



The State Bar of California

OPEN SESSION AGENDA ITEM OCTOBER 2022 BOARD EXECUTIVE COMMITTEE I.B

DATE: October 7, 2022

TO: Members, Board Executive Committee

FROM: Randall Difuntorum, Program Director, Office of Professional Competence
Steve Moawad, Special Counsel, Regulation Division

SUBJECT: Client Trust Account Protection Program: Request for Adoption of Amendment to Proposed New Rule of Court 9.8.5

EXECUTIVE SUMMARY

The Board Executive Committee is asked to act on behalf of the State Bar Board of Trustees between regularly scheduled meetings to consider a staff recommendation for amending a proposed rule for the Client Trust Account Protection Program (CTAPP).

At the September 2022 meeting, the Board approved proposed new Rule of Court 9.8.5 as the enabling rule for the Client Trust Account Protection Program (CTAPP). Staff is recommending that BEC adopt an amendment to the proposed rule to address an error in the rule language that was attached to the September agenda item. Additionally, the amendment includes recommended clarifying language.

BACKGROUND

BEC is delegated authority to act on behalf of the Board between regularly scheduled meetings of the full Board and when obtaining a quorum of the full Board would not be feasible. (See section 2.11.4 and Appendix D (Board Executive Committee Charter) of the Board Book.) In this instance, action is needed before Monday, October 10, 2022, so that an amended petition requesting the Supreme Court to adopt proposed Rule of Court 9.8.5 can be submitted in time

to allow the Court to consider and act on the petition in advance of the December licensee renewal period, and obtaining a quorum of the Board is not feasible in this short timeframe.¹

After the September Board meeting and the submission of the petition to the Supreme Court, staff learned that the version of proposed Rule of Court 9.8.5 attached to the September agenda item and the resolution adopted by the Board were missing one of the revisions implemented when the rule was sent out for its second round of public comment. The staff recommended action taken by the Board at the September meeting was to adopt the second round public comment version of Rule of Court 9.8.5 with no further changes and the omission of this one revision was inconsistent with that action. Accordingly, Board action is requested to adopt a corrected version of the rule.²

DISCUSSION

The specific revision that was omitted, as further described below, pertains to the manner for registering client trust account information. In preparing this agenda item, staff has also reconsidered this specific change and is recommending a modification to make the provision more responsive to some of the public comments previously received and to incorporate language that is reasonably implicit in the version of the Rule of Court that went out for public comment.

As issued for its first round of public comment, paragraph (a)(2) provided that a licensee's submission of trust account information, including identification of account numbers and financial institutions, must be registered "in an online form on a secure system provided by the State Bar for such reporting."

When issued for its second round of public comment, paragraph (a)(2)'s language referring to an online form on a secure system was replaced with a more generalized reference providing that trust account information must be registered "in a manner prescribed by the State Bar for such reporting." This change was made to clarify that the State Bar would have flexibility in determining the manner for reporting. For example, staff considered the benefit of flexibility where: (1) a lawyer cannot use a computer and must report manually; and (2) the online system fails and a fallback system must be used.

In addition, State Bar flexibility would permit ongoing improvements to the secure system for storing trust account information. For example, the ability to consider options for registering

¹ Delegated decisions of the Board Executive Committee also must be consistent with the goals, values, and direction of the Board. The requested action is the adoption of a proposed amendment to a rule necessary for CTAPP. The development and implementation of CTAPP is expressly provided for in the Board's Strategic Plan: Goal 3: Protect the Public by Regulating the Legal Profession, Objective d.1. Implement the Client Trust Account Protection Program.

² The proposed amended version of Rule of Court 9.8.5 recommended for adoption is provided as Attachment A, which includes the concept of data security described below. The version of proposed Rule of Court 9.8.5 approved by the Board for circulation at the July 22, 2022, meeting is provided as Attachment B. Should the Board Executive Committee not adopt Attachment A, staff recommends, in the alternative, that the Board Executive Committee adopt Attachment B.

information using something other than an “online form” if another method offers better security or efficiency. The proposed Rule of Court 9.8.5 that the Board adopted at its September meeting did not incorporate the updated language in paragraph (a)(2) providing the State Bar flexibility and reverted to the language in the original version of the proposed rule.

