



The State Bar of California

OPEN SESSION

AGENDA ITEM

121 MAY 2020

REGULATION AND DISCIPLINE COMMITTEE III.D

DATE: May 12, 2020

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

FROM: James J. Chang, Assistant General Counsel, Office of General Counsel

SUBJECT: Request for Approval of Rule Changes to Permit Videoconference Appearances
and Electronic Service of Process in Fee Arbitration Proceedings

EXECUTIVE SUMMARY

This item proposes rule changes to permit videoconference appearances and electronic service of process in fee arbitration proceedings conducted by the State Bar and local bar associations.

Staff proposes that these changes be authorized immediately as emergency interim measures and circulated for public comment as proposals for permanent adoption.

BACKGROUND

1. Electronic Service

At its April 16, 2020 meeting, the Board of Trustees approved interim amendment to rule 3.513(F) of the Rules of the State Bar of California to permit electronic service of process in fee arbitration proceedings conducted by the State Bar. This measure was adopted as an immediately effective emergency measure due to the COVID-19 pandemic. However, the April 16, 2020 board action only applies to proceedings conducted by the State Bar and did not authorize local bar associations to implement similar changes to their rules.

Local bar associations conduct fee arbitration under the supervision of the State Bar pursuant to Business and Professions Code section 6200(d). The rules of procedure in those local fee arbitration proceedings must be approved by the Regulation and Discipline Committee.¹

This item proposes to permanently adopt the interim rule enacted in April to permit electronic service of process in fee arbitration proceedings conducted by the State Bar, and to authorize local bar associations to enact similar rule changes.

2. Videoconference Appearances

Current State Bar Rule 3.540(E)(2) of the Rules of the State Bar of California and Rules 27.3-27.4 of the State Bar of California Model Rules of Procedure for Fee Arbitrations (Model Rules) permit remote appearances by telephone in fee arbitration proceedings with the approval of the arbitrator. While the rules permit telephonic appearances, they do not expressly recognize videoconference as an approved format for remote appearance.

This item proposes to amend State Bar rules to allow videoconference as a form of remote appearance in fee arbitration proceedings conducted by the State Bar (both as an interim emergency measure and as a proposal for permanent adoption), to amend the Model Rules to allow videoconference appearances, and to authorize local bar associations to enact similar changes.

DISCUSSION

1. Electronic Service of Process

The proposed changes in this item would allow electronic service of process on a permanent basis in fee arbitration proceedings conducted by the State Bar and by local bar associations.

For fee arbitration proceedings conducted by the State Bar, Interim State Bar Rule 3.513(F) allows electronic service of process as defined by Code of Civil Procedure section 1010.6(a)(1)(A)-(C). As this interim rule expires on August 14, 2020, staff now proposes to circulate the interim rule for a 30-day public comment period as a proposal for permanent adoption.

For fee arbitration proceedings conducted by local bar associations, this item proposes a resolution to authorize local bar associations to amend their rules to allow electronic service of process without having to return to the State Bar to seek approval of those changes.

¹ Business and Professions Code section 6200(d) [“The board of trustees shall adopt rules to allow arbitration and mediation of attorney fee and cost disputes under this article to proceed under arbitration and mediation systems sponsored by local bar associations in this state. Rules of procedure promulgated by local bar associations are subject to review by the board or a committee designated by the board to ensure that they provide for a fair, impartial, and speedy hearing and award.”]. See also Resolution 54 of the October 29, 1994 Board of Governors meeting [delegating to the Board Committee on Client Relations and Assistance (predecessor of the Regulation and Discipline Committee) the authority to approve local bar rules of procedure for fee arbitration].

2. Videoconference Appearances

The proposed changes in this item would allow remote appearances by videoconference with the approval of the arbitrator in fee arbitration proceedings conducted by the State Bar and by local bar associations.

Currently, remote appearances are allowed by telephone, but there is no express provision for videoconference appearances. Especially since COVID-19 related restrictions have been put in place, many arbitrators and local bar association program administrators have asked if they have the ability under the rules to conduct arbitrations by videoconference.

For fee arbitration proceedings conducted by the State Bar, State Bar Rule 3.540(E)(2) currently allows a party to “appear by telephone” with the permission of the arbitrator. This rule is proposed to be amended to add videoconference as a form of approved remote appearance.

Similarly, for fee arbitration proceedings conducted by local bar associations, Model Rule 27.3 currently allows a party to “request to appear by telephone.” This rule is proposed to be amended to add videoconference as a form of approved remote appearance.

This item also proposes a resolution to authorize local bar associations to amend their rules to allow remote appearance by videoconference without having to return to the State Bar to seek approval of those changes.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF THE STATE BAR

Title 3, Division 4, Chapter 2, Rules 3.513(F) and 3.540(E)(2) are proposed to be amended as set forth in Attachments A and B.

