

Title 3. Programs and Services
Division 4. Consumers

Chapter 1. Client Security Fund

Proposed Rules

Note: Footnotes in italics are used to relate current rules to proposed revisions. All footnotes in italics are to be deleted from any rules adopted by the Board of Governors. Footnotes in Roman are citations or cross-references that are to be retained in the board-adopted version.

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Article 1. In general

Rule 3.420 Client Security Fund

- (A) Pursuant to statute the Board of Governors of the State Bar of California has established a Client Security Fund (“Fund”) that may reimburse individuals who have suffered a loss of money or property because of the dishonest conduct of an attorney.¹ For the purposes of these rules, an attorney is a current or former member of the State Bar of California,² a Foreign Legal Consultant registered with the State Bar, or an attorney registered with the State Bar under the Multijurisdictional Practice Program.
- (B) Applications for reimbursement must meet the requirements of these rules, and payments from the Fund are solely within the discretion of the State Bar.³
- (C) No person or entity has a right to reimbursement, and no person or entity, including a creditor or third-party beneficiary, has any right in the Fund.⁴

Rule 3.421 Client Security Fund Commission⁵

- (A) To administer the Client Security Fund, the Board of Governors of the State Bar of California has established a Client Security Fund Commission (“Commission”) to which it appoints seven members who serve at its pleasure or until the expiration of a term set by the Board. Four members at most may be present or former members of the State Bar or admitted to practice before any court in the United States. The Commission has sole and final authority to determine whether to grant an

¹ Business & Professions Code § 6140.5.

² Business & Professions Code § 6125.

³ See Rule 2: “Any payments from the Fund shall be discretionary and shall be subject to these rules and such other regulations and conditions as the Board shall prescribe.”

⁴ See Rule 2: “All payments from the Fund shall be a matter of grace and not of right and shall be in the sole discretion of the State Bar of California. No client or member of the public shall have any right in the Fund as a creditor, third party beneficiary, or otherwise.”

⁵ See Rule 11: “The Board hereby creates a Client Security Fund Commission (referred to in these rules as the “Commission”) to act as the Board’s delegate to administer the Fund and these rules. Except as provided herein, or as may be otherwise provided by the Board, in addition to its other duties, the Commission shall have the final authority to determine applications before the Fund, including, without limitation, the authority to interpret and apply the provisions of these rules. The State Bar shall provide an active member as Director and necessary additional active members, who with the Director shall be referred to in these rules as ‘counsel’, to represent the interests of the Fund and of the Commission. It shall also provide other support staff as necessary and appropriate to assist the Commission in carrying out the provisions of these rules.”

application for reimbursement from the Client Security Fund and the extent and manner of any payment.⁶

- (B) The vote of a majority of the commissioners present and voting at a Commission meeting constitutes the action of the Commission, unless the Commission or its chair has authorized a vote by poll, in which case a majority vote of commissioners then in office constitutes its action.⁷
- (C) The State Bar must provide the Commission with a staff headed by a Director who serves as counsel to the Commission by representing its interests and those of the Fund. The Director and any other staff who serve as counsel must be active members of the State Bar. In these rules, Director may also mean the Director's designee.⁸
- (C) The reasonable expenses of the Commission and its staff may be charged to the Fund. These expenses include staff salaries and Fund-related costs of administration and litigation.⁹

Article 2. Requirements for reimbursement; limitations and exclusions

Rule 3.430 General requirements for reimbursement

⁶ See Rule 12: "The Commission shall be composed of seven (7) persons, not more than four of whom shall be present or former members of the State Bar or have been admitted to practice before any court in the United States. Members of the Commission shall be appointed by the Board and shall serve at the pleasure of the Board or until the expiration of such terms as the Board may set, whichever first occurs." See also Rule 15(d). The Commission shall have the sole and final authority to determine whether and to what extent any application for reimbursement shall be granted and shall determine the order, manner (which may be in installments) and amount of payment of each application. The Commission may postpone consideration of any application until after any disciplinary action or any pending or contemplated court proceeding has been completed."

⁷ See Rule 15(f): "Action of the Commission may be taken either at a meeting of the Commission or by a poll of members of the Commission if such poll has been authorized by the Commission or its chair. The concurring vote of a majority of the members of the Commission then in office shall be the action of the Commission in a duly authorized poll of its members. In other cases, the vote of a majority of the members of the Commission present and voting when a vote is taken shall constitute the action of the Commission."

⁸ See Rule 11: "The State Bar shall provide an active member as Director and necessary additional active members, who with the Director shall be referred to in these rules as "counsel", to represent the interests of the Fund and of the Commission. It shall also provide other support staff as necessary and appropriate to assist the Commission in carrying out the provisions of these rules."

⁹ See Rule 12: "The reasonable expenses of the Commission including salaries and other costs of counsel and support staff engaged in the representation of or support of the Fund or Commission and including all costs of administration of the Fund and of litigation and review of all claims concerning the Fund shall be reasonable and necessary expenses which may be charged against the Fund pursuant to Business and Professions Code section 6140.5."