The language implementing this flexibility could be improved by adding the data security concept in the original version of the proposed rule. There were public comments that have expressed concerns about data security. For example, a public comment from the Orange County Bar Association (OCBA) (comment reference #22540722) conveyed concerns that the reporting requirements increase the possibility of trust account information being at risk of being compromised.³ (The full text of all of the public comments received on proposed Rule of Court are 9.8.5 are available online at: <https://bit.ly/CTAPP-PC>.)

Although staff does not believe there is a specific, State Bar data security issue, staff recommends the following amendment to paragraph (a)(2) of the second public comment version of the proposed rule to implement flexibility but with additional language that expressly refers to the importance of data security.

- (2) Annual Trust Account Registration - All licensees who were responsible for client funds and funds entrusted by others under the provisions of rule 1.15 of the Rules of Professional Conduct must, annually, register each and every trust account in which the licensee held such funds at any time during the prior year by identifying account numbers and financial institutions in a manner prescribed by the State Bar for such reporting [that will securely maintain the information submitted](#);

This draft language combines the data security concept from the first public comment proposal (“on a secure system”) and the flexibility language used in the second public comment proposal (“in a manner prescribed by the State Bar”). Accordingly, both concepts have been issued for public comment and additional public comment is not required for the recommended change.⁴

³ Among other things, OCBA noted a concern that “the ‘secure system’ used by the State Bar of California has auto-populated information pertaining to trust accounts in licensee profiles which do not belong to a licensee or otherwise are outdated (e.g., with a licensee leaving firms and the account information remaining visible to the licensee after departure).” After inquiring into this issue, staff learned that it might only arise in connection with the agency billing function where a law firm submits IOLTA account information on behalf of attorneys affiliated with the law firm and the cause was a failure of the administrator to maintain a current list of attorneys affiliated with the firm. Based on this, staff does not believe that this demonstrates a deficiency in the secure status of IOLTA account data reported to the State Bar. Moreover, the account information auto-populated under CTAPP will not be populated in the My State Bar Profiles of all lawyers affiliated with the firm that is participating in agency billing. It will only be available to the designated law firm administrator who submits information on behalf of the law firm.

⁴ Under State Bar Rule 1.10, public comment is not required “to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal.” In this instance, the specific language or concepts in the proposed revision have been present in prior versions of the proposed rule and the revision can be deemed to be a modification that is reasonably implicit in the proposal and also a narrowed version of the proposal.

FISCAL/PERSONNEL IMPACT

See Board agenda item [703 September 2022](#), at page six. Adoption of the recommended amendment will not change the previously described fiscal and personnel impact.

AMENDMENTS TO RULES OF COURT

Title 9, Division 2, Chapter 2

This agenda item requests BEC adoption of an amendment to proposed new Rule of Court 9.8.5.

Regarding an operative date, the State Bar's amended petition memorandum will respectfully request that if the Supreme Court acts to adopt the rule, that it be made operative forthwith. This timing would position the State Bar to launch the Phase 1 reporting of CTAPP with the upcoming 2023 licensee renewal process.

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None.

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 3. Protect the Public by Regulating the Legal Profession

d. 1. Implement the Client Trust Account Protection Program.

RECOMMENDATIONS

Should the Board Executive Committee concur in the proposed action on proposed amended new Rule of Court 9.8.5, passage of the following resolution is recommended:

RESOLVED, that the Board Executive Committee adopts proposed amended new Rule of Court 9.8.5 as set forth in Attachment A and directs staff to submit the amended proposed rule to the Supreme Court of California with a recommendation that it be adopted.

