



The State Bar of California

OPEN SESSION

AGENDA ITEM

JULY 2020

REGULATION AND DISCIPLINE COMMITTEE III.F

DATE: July 13, 2020

TO: Members, Regulation and Discipline Committee

FROM: Lori J. Meloch, Program Director, Office of Professional Support &
Client Protection
Matthew G. Zawol, Supervising Counsel, Client Security Fund

SUBJECT: Proposed Amendment to Client Security Fund Rules, Rule 3.434 to Implement
Procedure for Reimbursement of Monetary Sanctions from the Client Security
Fund: Request to Circulate for Public Comment

EXECUTIVE SUMMARY

This item seeks Board Committee on Regulation and Discipline (RAD) approval to authorize a 30-day public comment period for proposed amendments to Rule 3.434(B)(5) of the Client Security Fund (CSF) rules.¹ The proposed amendments authorize the Client Security Fund to distribute to eligible applicants monetary sanctions actually collected by the State Bar and deposited into the Client Security Fund pursuant to California Supreme Court orders imposing such sanctions in connection with the suspension or disbarment of an attorney and sets forth requirements regarding the same. Applicants who may be eligible to receive such collected monetary sanctions from the Client Security Fund consist of victims of the transaction connected with the attorney's discipline who hold uncollectible criminal penalty orders (restitution) or uncollectible civil judgments.

¹ All further references to rules are to the Client Security Fund rules unless otherwise indicated.

BACKGROUND

Business and Professions Code section 6086.13,² effective January 1, 1994, requires that the State Bar, with the approval of the California Supreme Court, adopt rules setting forth guidelines for the imposition and collection of monetary sanctions to be imposed in connection with suspension or disbarment of attorneys. The full text of the statute is as follows:

(a) Any order of the Supreme Court imposing suspension or disbarment of a licensee of the State Bar, or accepting a resignation with a disciplinary matter pending may include an order that the licensee pay a monetary sanction not to exceed five thousand dollars (\$5,000) for each violation, subject to a total limit of fifty thousand dollars (\$50,000).

(b) Monetary sanctions collected under subdivision (a) shall be deposited into the Client Security Fund.

(c) The State Bar shall, with the approval of the Supreme Court, adopt rules setting forth guidelines for the imposition and collection of monetary sanctions under this section.

(d) The authority granted under this section is in addition to the provisions of Section 6086.10 and any other authority to impose costs or monetary sanctions.

(e) Monetary sanctions imposed under this section shall not be collected to the extent that the collection would impair the collection of criminal penalties or civil judgments arising out of transactions connected with the discipline of the attorney. In the event monetary sanctions are collected under this section and criminal penalties or civil judgments arising out of transactions connected with the discipline of the attorney are otherwise uncollectible, those penalties or judgments may be reimbursed from the Client Security Fund to the extent of the monetary sanctions collected under this section.

At its November 14, 2019 meeting, the Board approved a resolution calling for staff to submit to the California Supreme Court for approval proposed State Bar Rule of Procedure, rule 5.137, which provides guidelines for the recommendation and imposition of monetary sanctions in attorney disciplinary proceedings and for collected monetary sanctions to be deposited into the Client Security Fund. The Rule was approved by the California Supreme Court on March 23, 2020, with an effective date of April 1, 2020.

Proposed Client Security Fund rule, Rule 3.434(B)(5) is necessary to allow the CSF to exercise the authority granted to it under Business and Professions Code section 6086.13(e) to distribute monetary sanctions actually collected by the State Bar and deposited into the Client Security Fund to victims who are unable to collect criminal penalties and civil judgments awarded to them related to the misconduct for which the sanctioned attorney was disciplined.

² All further references to section are to the Business and Professions Code unless otherwise indicated.

DISCUSSION

The CSF is designed to reimburse victims who lost money or property due to theft or equivalent dishonest conduct committed by a California attorney acting in a professional capacity customary to the practice of law.

A. General CSF Requirements for Reimbursement

To receive reimbursement from the Fund under the CSF rules, an applicant generally must establish a loss of money or property that was actually received by the attorney and the loss must have been caused by the dishonest conduct of the attorney. (Rule 3.430.) Rule 3.431 defines the term “dishonest conduct” to include theft or embezzlement, wrongful taking or conversion, or the failure to refund advance attorney fees when the attorney performed an insignificant portion of the services or none at all.

B. General Types of Losses Not Reimbursable

CSF is not an insurer of attorneys and does not provide reimbursement for malpractice, negligence, or consequential losses.

Likewise, the CSF does not pay criminal or disciplinary restitution orders or civil judgments against attorneys. Under the CSF rules, reimbursement related to any such orders or judgments may be granted only if the money or property was actually received by the attorney, lost due to the attorney’s dishonest conduct, and all other CSF rules are met.

C. Monetary Sanctions Actually Received by CSF

Business and Professions Code section 6086.13(e) provides a narrow exception to the requirements that the attorney actually receive the money or property and that such money or property be lost due to dishonest conduct as defined in the CSF rules.

Section 6086.13(e) provides that the Client Security Fund may reimburse monetary sanctions imposed by the Supreme Court against an attorney, but only in the limited circumstances where the State Bar actually collects those monetary sanctions from the attorney and where the victim of the misconduct that resulted in the sanctions is unable to collect criminal penalties or civil judgments held by them arising from the sanctioned misconduct.

