



The State Bar of California

**OPEN SESSION
AGENDA ITEM
54-122 SEPTEMBER 2020
REGULATION AND DISCIPLINE COMMITTEE III.B**

DATE: September 24, 2020

TO: Members, Regulation and Discipline Committee
Members, Board of Trustees

FROM: Melanie Lawrence, Interim Chief Trial Counsel
Steven Moawad, Special Assistant to the Chief Trial Counsel

SUBJECT: Proposed Amendments to Rule 5.101.1 Regarding Electronic Trial Exhibits –
Return from Public Comment and Request for Approval

EXECUTIVE SUMMARY

This proposal would amend rule 5.101.1 of the Rules of Procedure of the State Bar to allow parties to exchange exhibits electronically and would permit the State Bar Court to elect whether to receive their copy of the exhibits electronically or on paper.

At the July 2020 meeting, the Regulation and Discipline Committee resolved to separate the proposed rule amendments in [Item III.C](#) and submit them for public comment as two separate items. The amendments to rule 5.101.1 regarding electronic trial exhibits were submitted for a 30-day public comment period, which closed on August 21, 2020, and are addressed in this item. The proposed amendments to the Rules of Procedure of the State Bar regarding electronic service and electronic signatures were submitted for public comment for a 45-day period. The return of that item is addressed separately in Agenda Item 54-121.

BACKGROUND

The COVID-19 emergency highlighted the need to update State Bar Court procedures. Current rule 5.101.1 requires the parties to provide tabbed, labeled binders of exhibits to the opposing party, and in addition to providing original exhibits for the Supreme Court, must lodge two

copies of all exhibits with the State Bar Court for the court and witnesses. These two copies must also be presented in a tabbed exhibit binder with labels on the front and spine.

The proposed rule would allow parties to exchange exhibits electronically and would permit the State Bar Court to elect whether to receive their copy of the exhibits electronically or on paper. The Office of Chief Trial Counsel (OCTC) believes these changes will allow the State Bar disciplinary system to operate more efficiently, not only during an extended period of shelter-at-home, but also into the future.

DISCUSSION

Current rule 5.101.1 requires the parties to provide tabbed, labeled binders of exhibits to the opposing party. Proposed rule 5.101.1 instead permits the parties to provide electronic copies to opposing parties unless a respondent establishes that they do not have a computer or cannot otherwise reasonably access them. During discussions about the proposed rule change, the court expressed concern that OCTC would provide electronic versions of exhibits to a respondent with limited computer access (or limited technological capability), which may require such a respondent to print them. Depending on the number and size of the exhibits, printing could become expensive. OCTC understands the concern and altered the language to include a meet-and-confer process about the format of the exhibits exchanged. Further, no party is required to provide exhibits electronically.

Rule 5.101.1 currently provides that in addition to providing original exhibits to the Supreme Court, each party to a State Bar Court action must lodge two copies of all exhibits with the court for the court and witnesses. Under current rules, the two copies lodged with the court “must be presented in a tabbed exhibit binder, which binder must bear on both its front and spine affixed labels identifying the case name and number and the identity of the proffering party” (Rule 5.101.1(D)(2)). Proposed amendments to Rule 5.101.1 instead require the parties to lodge only one additional copy in either electronic or paper form, as ordered by the court.

During discussions about the proposed rule change, the court expressed a desire to maintain the requirement that the court be given a paper copy of the exhibits in a tabbed binder with labels, and if the parties exchange electronic exhibits, the court would also receive an electronic copy. OCTC is concerned about enshrining a requirement that the parties provide the court with additional exhibits in paper, and instead proposes a more flexible approach that still permits the court to order the parties to provide a paper copy in individual cases. OCTC respectfully declined to accept the suggestion that we provide an additional electronic copy if the parties exchange exhibits electronically, because OCTC is concerned about establishing a rule requiring the office to perform redundant work.

In proposed rule 5.101.1, parties must still supply witnesses with copies of relevant exhibits, but do not need to provide each witness with all of them. The format of the exhibits for witnesses (e.g., paper or electronic) will be as ordered by the court.

