



# The State Bar Court *of California*

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## **OPEN SESSION**

### **AGENDA ITEM**

**702 JANUARY 2022**

**DATE:** January 20, 2022

**TO:** Members, Board of Trustees

**FROM:** Michelle Cramton, Clerk of Court, State Bar Court  
Erika Doherty, Projects Attorney, State Bar Court

**SUBJECT:** Request for Adoption of Interim Rules of Procedure Requiring Remote Court Proceedings Due to Omicron Variant

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### **EXECUTIVE SUMMARY**

This agenda item requests that the Board of Trustees adopt interim rule 5.19 of the Rules of Procedure of the State Bar of California. If adopted, this interim rule will authorize the State Bar Court to order State Bar Court proceedings scheduled to occur through April 1, 2022, to be conducted remotely. These proposed changes are intended to mitigate the impact of the Omicron variant surge of COVID-19 and safeguard members of the public, court participants, State Bar employees, and State Bar Court judges.

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### **BACKGROUND**

Effective March 17, 2020, and in response to the COVID-19 pandemic and the related State of Emergency, the State Bar closed the San Francisco and Los Angeles buildings to the public on a temporary basis. The buildings were reopened to the public beginning June 15, 2020, and then closed again December 7, 2020, until February 1, 2021. More recently, on December 29, 2021, the State Bar determined that due to increasing concerns about the Omicron variant, State Bar employees should only come in if required to for a work-related reason; otherwise, in-office work should be discouraged. Similarly, state and federal courts throughout California are postponing in-person court proceedings, and some courts are urging judges and court users to take advantage of remote access to court proceedings and other services.

During prior State Bar building closures and other COVID-19 surges, the State Bar Court was able to rely on Emergency Rule 3 of the Rules of Court (Emergency Rule 3) to conduct court

proceedings remotely. However, effective January 1, 2022, the Judicial Council amended Emergency Rule 3 to exclude civil proceedings from the scope of that rule. As such, the State Bar Court determined that it could no longer rely on Emergency Rule 3 to conduct court proceedings remotely as of January 1, 2022. Since then, the State Bar Court has conducted State Bar Court proceedings remotely pursuant to interim rules 5.17, 5.18, and 5.154 of the Rules of Procedure (interim rules) as approved by the Board of Trustees at its November 2021 meeting. However, these interim rules do not permit the State Bar Court to order court proceedings to be conducted remotely if a party intends to appear in person.

## **DISCUSSION**

At the November 2021 Board of Trustees meeting, the Board of Trustees adopted interim rules 5.17, 5.18, and 5.154, and authorized the State Bar to issue the same rules for a 45-day public comment period. The State Bar Court intends to seek permanent adoption of those interim rules at the March 2022 Board of Trustees meeting.

Interim rule 5.17 permits a party to appear in person at any court proceedings that is not a trial or evidentiary hearing upon timely notice to the court and the opposing party. Interim rules 5.18 and 5.154 require a party to appear in person for a trial, evidentiary hearing, or oral argument unless the party provides timely notice of the party's intent to appear remotely to the court and the opposing party. Significantly, these rules do not permit the State Bar Court to order that the State Bar Court proceedings be conducted remotely. Whether a party appears in person is determined by the party, based on the party's preference. Proposed interim rule 5.19 will authorize the State Bar Court to order on a case-by-case basis that State Bar Court proceedings scheduled to occur through April 1, 2022 be conducted remotely. This rule will reduce the impact of the Omicron variant surge to protect the public, court participants, State Bar employees, and State Bar Court judges.

This agenda item requests that interim rule 5.19 be adopted while interim rules 5.17, 5.18, and 5.154 remain in effect so that the parties and court continue to become better accustomed to the new notice requirements set forth in those rules, and to smoothly transition to permanent adoption of those rules if the Board of Trustees approves them at the March 2022 meeting. The court frequently sets trials and other court events several weeks in advance. Adopting interim rule 5.19 will allow the court to schedule court proceedings remotely during the Omicron variant surge, while retaining interim rules 5.17, 5.18, and 5.154 will permit the court to set court events scheduled to occur after April 1, 2022, as in-person or remote proceedings when the Omicron variant surge has subsided.

