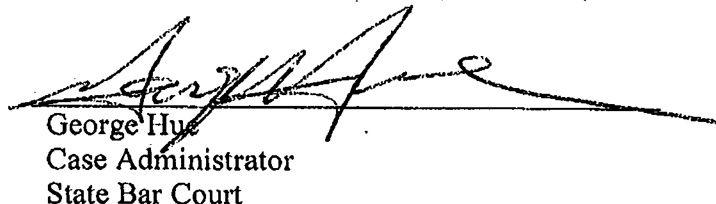
☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Robert A. Endries, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on April 30, 2009.



George Hue
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STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of: STANLEY G. HILTON, No. 65990, A Member of the State Bar	Case No. 05-O-04119 et al. PETITION FOR INTERLOCUTORY REVIEW (Rule 300, Rules Proc. State Bar)

To: The Honorable JoAnn Remke, Presiding Judge, and the Associate Judges of the Review Department of the State Bar Court:

The State Bar of California hereby petitions for interlocutory review of the Hearing Department's "Order Severing Cases and Granting Motion to Dismiss NDC Without Prejudice," filed herein on April 30, 2009.

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I
INTRODUCTION

The Hearing Department dismissed this case without prejudice, solely to allow respondent to participate in an Early Neutral Evaluation Conference. The Hearing Department did so despite the following facts that are *not in dispute*:

* Respondent never scheduled an ENEC despite the fact that he had many months to do so;

* The State Bar had repeated pre-filing communications with respondent's counsel concerning the scheduling of an ENEC;

* The State Bar sent respondent's counsel a letter stating that the Notice of Disciplinary Charges (NDC) would be filed if he failed to schedule an ENEC;

* Respondent was *personally* on notice both of his ability to request an ENEC and the fact that the State Bar was planning to file the NDC;

* Instead of simply scheduling an ENEC, respondent demanded a 2-1/2 month delay in the filing of the charges (even though Rule of Procedure 75(a) provides that ENEC's "shall" be scheduled within fifteen days of the request); the demand was accompanied by a lawsuit threat;

* The NDC alleges three separate investigation matters, including three separate allegations of moral turpitude. Notably, the NDC alleges that respondent engaged in improper delaying tactics in a case he was handling (Amended NDC, Count 2(A)); and

* After the NDC was filed, respondent delayed an additional two months before he filed the motion to dismiss.

Respondent is not entitled to a dismissal of this proceeding because he has not acted diligently in seeking an ENEC. Further, the dismissal unnecessarily restricts the ability of the State Bar to protect the public and wastes the State Bar's resources.

In his motion, respondent blamed his former counsel for failing to request an ENEC. However, respondent did not provide a corroborating declaration from his counsel. Moreover, as we will show, respondent bears the responsibility for his failure to schedule an ENEC.

Finally, the Hearing Department did not follow the appropriate procedures for a dismissal in the interest of justice and, instead, granted respondent's *ultra vires* motion.

II
FACTUAL AND PROCEDURAL RECITATION

A. RESPONDENT'S FAILURE TO REQUEST AN ENEC PRIOR TO THE FILING OF THE NOTICE OF DISCIPLINARY CHARGES

On March 20, 2008, State Bar Deputy Trial Counsel Robert Henderson sent respondent's counsel, Doron Weinberg, a letter (1) advising him that the State Bar had decided to file formal charges against respondent, (2) offering to conduct a pre-filing meeting, and (3) notifying Weinberg about the ENEC process (Exhibit 1 to Henderson Declaration).

On March 24, 2008, Weinberg sent a reply letter asking for a month's delay (Exhibit 2 to Henderson Declaration). Henderson agreed to this delay (Henderson declaration, par. 5). On May 27, 2008, Henderson mailed Weinberg an ENEC form, requesting that the form be returned no later than May 30th (Exhibit 3 to Henderson Declaration). However, instead of scheduling an ENEC, the parties conducted further negotiations. These negotiations were unsuccessful (see Henderson Declaration, pars. 7 and 8).

On December 1, 2008, in an attempt to move the case forward, DTC Henderson mailed a letter to Weinberg, again requesting that he schedule the ENEC (Exhibit 4 to Henderson Decl.). Weinberg did not schedule the ENEC or provide dates that he would be available (Henderson Decl., par. 8).