Proposed amendments to rule 5.101.1 also set forth the requirements for electronic exhibits, which include the following: the exhibit must be capable of being read using software in the public domain or generally available at a reasonable cost; must be searchable via text when technologically feasible without impairment of the document's image; and must include electronic bookmarks with links to the first page of each exhibit with bookmark titles that identify the exhibit number or letter and briefly describe the exhibit. The requirements for electronic exhibits are from rule 2.256(b) of the California Rules of Court. Under the proposed rule, paper exhibits must be presented in the same form as the current rule.

Public Comment

At the July 2020 meeting, in [Item III.C](#), the Regulation and Discipline Committee resolved to submit amendments to rule 5.101.1 regarding electronic trial exhibits for a 30-day public comment period, which closed on August 21, 2020.

Four comments were received during the period, three of which agreed with the proposed amendments to rule 5.101.1 without comment. In the fourth, Farida B. stated that she would agree with the proposal only if it was modified and provided the following comment: "Modified so long as original evidence can be available and submitted where a copy would not typically not be used. Not sure how to accomplish that. For the most part, it's probably a bad idea to use uploaded files and call it evidence."

OCTC Response to Public Comment

Original exhibits are now—and under the OCTC proposal will still be—submitted to the State Bar Court for transmittal to the Supreme Court. The proposal is simply to provide electronic copies of exhibits in lieu of what otherwise would have been paper copies of the original. OCTC does not believe any modification is required in response to this comment.

FISCAL/PERSONNEL IMPACT

Unknown

AMENDMENTS TO RULES OF THE STATE BAR

Title 5, Division 2, Chapter 5, Rule 5.101.1, Rules of Procedure of the State Bar

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None

RECOMMENDATIONS

Should the Regulation and Discipline Committee concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Regulation and Discipline Committee recommends that the Board of Trustees adopts the proposed amendments to:
Title 5, Division 2, Chapter 5, Rule 5.101.1, Rules of Procedure of the State Bar; and it is

FURTHER RESOLVED, that the Regulation and Discipline Committee recommends that the proposed amendments to the above rule become effective on November 1, 2020.

Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board of Trustees, upon recommendation of the Regulation and Discipline Committee adopts the proposed amendments to:
Title 5, Division 2, Chapter 5, Rule 5.101.1, Rules of Procedure of the State Bar; and it is

FURTHER RESOLVED, that the Regulation and Discipline Committee recommends that the proposed amendments to the above rule become effective on November 1, 2020.

ATTACHMENT(S) LIST

- A. Proposed Amended Rule 5.101.1 (Clean Version)
- B. Proposed Amended Rule 5.101.1 (Redline Version)

Proposed Amended Rule 5.101.1 (Clean Version)

Rule 5.101.1 Trial Exhibits

- (A) **Marking of Exhibits.** Each proposed exhibit for trial must be pre-marked by the parties for identification using a system of letters or numbers as ordered by the court. Any exhibit consisting of more than a single page must be pre-marked on the initial page with the exhibit number or letter, with each individual page within the exhibit, commencing with the first page of the exhibit, being paginated in numerical sequence. Upon request, a party must make the original or underlying document of any proffered exhibit available for inspection and copying.
- (B) **Exchange of Exhibits by Parties.** Unless otherwise ordered by the court, at least 10 days prior to the pretrial conference, the parties must exchange copies of all documents to be offered as exhibits or otherwise used at trial. Exhibits may be exchanged in electronic or paper form. If a party establishes to the Office of Chief Trial Counsel after a meet and confer that they do not have a computer or otherwise cannot reasonably access electronic exhibits, the Office of Chief Trial Counsel will provide exhibits to the party in paper form.
- (C) **Format of Electronic Exhibits:** Electronic exhibits must be pre-marked and paginated, as set forth in subdivision (A). Electronic exhibits must be capable of being read using software in the public domain or generally available at a reasonable cost, be text searchable when technologically feasible without impairment of the document's image, and include electronic bookmarks with links to the first page of each exhibit and with bookmark titles that identify the exhibit number or letter and briefly describe the exhibit.
- (D) **Format of Paper and Oversized Exhibits:** Except for oversized exhibits (large exhibits which cannot be reasonably copied or presented in a binder), all paper exhibits exchanged by the parties must be pre-marked and paginated, as set forth in subdivision (A), and be in the same form as those lodged with the court pursuant to paragraph (2) of subdivision (F). The parties may exchange an alternative form of any oversized paper exhibit by reasonably duplicating that exhibit.
- (E) **Proposed Exhibit List.**
- (1) **Contents; restriction on evidence of prior discipline.** Together with the pretrial statement, each party must submit, as a separate document, a proposed exhibit list of all documents and other items to be offered by such party as exhibits at trial, properly described and indexed. Records of prior discipline to be used solely as evidence in aggravation must not be included in the proposed exhibit list.