This agenda item requests that interim rule 5.19 be adopted on an interim basis pursuant to rule 1.10(C) of the Rules of the State Bar of California, which allows the Board of Trustees to adopt or amend a rule on an interim basis without first circulating it for public comment in the case of an emergency. This rule is intended to be temporary to address the surging number of positive COVID-19 cases due to the Omicron variant. Without this interim rule, the court may be required to conduct court proceedings in person, putting the public, court participants, State Bar employees, and State Bar Court judges at a higher risk of exposure to the Omicron variant

when it has been demonstrated over a nearly two-year period that the State Bar Court can effectively conduct court proceedings through remote technology.

### **FISCAL/PERSONNEL IMPACT**

None

### **AMENDMENTS TO RULES OF PROCEDURE**

Title 5, Division 1 of the Rules of Procedure of the State Bar of California, Rule 5.19

### **AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL**

None

### **STRATEGIC PLAN GOALS & OBJECTIVES**

None

### **RECOMMENDATIONS**

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

**RESOLVED**, that the Board of Trustees determines pursuant to rule 1.10(C) of the Rules of the State Bar of California that the Omicron variant surge requires authorization of Interim Rule 5.19 of the Rules of Procedure of the State Bar of California to authorize the State Bar Court to order State Bar Court proceedings scheduled to occur through April 1, 2022, to be conducted remotely; and it is

**FURTHER RESOLVED**, that the Board of Trustees, having determined pursuant to rule 1.10(C) of the Rules of the State Bar of California that an emergency justifies the Board of Trustees adopt rule 5.19 on an interim basis without public comment, hereby adopts Interim Rule 5.19 of the Rules of Procedure of the State Bar of California as set forth in Attachment A (clean copy) effective January 20, 2022 through April 1, 2022.

### **ATTACHMENT LIST**

- A.** Proposed Interim Rule 5.19 of the Rules of Procedure of the State Bar of California

**Rule 5.19 Remote Court Proceedings**

- (A) Remote Appearances.** Notwithstanding any rule, including but not limited to interim rules 5.17, 5.18, and 5.154 of the Rules of Procedure, to protect the health and safety of the public, including court users, witnesses, State Bar Court personnel and judges, and others, the State Bar Court must conduct all court proceedings as follows:
- (1) **Appearances for Non-Trial Events in the Hearing Department.** If the court receives notice of a party's intent to appear in person under interim rule 5.17(B), the court may order that the proceeding be conducted remotely by providing the parties with at least two court days' notice of the remote proceeding.
  - (2) **Appearances for Evidentiary Hearings and Trials in the Hearing Department.** The court may order that an evidentiary hearing or trial be conducted remotely after the period in which a party may provide notice of the party's intent to appear remotely under interim rule 5.18(B) and after the period in which a party may provide any opposition to remote proceedings under interim rule 5.18(C) has ended. If the court orders that the evidentiary hearing or trial will be conducted remotely, the court must provide the parties with at least five court days' notice of the remote proceeding.
  - (3) **Review Department Proceedings.** The court may order that oral argument be conducted remotely after the period in which a party may provide notice to appear remotely under interim rule 5.154(B) has ended. If the court orders that the oral argument will be conducted remotely, the court must provide the parties with at least five court days' notice of the remote proceeding.
- (B) Court Discretion to Require an In-Person Appearance.** Notwithstanding any other provision of this rule or interim rules 5.17, 5.18, and 5.154 of the Rules of Procedure, and except as otherwise required by law, the court may require a party to appear in person at a proceeding in any of the following circumstances:
- (1) If the court determines that an in-person appearance would materially assist in the determination of the proceeding or in the effective management or resolution of the case;
  - (2) If the quality of the technology or audibility at a proceeding prevents the effective management or resolution of the proceeding or inhibits the ability to accurately prepare a recording of the proceeding; or
  - (3) If, at any time during a remote proceeding, the court determines that an in-person appearance is necessary, the court may continue the matter and require such an appearance.
- (C) Timing of This Rule.** This rule applies to all court proceedings scheduled to take place from the effective date of this rule through April 1, 2022. Any court event that is scheduled to occur after that date must be set as an in-person or remote proceeding pursuant to interim rules 5.17, 5.18, or 5.154 of the Rules of Procedure.
- (D) Review.** The court's decision to order a remote appearance under this rule is the final decision and is not reviewable.