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 staff is authorized to make available for public comment for a period of 30 days the proposed amendments to Rules 3.513 and 3.540 of the Rules of the State Bar of California and Rules 27.3-27.4 of the State Bar of California Model Rules of Procedure for Fee Arbitrations as set forth in Attachments A, B, and C respectively; and it is

FURTHER RESOLVED, that this authorization for release and public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed amended Rules of the State Bar of California; and it is

FURTHER RESOLVED, that the Regulation and Discipline Committee hereby approves of any rule of procedure adopted by a local bar association permitting electronic service of process in a manner similar to Interim Rule 3.513(F) of the Rules of the State Bar of California as being in compliance with Business and Professions Code sections 6200-6206 and the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitrations; and it is

FURTHER RESOLVED, that the Regulation and Discipline Committee hereby approves of any rule of procedure adopted by a local bar association permitting remote appearance by videoconference in a manner similar to proposed amended Rule 3.540(E)(2) of the Rules of the State Bar of California or proposed amended rules 27.3-27.4 of the State Bar of California Model Rules of Procedure for Fee Arbitrations, as being in compliance with Business and Professions Code sections 6200-6206 and the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitrations; and it is

FURTHER RESOLVED, that the Regulation and Discipline Committee recommends that the Board of Trustees adopt proposed interim amendment to Rule 3.540(E)(2) as set forth in Attachment B.

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, having determined that an emergency justifies the immediate enactment of this interim measure without public comment pursuant to Rule 1.10(C) of the Rules of the State Bar of California, hereby adopts the proposed interim amendment to Rule 3.540(E)(2) as set forth in Attachment B.

ATTACHMENT(S) LIST

- A.** Proposed Amendment to Rule 3.513 of the Rules of the State Bar of California [Permitting Electronic Service] (Redline Version)
- B.** Proposed Amendment to Rule 3.540 of the Rules of the State Bar of California [Permitting Videoconference Appearances] (Redline Version)

C. Proposed Amendment to 27.3-27.4 of the State Bar of California Model Rules of Procedure for Fee Arbitrations

**Proposed Amendment to Rule 3.513 of the Rules of the State Bar of California
[Permitting Electronic Service] (Redline Version)**

Rule 3.513 Service; receipt; dates

- (A) Unless these rules provide otherwise, service is by personal delivery or by mail pursuant to Code of Civil Procedure section 1013(a). If a party is represented by counsel, service is required only upon that party's counsel, except for service of an award, which is served on the party as well as on counsel.
- (B) Service by mail is complete at the time of deposit in the United States mail or in a business facility used to collect and process correspondence for mailing with the United States Postal Service. The time for performing any act commences on the date service is complete and shall not be extended by reason of service by mail.
- (C) A client who is a party to an arbitration is served at the latest address provided to the State Bar. If a client fails to advise the State Bar of his or her current address, the State Bar may close a client request for arbitration or enforcement thirty days after learning that the address is not current.
- (D) An attorney who is a party to an arbitration or who represents a party in an arbitration is served at the attorney's address of record with the State Bar.
- (E) A filing or other communication submitted to the State Bar electronically or by facsimile is deemed to be received on the date of receipt of the transmission only when the State Bar receives the original within five days of the electronic or facsimile submission.
- (F) Electronic Service
 - (i) In addition to the methods of service provided for in subdivision (A) of this rule, the parties to an arbitration may consent to electronic service of documents upon each other pursuant to Code of Civil Procedure section 1010.6(a)(1)(A)-(C).
 - (ii) The parties to an arbitration may consent to receive electronic service of documents from the State Bar in lieu of service by mail by providing to the State Bar written consent to receive electronic service of documents from the State Bar at the party's designated electronic address.

**Proposed Amendment to Rule 3.540 of the Rules of the State Bar of California
[Permitting Videoconference Appearances] (Redline Version)**

Rule 3.540 Preparation for hearing

- (A) Discovery is not permitted except as provided by this rule.
- (B) Nothing in these rules deprives a client of the right to inspect and obtain the client's file kept by the attorney. This provision does not apply to a non-client.
- (C) Before a hearing the parties
 - (1) are encouraged to agree to issues not in dispute and to voluntarily exchange documents;
 - (2) may be required by the sole arbitrator or panel chair to clarify issues, submit additional documentation, or exchange documents, and the sole arbitrator or panel may decline to admit into evidence any document a party was required to exchange but did not; and
 - (3) may request issuance of a subpoena in accordance with these rules.
- (D) A party seeking to have a subpoena issued must submit to the State Bar a completed but unsigned subpoena form approved by the State Bar, with proof of service on all parties. Upon a showing of good cause, the presiding arbitrator, or panel chair if appointed, may issue a signed subpoena. The requesting party is responsible for service of the subpoena and any witness fees.
- (E) At least ten days before the hearing a party may submit a written request that the sole arbitrator or panel chair permit the party to
 - (1) waive personal appearance and submit testimony and exhibits by declaration under penalty of perjury;
 - (2) appear by telephone or videoconference; or
 - (3) designate an attorney or non-attorney representative because of inability to attend the hearing.

**Proposed Amendment to 27.3-27.4 of the State Bar of California
Model Rules of Procedure for Fee Arbitrations**

RULE 27.0 Waiver of Personal Appearance.

27.1 Upon advance approval of the Panel Chair, any party may waive personal appearance and submit to the hearing panel testimony and exhibits by written declaration under penalty of perjury.

27.2 Any party may designate a lawyer or non-lawyer representative.

27.3 Any party unable to attend a hearing may request to appear by telephone or videoconference, subject to the advance approval of the Panel Chair.

27.4 A request for waiver of appearance or designation of a representative and the submission of testimony by written declaration or request for telephonic or videoconference appearance pursuant to this rule shall be filed with the Panel Chair and served on all parties at least 10 days prior to the hearing.