On December 12, 2008, DTC Henderson spoke to Weinberg about the need to schedule an ENEC and Henderson's intent to file the NDC. Henderson's "recollection" of the discussion is that Weinberg had not been able to obtain the dates from his client (Henderson Decl, par. 9). In contrast, respondent claims that he asked Weinberg to schedule the ENEC and he blames Weinberg for not doing so (Hilton Declaration). However, respondent has not provided a corroborating declaration from Weinberg.

Also on December 12, 2008, respondent faxed a letter directly to the State Bar, requesting that an ENEC be scheduled. However, respondent's letter did not provide any dates on which an ENEC could be scheduled. Further, the letter made it clear that respondent would not agree to an early scheduling. Instead, respondent demanded that the case be delayed until

March 31, 2009 and threatened to file a lawsuit against the State Bar if he did not get his way (Exhibit 5 to Henderson Declaration).

As required by the ethics of our profession, Henderson did not respond directly to respondent. Instead, Henderson sent a December 15 letter to Weinberg advising him of the communications. The letter asked Weinberg to advise the State Bar if he no longer represented respondent (Exhibit 6 to Henderson Declaration). Weinberg did not withdraw from the case at that point (see Henderson Declaration, par. 11). Thus, Henderson could not ethically contact respondent directly and he did not do so.

Henderson then waited another 45 days (from December 15, 2008 to January 30, 2009) before he filed the Notice of Disciplinary Charges. In the interim, respondent still failed to schedule an ENEC and still failed to provide any dates for an ENEC—even dates in March or April 2009.

B. POST-NDC PROCEEDINGS

On January 30, 2009, the State Bar filed a Notice of Disciplinary Charges alleging misconduct in three separate matters and acts of moral turpitude in each matter (Exhibit 1).

On February 6, 2009, the matter was assigned to the Honorable Pat McElroy, Judge of the State Bar Court, who presided over all further Hearing Department proceedings (Exhibit 2).

On February 23, 2009, the Hearing Department conducted a status conference in which it: (1) consolidated this case with a pending criminal conviction matter (case no. 08-C-10286), (2) vacated the previously scheduled trial date for the conviction matter and continued the trial until August 2009, (3) relieved attorney Doron Weinberg as counsel in the conviction matter,[1] and (4) scheduled a settlement conference for May 11, 2009 before the Honorable Lucy Armendariz. Attorney William Balin appeared as counsel for respondent in both matters (Exhibit 3). Mr. Balin orally requested that the case be dismissed so that an ENEC could be

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[1] Respondent's counsel, Doron Weinberg, had filed a motion to withdraw from the criminal case. In his motion, Weinberg stated that respondent was dissatisfied with Weinberg's representation in the underlying criminal case (Exhibit 12).

conducted. The Court denied the request and instead advised respondent to file a written motion (see Exhibit 11 (audio recording of status conference)).

On March 18, 2009, the State Bar filed an Amended Notice of Disciplinary Charges (Exhibit 4).

On April 7, 2009—more than two months after the NDC had been filed—respondent (through counsel, Mr. Balin) filed a motion to dismiss the case. In the motion, respondent claimed that his prior counsel, Doron Weinberg, should have requested an ENEC (Exhibit 5).[2]

On April 17, 2009, the State Bar filed an opposition, replete with a declaration and exhibits showing that respondent had been afforded a full opportunity to request an ENEC (Exhibit 7). On April 21, 2009, the State Bar filed an amended opposition, correcting a mis-description of the February 23 status conference (Exhibit 8).

On April 30, 2009, the Hearing Department granted respondent's motion and, *sua sponte*, severed this case from the conviction referral matter (Exhibit 10).

III
POINTS AND AUTHORITIES

A. STANDARD OF REVIEW.

In *In the Matter of Respondent AA* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 721, 725, this Court approved the Hearing Department's without-prejudice dismissal of a disciplinary proceeding on the ground that the respondent had been denied an ENEC. The Court considered the case under interlocutory review (Rule 300, Rules Proc. State Bar) and applied an abuse of discretion/error of law standard (*In the Matter of Respondent AA, supra*, 4 Cal. State Bar Ct. Rtpr. at p. 726).

The Court might apply the same standard of review in this case. However, we submit this Court should employ a heightened scrutiny because, as shown in the next section, the

[2] The parties filed a stipulation extending the time to April 28, 2009 (Exhibit 6) and respondent filed his response to the Amended NDC on April 27, 2009 (Exhibit 9).

Hearing Department did not follow the required procedures in granting respondent's *ultra vires* motion.