ATTACHMENTS LIST

- A. Proposed Amended New Rule 9.8.5 of the California Rules of Court, clean version of the proposed amended rule as recommended for adoption
- B. Proposed New Rule 9.8.5 of the California Rules of Court, clean version of the second public comment version authorized for circulation by the Board at the July 22, 2022, meeting

Proposed Amended New Rule 9.8.5 of the California Rules of Court
(clean version of the proposed amended rule as recommended for adoption)

Rule 9.8.5 State Bar Client Trust Account Protection Program

(a) Client trust account protection program requirements

The State Bar of California must establish and administer a Client Trust Account Protection Program for the protection of client funds held in trust by a licensee that facilitates the State Bar's detection and deterrence of client trust accounting misconduct. Among the requirements that the State Bar may impose under this program are the following:

- (1) Annual Trust Account Certification - All licensees must annually (a) report whether or not, at any time during the prior year, they were responsible for client funds and funds entrusted by others under the provisions of rule 1.15 of the Rules of Professional Conduct and (b) if they were responsible, certify that they are knowledgeable about, and in compliance with, applicable rules and statutes governing client trust accounts and the safekeeping of funds entrusted by clients and others;
- (2) Annual Trust Account Registration - All licensees who were responsible for client funds and funds entrusted by others under the provisions of rule 1.15 of the Rules of Professional Conduct must, annually, register each and every trust account in which the licensee held such funds at any time during the prior year by identifying account numbers and financial institutions in a manner prescribed by the State Bar for such reporting that will securely maintain the information submitted;
- (3) Annual Self-Assessment - All licensees who were responsible, at any time during the prior year, for a client trust account under the provisions of rule 1.15 of the Rules of Professional Conduct must complete an annual self-assessment on client trust accounting duties and practices;
- (4) Compliance Review - If selected by the State Bar, a licensee must complete and submit to the State Bar a client trust accounting compliance review to be conducted by a certified public accountant at the licensee's expense; and
- (5) Additional Actions - If selected by the State Bar, an additional action or actions based on the results of a compliance review may include an investigative audit, a notice of mandatory corrective action, and a referral for disciplinary action.

(b) Authorization for the Board of Trustees of the State Bar to adopt rules and regulations

The Board of Trustees of the State Bar is authorized to formulate and adopt such rules and regulations as it deems necessary and appropriate to comply with this rule, including a rule or regulation that defines a licensee who is responsible for client funds and funds entrusted by others under the provisions of rule 1.15 of the Rules of Professional Conduct.

(c) Failure to comply with program

A licensee who fails to satisfy the requirements of this program must be enrolled as an inactive licensee of the State Bar under the rules to be adopted by the Board of Trustees of the State Bar. Inactive enrollment imposed for noncompliance with the requirements of this program is cumulative and does not preclude a disciplinary proceeding or other actions for violations of the State Bar Act, the Rules of Professional Conduct, or other applicable laws.

(d) Fees and penalties

The State Bar has the authority to set and collect appropriate fees and penalties.

Proposed New Rule 9.8.5 of the California Rules of Court

(clean version of the second public comment version authorized for circulation
by the Board at the July 22, 2022, meeting)

Rule 9.8.5 State Bar Client Trust Account Protection Program

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- (2) Annual Trust Account Registration - All licensees who were responsible for client funds and funds entrusted by others under the provisions of rule 1.15 of the Rules of Professional Conduct must, annually, register each and every trust account in which the licensee held such funds at any time during the prior year by identifying account numbers and financial institutions in a manner prescribed by the State Bar for such reporting;
- (3) Annual Self-Assessment - All licensees who were responsible, at any time during the prior year, for a client trust account under the provisions of rule 1.15 of the Rules of Professional Conduct must complete an annual self-assessment on client trust accounting duties and practices;
- (4) Compliance Review - If selected by the State Bar, a licensee must complete and submit to the State Bar a client trust accounting compliance review to be conducted by a certified public accountant at the licensee's expense; and
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