- (2) **Format of exhibit list.** The proposed exhibit list must be in the format approved by the court for use as the master exhibit list at trial. No exhibits are to be attached to the pretrial statement or the proposed exhibit list.
- (F) **Lodging and Offering of Exhibits at Trial**
- (1) **Exhibits to be formally offered:** At the time trial commences, or as otherwise ordered by the court, each party must supply to the Clerk the original exhibits identified in such party's proposed exhibit list. Each exhibit must be top-hole-punched, pre-marked, and paginated as described above, and, if over 30 pages, top-bound with a clasp. These original exhibits are not to be presented to the Clerk in binders. A copy of such exhibits, pre-marked and paginated as described above, must have been previously provided to opposing counsel. Except as provided below, these exhibits will become part of the official court record.
- (2) **Exhibits lodged for use of court:** In addition to the exhibits to be formally offered, at the time trial commences or by the date ordered by the court, each party must lodge one set of its proposed exhibits for the use of the court, in either paper or electronic format, as ordered by the court. Exhibits must be formatted pursuant to subdivision (C) or (D). Paper exhibits must be presented in a tabbed exhibit binder, which binder must bear on both its front and spine affixed labels identifying the case name and number and the identity of the proffering party.
- (3) **Exhibits lodged for use of witnesses:** Unless otherwise ordered by the court, at the time trial commences or as soon as practicable, the parties must provide to each witness a copy of any exhibit(s) relevant to the witness. The exhibit(s) must be in paper or electronic format as ordered by the court.
- (4) **Witnesses:** No exhibit may be shown to a witness during trial until opposing counsel has had an opportunity to examine it.
- (G) **Withdrawn Exhibits.** A proposed exhibit which is withdrawn or not offered into evidence will not become part of the official record.
- (H) **Exhibits Judicially Noticed.** Requests for judicial notice will be governed by California Evidence Code sections 450 et seq. Any document for which judicial notice is requested must be pre-marked, disclosed to the other parties, and lodged with the court in accordance with subdivision (F) of this rule.
- (I) **Failure to Comply.** Failure to comply with this rule without good cause may constitute grounds for such orders as the court deems proper, including, but not limited to, exclusion of exhibits from evidence.

Proposed Amended Rule 5.101.1 (Redline Version)