B. THE HEARING DEPARTMENT'S ORDER WAS NOT ISSUED IN CONFORMITY WITH THE RULES OF PROCEDURE.

State Bar proceedings are governed by the Rules of Procedure (Bus. & Prof. Code § 6086). Rule 262 sets forth nine limited grounds for dismissal of State Bar cases. Here, respondent's motion (Exhibit 5) did not rely on any of the grounds for dismissal set forth in rule 262, but merely cited this Court's decision in *Respondent AA*. However, the *Respondent AA* decision did not create an additional ground for respondents to move for dismissal. Rather, the *Respondent AA* Court approved a process whereby the Hearing Department—acting on its own motion—dismissed in the furtherance of justice under the specific procedural process set forth in Rule 262(e) (see *In the Matter of Respondent AA, supra*, 4 Cal. State Bar Ct. Rtpr. at p. 725).

Respondent's motion, to the extent it relied on Rule 262(e),[3] was baseless:

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[3]Rule 262(e) provides as follows:

"(e) Furtherance of Justice.

"(1) The party initiating a proceeding may move to dismiss in the furtherance of justice. A dismissal under this paragraph shall be without prejudice unless the motion seeking dismissal shows good cause why the proceeding should be dismissed with prejudice.

"(2) The Court on its own motion, after the parties are afforded notice and an opportunity to object, may dismiss a proceeding with or without prejudice in the furtherance of justice. The reasons for the dismissal and the determination of whether the dismissal is with or without prejudice shall be set forth in a written order.

"(3) Prior to dismissing a proceeding on its own motion pursuant to paragraph (2) above, the Court shall issue an order to show cause notifying the parties of the Court's intent to dismiss the proceeding in the interests of justice and the proposed reasons for its dismissal. Within ten (10) days of service of the Court's order to show cause, the parties may file a response to the Court's order, which may include declarations, an offer of proof and points and authorities either in support of or in opposition to the Court's intended action. The State Bar may include, in its response, information concerning prior investigation matters which were closed with warning letters,

> "...[R]ule 262(e) does not permit a motion to dismiss in the furtherance of justice to be made by the respondent. The motion may be made only by the State Bar, as the prosecutor, or a dismissal made be entered on the court's own motion."

(*In the Matter of Respondent AA, supra*, 4 Cal. State Bar Ct. Rtpr. at p. 728 (citations omitted)). In *Respondent AA,* this Court upheld the Hearing Department's action precisely because it complied with the express requirements of rule 262(e), i.e., the hearing judge "...issued an order to show cause to the parties, allowed for responses from them, *considered all appropriate interests* and *stated in detail* her reason for dismissal..." (*id.* at p. 728; emphasis added). In contrast, the Hearing Department did not follow these procedures and instead granted respondent's *ultra vires* motion.

We hasten to add that this is not a mere technical error. If it had adhered to Rule 262(e), the Hearing Department would have issued an Order to Show Cause, providing the State Bar with *advance notice* of its *reasons* for the proposed dismissal (Rule 262(e)(3)). The Hearing Department should have also requested a response to the OSC from attorney Weinberg, since he was being accused of not following his client's wishes and since respondent had expressly waived the attorney-client privilege on this issue (see Exhibit 5, p. 6 (respondent's declaration)).

After receiving responsive papers from the parties, the Hearing Department would have been required to state "...the reasons for the dismissal...in a written order..." (Rule 262(e)(2)). Instead, the Hearing Department granted the motion in a summary fashion. The Hearing Department's explanation was limited to the following statement:

> "Respondent was represented by counsel prior to the filing of the notice and, *for whatever reason*, counsel did not request the ENE although respondent desired it. Respondent, therefore, was unable to participate in the ENE process. (*In the Matter of Respondent AA* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 721.)"

(Exhibit 10; emphasis added). Thus, the Hearing Department provided no discussion about whether a dismissal would serve the interests of public protection, no discussion about whether

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resource letters, agreements in lieu of disciplinary prosecution, other agreements resolving investigations, and impositions of discipline including private reprovals and/or any other evidence of prior conduct tending to establish a common plan, scheme or device."

respondent and his new counsel had unduly delayed the filing of the motion to dismiss, no discussion about whether Weinberg's alleged error constituted excusable neglect,[4] and no discussion about whether the scheduled settlement conference could serve the same function as an ENEC. The Hearing Department's summary order does not provide this Court with an adequate basis for review.