Collected monetary sanctions deposited into the CSF pursuant to section 6086.13(e) do not constitute money or property received from or on behalf of the applicant by the disciplined attorney. Accordingly, the threshold Rule 3.430 reimbursement eligibility requirement that the attorney actually receive the money or property at issue cannot be met with respect monetary sanctions deposited into the CSF, necessitating an exception to that requirement.

D. Proposed CSF Rule, Rule 3.434(B)(5)

Attachment A contains proposed CSF rule, Rule 3.434(B)(5), authorizing the CSF to reimburse victims who hold such uncollectible criminal penalty orders or civil judgments. Reimbursement to a victim may only be made up to the amount of imposed monetary sanctions actually collected against the attorney.

Proposed Rule 3.434(B)(5) confirms that CSF does not pay criminal penalties or civil judgments imposed against the attorney—except in the very limited circumstances where the attorney must have been monetarily sanctioned by the Supreme Court in connection with a disciplinary matter; the State Bar must actually collect all or a portion of the monetary sanction; and the victim of the sanctioned misconduct must hold a criminal penalty order or civil judgment that is uncollectible.

Proposed Rule 3.434(B)(5) preserves the discretionary nature of CSF reimbursement provided by Business and Professions Code section 6140.5(a) and the CSF rules, and ensures that the total amount that may be reimbursed with respect to any attorney cannot exceed the total monetary sanctions actually collected by CSF with respect to that attorney. No funds received by CSF via annual licensee assessments will be used for this purpose.

The suggested placement of the CSF’s proposed monetary sanctions rule within the framework of existing Rule 3.434(B) serves several purposes:

1. We anticipate that the number of applications seeking reimbursement of such State Bar collected monetary sanctions to be quite small in comparison to those in the ordinary course of business under the general grounds for reimbursement (loss of money received by the attorney dishonest conduct). We believe that placement of the limited-scope monetary sanctions reimbursement rule within the general reimbursement rules (Rules 3.430 and 3.431) would risk confusing applicants, respondents, and other readers of those general rules or creating potential ambiguity that would result in increased challenges to ordinary CSF decisions.
2. Applicants sometimes assume that CSF automatically pays restitution orders or civil judgments obtained against attorneys. While the conduct underlying a restitution or judgment often falls within the scope of the general rules for reimbursement, other conduct resulting in civil judgments does not, such as malpractice. Placing the monetary sanctions rule within Rule 3.434(B) thus allows CSF to expressly confirm that the Fund does not pay criminal penalties or civil judgments against attorneys—except in the very narrow circumstances contemplated by the collected sanctions provisions of Business and Professions Code section 6086.13.
3. Rule 3.434(B) already contains the only other exception to the general rule that money at issue must have been received by the disciplined attorney. Under Rule 3.434(B)(3), CSF may reimburse reasonable attorney fees and costs expended by a victim in pursuing

the disciplined attorney—but only if those fees and costs actually reduce the amount that would otherwise be reimbursable from CSF. Placement of proposed Rule 3.434(B)(5) alongside existing Rule 3.434(B)(3) thus parallels the structure of the only other exception to the general rule that the money at issue must have been received by the attorney to eligible for reimbursement.

FISCAL/PERSONNEL IMPACT

If adopted, the proposed rule may necessitate additional resources in the Client Security Fund in order to receive, evaluate, and decide applications requesting reimbursement of monetary sanctions collected from disciplined and disbarred respondent attorneys, to consider and make decisions on objections from applicants and/or respondents, and to implement final decisions.

AMENDMENTS TO RULES OF THE STATE BAR

Title 3, Division 4, Chapter 1

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Objective: d. Support adequate funding of the Client Security Fund.

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 authorizes staff to make available for a 30-day public comment period proposed Rule 3.434(B)(5) of the Client Security Fund rules, attached hereto as Attachment A.

ATTACHMENT(S) LIST

- A.** Client Security Fund Rules, Proposed Rule 3.434(B)(5)

Client Security Fund Rules

Proposed Rule 3.434(B)(5)

Rule 3.434 Reimbursement limitations and exclusions

....

(B) The Fund may not reimburse

- (1) interest or a consequential loss;
- (2) a loss covered by any indemnity, such as insurance, fidelity guarantee, or bond, unless the indemnifier has a cause of action against the applicant for recovery of a payment made for the loss;
- (3) attorney fees and other costs paid to recover a reimbursable loss, unless the applicant submits clear and convincing proof that the payments were reasonable and they reduced the amount otherwise reimbursable;
- (4) a loss from a loan or investment, unless it meets the requirements of Rule 3.436; or
- (5) any criminal penalties or civil judgments, unless all of the following circumstances are met:
 - (a) the criminal penalty or civil judgment arises out of a transaction connected with the discipline of the attorney;¹
 - (b) the Supreme Court order imposing suspension or disbarment, or accepting a resignation with a disciplinary matter pending, orders the attorney to pay a monetary sanction;
 - (c) the Client Security Fund actually receives funds consisting of all or a portion of the ordered monetary sanction;² and
 - (d) the criminal penalty or civil judgment is otherwise uncollectible.

The total amount reimbursed under this subsection with respect to any attorney cannot exceed the total sanction amount actually received by the Client Security Fund with respect to that

¹ See Business & Professions Code § 6086.13; Rules of Procedure of the State Bar, Rule 5.137.

² Id.

attorney. The limits contained in Rule 3.434(A) do not apply to this subsection. Nothing in this subsection is intended to alter the discretion of the Client Security Fund.³

Rule 3.434 adopted effective January 1, 2010; amended effective [Date].

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³ See Client Security Fund rules, Rules 3.420(B) and (C), 3.421(A), 3.430(D), and 3.435.