



The State Bar of California

**OPEN SESSION
AGENDA ITEM
NOVEMBER 2021
REGULATION AND DISCIPLINE COMMITTEE III.B**

DATE: November 18, 2021

TO: Members, Regulation and Discipline Committee

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

SUBJECT: Proposed Amendments to the Client Security Fund Rules Regarding Electronic Service: Request to Circulate for Public Comment

EXECUTIVE SUMMARY

This proposal would amend the Client Security Fund (CSF) rules to permit the electronic service of Client Security Fund decisions and to permit the use of electronic signatures.

BACKGROUND

Under current law, Federal courts and California state courts permit electronic service and the use of electronic signatures. In late 2020, the Board of Trustees adopted amendments to State Bar Rules of Procedure (ROP), permitting the electronic service of pleadings in disciplinary proceedings before the State Bar Court.

This item seeks to update the CSF rules to permit electronic service of CSF decisions and the use of electronic signatures. These changes will complement the electronic service rules already authorized for disciplinary matters and allow the CSF to operate more efficiently.

DISCUSSION

Existing rule 3.445 of the CSF rules authorizes the fund to serve Notices of Intention to Pay, Tentative Decisions, and Final Decisions by first-class mail to CSF applicants and respondent attorneys.

The proposed amendments to CSF rules, rule 3.445, if approved, will authorize the CSF to serve such documents by electronic service or by first-class mail. (Proposed Amendments to rules 3.445(A), (B), and (D).)

The proposed amendments also confirm that respondent objections to Notices of Intention to Pay and party objections to Tentative Decisions may be made by first-class mail or by electronic service or electronic transmission. (Proposed rule 3.445(E).) This conforms with CSF's long-standing practice to accept timely written objections by first-class mail or email.

The proposed amendments to rule 3.445 specifically authorize electronic service of decisions by the CSF as set forth in the proposed amendments to subsections (A), (B), and (D) of that rule.

Proposed new subsections (F) through (M) define the terms "electronic service," "electronic transmission," and "electronic service address," which are based on definitions already approved by the Board as part of the State Bar ROP, rule 5.4, for disciplinary proceedings before the State Bar Court. Those definitions, which, in turn, derive from Code of Civil Procedure section 1010.6, have been modified to conform with CSF procedures.

For example, the proposed definition of the term "electronic service address" in proposed rule 3.445(H) refers only to such addresses for applicants and respondents and does not include addresses for CSF employees or counsel in the manner that ROP, rule 5.4, includes such addresses for Office of Chief Trial Counsel (OCTC) personnel. This is because unlike OCTC in disciplinary proceedings, CSF is not a party to CSF matters. CSF counsel and staff do not litigate CSF cases but participate in the adjudication of CSF cases filed by applicants against respondent attorneys.

Proposed new subsections (F) and (G) also respectively confirm that electronic service of a document is deemed complete at the time of electronic service, and the document served electronically has the same legal effect as an original paper document.

The proposed definition of "electronic signature" in new subsection (I) is identical to the definition contained in ROP, rule 5.4, and is proposed to be included in its entirety within the CSF rules (rather than by reference to the ROP) for the convenience of CSF applicants and respondents and to avoid implying that the ROP apply to CSF cases.

Proposed subsection (J) sets forth a carve out for parties who do not have an electronic service address or communicate a desire not to be served electronically, allowing them to be served by mail instead.

Proposed subsections (K) through (M) set forth the manner in which electronic signatures may be deemed as original signatures both in situations where the document need not be executed under penalty of perjury and where the document is to be executed under penalty of perjury. These proposed subsections derive from ROP, rule 5.26.2, as modified to refer to CSF rather than to the court or to disciplinary stipulations.

Last, the proposed amendments to rule 3.440(C) call for applicants to provide a current email address in their application for reimbursement; however, as noted above, proposed rule 3.445(J) contemplates that some parties may not have an email address or may not want to be served electronically. In such cases, service of CSF decisions will be by regular mail.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES OF THE STATE BAR OF CALIFORNIA

Title 3, Division 4, Chapter 1, rule 3.440, Client Security Fund rules

Title 3, Division 4, Chapter 1, rule 3.445, Client Security Fund rules

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None

Objective: 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 authorize staff to make available, for public comment for a period of 30-days, proposed amendments to:

Title 3, Division 4, Chapter 1, rule 3.440, Client Security Fund rules and
Title 3, Division 4, Chapter 1, rule 3.445, Client Security Fund rules, as set forth in Attachment A; and it is

FURTHER RESOLVED, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed amended Client Security Fund rules of the State Bar of California.

ATTACHMENT(S) LIST

- A.** Proposed Amended Rules 3.440 and 3.445 of the Client Security Fund Rules (Clean Version)
- B.** Proposed Amended Rules 3.440 and 3.445 of the Client Security Fund Rules (Redline Version)

TITLE 3. PROGRAMS AND SERVICES

Adopted July 2007

DIVISION 4. CONSUMERS

Chapter 1. Client Security Fund

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Article 3. Applications and action on applications

[¶]

Rule 3.440 Application for reimbursement

[¶]

- (C) The application requires the applicant to acknowledge that he or she has read these rules and agrees to be bound by them; to provide current mailing and email addresses and to promptly notify the State Bar of any change in those addresses; to sign a subrogation and assignment agreement; and to cooperate with the State Bar in its review of the application or in any related disciplinary proceeding or civil action the State Bar brings pursuant to the subrogation and assignment agreement.