C. THE DISMISSAL WAS NOT IN THE FURTHERANCE OF JUSTICE

The *Respondent AA* case involved a situation wherein the respondent failed to receive the State Bar's notice of intent to file an NDC because he made a typographical error when he notified the State Bar of his change of address (*In the Matter of Respondent AA, supra*, 4 Cal. State Bar Ct. Rtpr. at pp. 724-725). *Respondent AA* is thus distinguishable in three major ways:

First, unlike *Respondent AA,* both respondent and his counsel were fully aware of the State Bar's notice of intent to file a Notice of Disciplinary Charges and they were both fully aware of their right to request an ENEC. Either could have submitted the ENEC form to the Court. They both had months to do so; neither did.

Second, the attorney in *Respondent AA* did not slumber on his rights once the NDC was filed (see procedural discussion in *In the Matter of Respondent AA, supra*, 4 Cal. State Bar Ct. Rtpr. at pp. 724-725). In its support of its finding of good cause for the dismissal, the *Respondent AA* Court noted that the attorney "promptly participated" when he received the NDC (*id.* at p. 730, fn. 15; see also at p. 729). Similarly, because the Hearing Department "...acted promptly after the proceeding was filed...", the *Respondent AA* Court found that the State Bar had suffered no prejudice (*id.* at p. 728). In contrast, respondent waited for more than two months after the disciplinary proceedings were commenced before he filed the motion to dismiss.

Third, the *Respondent AA* attorney was not demanding a lengthy delay as part of the ENEC process. Indeed, the *Respondent AA* Court stated: "There is no evidence that, but for the mistaken address change, respondent would not have responded *promptly* to the Bar's September

[4] Indeed, the Hearing Department expressly declined to make a finding on the issue of excusable neglect. Rather, the Hearing Department stated that Weinberg did not request an ENEC "for whatever reason."

30, 2003, letter notice." (*Id.* at p. 730 fn. 15; emphasis added.) In contrast, respondent's December 12, 2008 letter to the State Bar expressly declined to provide early dates for an ENEC. Instead, respondent issued a lawsuit threat and demanded an additional 2-1/2 month delay before he would agree that the charges could be filed (Exhibit 5 to Henderson Declaration). Moreover, respondent's demands were inconsistent with Rule 75, Rules of Procedure of the State Bar, which states that ENECs "...*shall* be held within fifteen (15) days of the request of either party." (emphasis added).

Thus, respondent's failure to obtain an ENEC had nothing to do with Mr. Weinberg's representation and everything to do with respondent's refusal to accept the 15-day limitation of Rule 75. Respondent's December 12 letter makes it clear that he would not agree to any ENEC scheduled within the time required by Rule 75.[5] Indeed, respondent never proposed any actual dates for the ENEC, even dates in March or April 2009.

In any event, respondent is not entitled to relief based on a claim of ineffectiveness of counsel. In *Walker v. State Bar* (1989) 49 Cal.3d 1107, 1115-1116, the Supreme Court rejected a similar claim by a respondent who argued that his counsel had failed to present key witnesses and evidence:

> "State Bar disciplinary proceedings are administrative in nature, not governed by the rules of criminal procedure. (*Emslie v. State Bar* (1974) 11 Cal.3d 210, 225-226 [113 Cal.Rptr. 175, 520 P.2d 991].) Petitioner's only due process entitlement is to a "fair hearing." (*Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 634 [238 Cal.Rptr. 377, 738 P.2d 723].)
>
> "Fundamental fairness sufficient to meet the demands of due process has never been held to encompass the right to assistance of counsel in State Bar disciplinary proceedings, under either the United States Constitution or the California Constitution. On the contrary, the general rule is that there is no due process right to counsel in civil cases. (*White v. Board of Medical Quality Assurance* (1982) 128 Cal.App.3d 699, 707 [180 Cal.Rptr. 516] [civil disciplinary action against medical licensee].) Generally speaking,

[5] Respondent's documents also suggest motives other than a desire for an ENEC, i.e., a motivation for delay. Thus, respondent's December 12, 2008, letter threatens a civil lawsuit and demands that the Bar recuse itself in favor of "...an independent panel of judges outside the bay area..." (Exhibit 5 to Henderson Declaration). Similarly, respondent's email to Weinberg asks whether the "show trial" (meaning the hearing on the conviction case) had been continued. The email also suggests that respondent was late in paying Weinberg's fees (Exhibit A to Motion to Dismiss).