Rule 5.101.1 Trial Exhibits

- (A) **Marking of Exhibits.** Each proposed exhibit for trial must be pre-marked by the parties for identification using a system of letters or numbers as ordered by the court. Any exhibit consisting of more than a single page must be pre-marked on the initial page with the exhibit number or letter, with each individual page within the exhibit, commencing with the first page of the exhibit, being paginated in numerical sequence. Upon request, a party must make the original or underlying document of any proffered exhibit available for inspection and copying.
- (B) **Exchange of Exhibits by Parties.** Unless otherwise ordered by the court, at least 10 days prior to the pretrial conference, the parties must exchange copies of all documents to be offered as ~~exhibits, exhibits or~~ otherwise used at trial. Exhibits may be exchanged in electronic or paper form. If a party establishes to the Office of Chief Trial Counsel after a meet and confer that they do not have a computer or otherwise cannot reasonably access electronic exhibits, the Office of Chief Trial Counsel will provide exhibits to the party in paper form. ~~Except for oversized exhibits (large exhibits which cannot be reasonably copied or presented in a binder), all exhibits exchanged by the parties must be pre-marked and paginated, as set forth above, and be in the same form as those lodged with the court. The parties may exchange an alternative form of any oversized exhibit by reasonably duplicating that exhibit.~~
- (C) **Format of Electronic Exhibits:** Electronic exhibits must be pre-marked and paginated, as set forth in subdivision (A). Electronic exhibits must be capable of being read using software in the public domain or generally available at a reasonable cost, be text searchable when technologically feasible without impairment of the document's image, and include electronic bookmarks with links to the first page of each exhibit and with bookmark titles that identify the exhibit number or letter and briefly describe the exhibit.
- (D) **Format of Paper and Oversized Exhibits:** Except for oversized exhibits (large exhibits which cannot be reasonably copied or presented in a binder), all paper exhibits exchanged by the parties must be pre-marked and paginated, as set forth ~~above~~in subdivision (A), and be in the same form as those lodged with the court pursuant to paragraph (2) of subdivision (F). The parties may exchange an alternative form of any oversized paper exhibit by reasonably duplicating that exhibit.
- (~~C~~E) **Proposed Exhibit List.**
- (1) **Contents; restriction on evidence of prior discipline.** Together with the pretrial statement, each party must submit, as a separate document, a proposed exhibit

list of all documents and other items to be offered by such party as exhibits at trial, properly described and indexed. Records of prior discipline to be used solely as evidence in aggravation must not be included in the proposed exhibit list.

- (2) **Format of exhibit list.** The proposed exhibit list must be in the format approved by the court for use as the master exhibit list at trial. No exhibits are to be attached to the pretrial statement or the proposed exhibit list.

(DE) Lodging and Offering of Exhibits at Trial

- (1) **Exhibits to be formally offered:** At the time trial commences, or as otherwise ordered by the court, each party must supply to the Clerk the original exhibits identified in such party's proposed exhibit list. Each exhibit must be top-hole-punched, pre-marked, and paginated as described above, and, if over 30 pages, top-bound with a clasp. These original exhibits are not to be presented to the Clerk in binders. A copy of such exhibits, pre-marked and paginated as described above, must have been previously provided to opposing counsel. Except as provided below, these exhibits will become part of the official court record.
- (2) **Exhibits lodged for use of court and witnesses:** In addition to the ~~original~~ exhibits to be formally offered, at the time trial commences or by the date ordered by the court, or as otherwise ordered by the court, each party must lodge ~~two~~ one separate sets ~~set~~ of its proposed exhibits for the use of the court, in either paper or electronic format, pre-marked and paginated as described above, as ordered by the court. One of these sets is for the use of the court and the other is for the use of witnesses at trial. Each such set Exhibits must be formatted pursuant to subdivision (C) or (D). Paper exhibits must be presented in a tabbed exhibit binder, which binder must bear on both its front and spine affixed labels identifying the case name and number and the identity of the proffering party.
- (3) **Exhibits lodged for use of witnesses:** Unless otherwise ordered by the court, at the time trial commences or as soon as practicable, the parties must provide to each witness a copy of any exhibit(s) relevant to the witness. The exhibit(s) must be in paper or electronic format as ordered by the court.

- ~~(3)~~(4) **Witnesses:** No exhibit may be shown to a witness during trial until opposing counsel has had an opportunity to examine it.

(EG) Withdrawn Exhibits. A proposed exhibit which is withdrawn or not offered into evidence will not become part of the official record.

(FH) Exhibits Judicially Noticed. Requests for judicial notice will be governed by California Evidence Code sections 450 et seq. Any document for which judicial notice is requested must be pre-marked, disclosed to the other parties, and lodged with the court in accordance with ~~subsection~~ subdivision (DE) of this rule.

(G) **Failure to Comply.** Failure to comply with this rule without good cause may constitute grounds for such orders as the court deems proper, including, but not limited to, exclusion of exhibits from evidence.