[¶]

Rule 3.445 Service of decisions and Notice of Intention to Pay; Submission of objections

- (A) Service of a Notice of Intention to Pay must be made by first-class mail or by electronic service as set forth below in subsections (F) through (J) to the attorney and any lawyer representing the attorney in connection with the application.
- (B) Service of a Tentative Decision or a Final Decision must be made by first-class mail or by electronic service as set forth below in subsections (F) through (J) to the applicant,¹² the attorney, and any lawyer representing either party in connection with the application.
- (C) A deceased attorney need not be served with a Tentative Decision or Final Decision. If a Tentative Decision is not served because the attorney is deceased, the time for objecting to the decision may be waived in writing by the applicant. Upon receipt of the waiver, the Tentative Decision may be deemed the Final Decision.

¹² Rule 3.440(C) requires an applicant to agree to promptly notify the State Bar of any change of address.

- (D) An attorney and a lawyer representing either an attorney or an applicant must be served at the address of record or by electronic service as set forth below in subsections (F) through (J).
- (E) An objection to a Notice of Intention to Pay or to a Tentative Decision may be made by first-class mail or by electronic service or electronic transmission to the Client Security Fund as set forth below in subsections (F) through (M).
- (F) “Electronic service,” or “serve electronically,” means service of a document, on an applicant, attorney, or any lawyer representing either party, by electronic transmission. Electronic service may be performed directly by the Client Security Fund, a party or other person, by an agent of a party or other person, including the party or other person’s attorney, or through an electronic filing service provider. Prior consent of the party or other person to be served electronically is not required to serve documents as provided in these rules. Electronic service of a document is deemed complete at the time of the electronic transmission of the document.
- (G) “Electronic transmission” means the transmission of a document by electronic means to an electronic service address. A document that is served electronically shall have the same legal effect as an original paper document.
- (H) “Electronic service address” means an email address at or through which the party or other person is deemed to have authorized electronic service. The electronic service address, as set forth below, is deemed valid to a party or other person if the party or other person has not filed notice of a change of electronic service address with the Client Security Fund:
 - (1) For attorneys, the email address provided to the State Bar to facilitate communications by the State Bar with attorneys pursuant to rule 9.9(a)(2) of the California Rules of Court, and
 - (2) For applicants, the email address provided to the Client Security Fund for communication, including service of documents.
- (I) “Electronic signature” means an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign a document or record created, generated, sent, communicated, received, or stored by electronic means. Electronic signature includes a copy of an original signature placed into the document by electronic means and includes a typographic signature that includes “/s/” followed by the signer’s name, e.g., “/s/ John Doe.” For purposes of these rules, a “digital signature” as defined in subdivision (d) of Section 16.5 of the Government Code is a type of electronic signature. A typewritten name created in a word processing program, regardless of the use of a cursive font, that

is not preceded by “/s/” is not an electronic signature unless it otherwise complies with Government Code section 16.5.

- (J) If a party does not have an electronic service address or communicates to the Client Security Fund in writing a request not to be served electronically, the Client Security Fund shall serve that party by mail at the party’s address of record or other address provided by that party.
- (K) Notwithstanding any provision of law to the contrary, an electronic signature is deemed to be an original signature if either subdivision (L) or subdivision (M) applies.
- (L) When a document to be filed or served requires the signature of any person, not under penalty of perjury, the document is deemed to have been signed by the person whose electronic signature is attached or logically associated with the document provided the document was served by the signer or a person acting at the signer’s direction.
- (M) When a document to be filed or served electronically provides for a signature under penalty of perjury¹³ of any person, the document is deemed to have been signed by the person whose electronic signature is attached or logically associated with the document if the document was served by the person or an agent of the person and either of the following conditions is satisfied:
 - (1) The declarant has signed the document using an electronic signature and declares under penalty of perjury under the laws of the state of California that the information submitted is true and correct. If the person serving the document is not declarant or declarant’s counsel, the electronic signature must be unique to the declarant, capable of verification, under the sole control of the declarant, and linked to data in such a manner that if the data are changed, the electronic signature is invalidated; or
 - (2) The declarant, before serving the document, has physically signed a printed form of the document. The person serving the document represents, by the act of serving electronically, that the declarant has complied with this subdivision. The person serving the document electronically on a party, a party’s lawyer, or the Client Security Fund must maintain the printed form of the document bearing the original signature until final disposition of the case and make it available for review and copying upon the request of the Client Security Fund, Commission, or any party to the proceeding in which it is filed.

¹³ See Rule 3.440(D) [application under penalty of perjury]; Rule 3.441(C) [declaration under penalty of perjury]; Rule 3.442(E) [objection to Notice of Intention to Pay]; and Rule 3.443(B) [objection to Tentative Decision].

ATTACHMENT A

Rule 3.445 adopted effective January 1, 2010; amended effective May 17, 2019; amended effective xxxx yy, 202y.

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- (M) When a document to be filed or served electronically provides for a signature under penalty of perjury¹³ of any person, the document is deemed to have been signed by the person whose electronic signature is attached or logically associated with the document if the document was served by the person or an agent of the person and either of the following conditions is satisfied:
 - (1) The declarant has signed the document using an electronic signature and declares under penalty of perjury under the laws of the state of California that the information submitted is true and correct. If the person serving the document is not declarant or declarant’s counsel, the electronic signature must be unique to the declarant, capable of verification, under the sole control of the declarant, and linked to data in such a manner that if the data are changed, the electronic signature is invalidated; or
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