> the right to counsel has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation. (*Lassiter v. Department of Social Services* (1980) 452 U.S. 18, 25 [68 L.Ed.2d 640, 648. 101 S.Ct. 2153]; *Salas v. Cortez* (1979) 24 Cal.3d 22, 34 [154 Cal.Rptr. 529, 593 P.2d 226] [indigent defendants in paternity actions brought by the district attorney, subject to possible deprivation of liberty, have right to counsel].) Obviously, petitioner here is not in any sense put at risk as regards his physical liberty by the disciplinary proceedings against him, and consequently cannot demonstrate a right to assistance of counsel."
>
> "Petitioner's assertion of a right to effective assistance of counsel depends on a demonstrated right to counsel. (*Chevalier v. Dubin* (1980) 104 Cal.App.3d 975, 979 [164 Cal.Rptr. 118].) As explained above, there is no constitutional right to the assistance of counsel in State Bar proceedings. Thus petitioner's contention he was impermissibly denied the effective assistance of counsel is without merit. The record establishes he has received fundamentally fair treatment overall at the hands of the disciplinary authorities.

Thus, under *Walker*, respondent is responsible for his own case. If Weinberg was not doing what respondent desired, then respondent was responsible for correcting the situation. Respondent does not claim that Weinberg misled him about the ENEC issue. To the contrary, respondent's December 12 letter acknowledges that he received advance notice from Weinberg's office that the NDC would soon be filed (Exhibit 5 to Henderson Declaration). Respondent could have then submitted the ENEC request form to the court, but he chose not to do so. Instead, respondent waited for another month and a half for the NDC to be filed. The fact that respondent sent the December 12, 2008 letter directly to the State Bar prosecutor suggests that he had essentially taken over his own representation. This inference is supported by Weinberg's February 14, 2009 motion to withdraw in which he represents that (1) respondent was upset with Weinberg's handling of respondent's underlying criminal case and (2) respondent had taken over his own representation in the instant case (Exhibit 12). The fact that the relationship between Weinberg and respondent had deteriorated to this extent belies respondent's claim that he was relying on Weinberg to schedule an ENEC.

In contrast to respondent's dilatory conduct, we ask the Court to consider the extensive efforts that the State Bar made to afford respondent his pre-NDC procedural opportunities. First, in March 2008, the State Bar granted respondent's counsel a long delay based on Doron Weinberg's commitment on another case (Henderson Decl., pars. 5-6). Then, between May and October 2008, the State Bar engaged in a lengthy negotiation process and even provided

respondent with a draft settlement agreement (Henderson Decl., par. 7). Next, on December 1, 2008, the State Bar sent respondent's counsel a letter asking him to schedule the ENEC (Exhibit 4 to Henderson Declaration). Finally, the State Bar delayed its filing for an additional two months (December 1, 2008 to January 30, 2009) during which time respondent or his counsel could have scheduled the ENEC.

No one could reasonably expect the State Bar to do more. Yet, the Hearing Department still dismissed this case.

Next, we ask the Court to consider the prejudicial effect of the dismissal upon the State Bar's ability to protect the public. There is a substantial public interest in the timely conclusion of disciplinary proceedings (see, e.g., *Jones v. State Bar* (1989) 49 Cal.3d 273, 287 (continuances are disfavored)), which is recognized in this Court's time pendency guidelines (see Rule 1130, Rules Prac. State Bar Court). The need for promptness is readily apparent when, as here, the attorney has been charged with multiple acts of moral turpitude arising from multiple separate investigations. The Hearing Department's dismissal—issued three months after the NDC was filed and in the midst of the discovery period—has unnecessarily caused delay. Because the dismissal served no legitimate purpose,[6] the delay was unwarranted.

Finally, we ask that the Court consider the prejudicial effect of dismissal upon the very limited resources of the State Bar. The *Respondent AA* Court rejected resource concerns, but only because it felt the case before it was "atypical" (*In the Matter of Respondent AA, supra*, 4 Cal. State Bar Ct. Rtpr. at p. 730, fn. 1). However, the instant Hearing Department has applied *Respondent AA* far beyond its "atypical" facts to a very common situation, i.e., a respondent who claims without corroboration that his counsel failed to perform competently. The Hearing

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[6] The Respondent AA opinion suggests two advantages to conducting an ENEC, i.e., that the case can be settled before it becomes public and that, if it is settled, the discipline costs would be lower (*In the Matter of Respondent AA, supra*, 4 Cal. State Bar Ct. Rtpr. at p. 727). However, these factors do not apply here. First, respondent is already facing public discipline charges in the conviction matter. As to costs, it is unreasonable to suggest that the State Bar should receive a lower cost award based on an allegation that respondent's counsel made an error. In any event, respondent's remedy for an excessive cost award would be to file a motion to reduce costs (see Rule 282(a), Rules Proc. State Bar), not to demand that charges be dismissed.

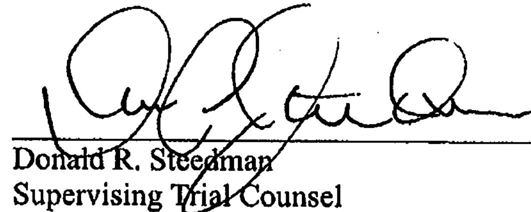
Department's order burdens the State Bar with the following additional process: (1) an ENEC must be conducted, (2) the charges must then be re-filed and re-served, (3) the instant case must be re-consolidated with the conviction case, (4) the two cases must be handled separately until the reconsolidation occurs, including a separate settlement conference now scheduled in the conviction case for May 11, 2009, and (5) the discovery process in the instant case must be re-commenced. The State Bar's resources are quite limited when considered in light of our vast public protection responsibility. We do not believe that the process created by the Hearing Department constitutes an appropriate use of the precious resources with which we have been entrusted.

IV
CONCLUSION

The State Bar requests that this Court reverse the Hearing Department's order of dismissal filed on April 30, 2009.

Respectfully submitted,

THE STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL



Dated: May 8, 2009 By:

Donald R. Steedman
Supervising Trial Counsel

V
APPENDIX OF EXHIBITS

Exhibit 1:	Notice of Disciplinary Charges, filed January 30, 2009
Exhibit 2:	Notice of Assignment and Notice of Initial Status Conference, filed February 6, 2009
Exhibit 3:	Status Conference Order, filed February 25, 2009
Exhibit 4:	Amended Notice of Disciplinary Charges, filed March 18, 2009
Exhibit 5:	Respondent's Notice of Motion and Motion to Dismiss Notice of Disciplinary Charges Without Prejudice, dated April 6, 2009
Exhibit 6:	Stipulation to Extend Time for Respondent to File Responsive Pleading, filed April 17, 2009
Exhibit 7:	State Bar's Opposition to Respondent's Motion to Dismiss Notice of Disciplinary Charges Without Prejudice, filed April 17, 2009, with attached Henderson declaration and seven exhibits
Exhibit 8:	State Bar's Request to Amend Opposition to Respondent's Motion to Dismiss Notice of Disciplinary Charges Without Prejudice, filed April 21, 2009, with attached Henderson declaration and seven exhibits
Exhibit 9:	Response to Amended Notice of Disciplinary Charges, served April 27, 2009
Exhibit 10:	Order Severing Cases and Granting Motion to Dismiss NDC Without Prejudice, filed April 30, 2009
Exhibit 11:	CD-R recording of February 23, 2009 Status Conference
Exhibit 12:	Motion to Withdraw as Attorney of Record, dated February 14, 2009

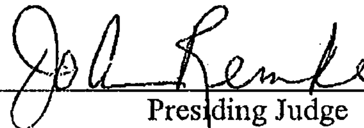
FILED
MAY 22 2009
STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

REVIEW DEPARTMENT OF THE STATE BAR COURT

IN BANK

In the Matter of	)	No. **05-O-04119**
STANLEY HILTON,	)	**ORDER**
A Member of the State Bar.	)	

The State Bar's petition for interlocutory review, filed May 8, 2009, is summarily denied. We find no abuse of discretion, and any procedural error of law was waived and/or harmless. (Rules Proc. of State Bar, rule 300(i).)



Presiding Judge

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on May 22, 2009, I deposited a true copy of the following document(s):

ORDER FILED MAY 22, 2009

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

WILLIAM M BALIN
345 FRANKLIN ST
SAN FRANCISCO, CA 94102

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

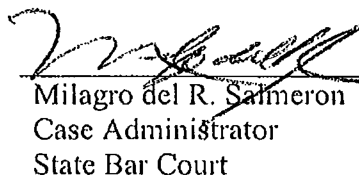
☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Robert A. Endries, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on May 22, 2009.



Milagro del R. Salmeron
Case Administrator
State Bar Court