- (A) To qualify for reimbursement, an applicant must establish a loss of money or property that was received by an active attorney who was acting as an attorney or in a fiduciary capacity customary to the practice of law, for instance as an administrator, executor, trustee of an express trust, guardian, or conservator.¹⁰
- (B) The loss must have been caused by dishonest conduct as defined in these rules.¹¹
- (C) The attorney must have a status that meets the requirements of these rules.¹²
- (D) Even if an application meets these requirements, the Commission has sole discretion to deny or limit reimbursement. No person or entity has a right to reimbursement.¹³

Rule 3.431 Dishonest conduct

“Dishonest conduct”¹⁴ refers to any of the following:

¹⁰ *This provision is derived from two rules. Rule 2 provides that “Except for the further limits contained in the rules which follow, in order to qualify for reimbursement from the Client Security Fund an applicant must establish loss of money or property which came into the hands of an active member of the State Bar, or a Foreign Legal Consultant registered with the State Bar, or an attorney registered with the State Bar under the Multijurisdictional Practice Program while acting as a lawyer, trustee or fiduciary as defined in these rules and which loss was caused by the dishonest conduct of that active member of the State Bar, or a Foreign Legal Consultant registered with the State Bar, or an attorney registered with the State Bar under the Multijurisdictional Practice Program occurring on or after March 4, 1972.” Rule 9(a)(2), which states that to be reimbursable the dishonest conduct may be committed by a lawyer acting “In a fiduciary capacity customary to the practice of law, such as administrator, executor, trustee of an express trust, guardian or conservator.”*

¹¹ See Rule 3.431.

¹² See Rule 3.432.

¹³ Rule 3.420(c).

¹⁴ *See Rule 6: “As used in these rules, “dishonest act” or “dishonest conduct” means any of the following:*
(a) Wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money or property.
(b) Refusal to refund an advance fee when the lawyer performed no work whatever, or such an insignificant portion of the services that he or she agreed to perform, such that the lawyer can be regarded at the time payment was received as having lacked the intention of performing the work. All other instances of a lawyer failing to return an unearned fee or the disputed portion of a fee are outside the scope of the Fund.
(c) The borrowing of money from a client without the intention, reasonable ability, or reasonably anticipated ability to repay it.
(d) Obtaining money or property from a client representing that it was to be used for investment purposes when no such investment was made. The failure of an investment to perform as represented to, or anticipated by, the applicant is outside the scope of the Fund.
(e) A lawyer’s act of intentional dishonesty or deceit which proximately leads to the loss of money or property, by a person with whom the lawyer held an attorney-client or fiduciary relationship.”

- (A) Theft or embezzlement of money, the wrongful taking or conversion of money or property, or a comparable act.
- (B) Failure to refund unearned fees received in advance for services when the attorney performed an insignificant portion of the services or none at all. Such a failure constitutes a wrongful taking or conversion. All other instances of an attorney's failure to return an unearned fee or the disputed portion of a fee are outside the scope of this provision and not reimbursable under these rules.
- (C) Borrowing money from a client without the intention or reasonable ability, present or prospective, of repaying it.
- (D) Obtaining money or property from a client for an investment that was not in fact made. Failure of an investment to perform as represented to or anticipated by a client is not dishonest conduct under these rules.
- (E) An act of intentional dishonesty or deceit that proximately leads to the loss of money or property.

Rule 3.432 Required status of attorney¹⁵

- (A) To qualify for reimbursement, an application must establish that the attorney whose dishonest conduct is alleged has
 - (1) been disbarred, disciplined, or voluntarily resigned from the State Bar;
 - (2) died or been adjudicated mentally incompetent; or
 - (3) because of the dishonest conduct become a judgment debtor of the applicant in a contested proceeding or been convicted of a crime.
- (B) The Commission may waive provision (A) of this rule.

Rule 3.433 Excluded applicants¹⁶

¹⁵ See Rule 9(b):

“(b) To be considered eligible for reimbursement, one of the following events must have occurred:

(1) The lawyer:

(a) died or was adjudicated mentally incompetent;

(b) was disciplined, or voluntarily resigned from the practice of law in California;

(c) became a judgment debtor of the applicant in a contested proceeding, or was judged guilty of a crime, which judgment or judgments shall have been predicated upon dishonest conduct while acting as specified in paragraph (a) of this rule and which judgment or judgments remain unsatisfied in whole or in part; or

(2) The Commission exercised discretion to waive the requirements of paragraph (b)(1) of this rule.”

An applicant is excluded from receiving reimbursement from the Fund who

- (A) is or was related to the attorney as a spouse or domestic partner;
- (B) has a family relationship with the attorney, including one by adoption, as child, parent, grandchild, grandparent, or sibling;
- (C) lives or lived with the attorney;
- (D) has or had a business or other relationship with the attorney as an associate, partner, employee, or employer;
- (E) is or was an insurer, surety, or bonding entity seeking reimbursement for a payment made under a contract or bond covering the dishonest conduct;
- (F) is or was a business entity controlled
 - (1) by the attorney; or
 - (2) by someone with whom the attorney has a personal or business relationship as defined by this rule;
- (G) is or was an assignee, lienholder, or creditor of the attorney or the person who incurred the loss; or
- (H) is a government entity or agency.

Rule 3.434 Reimbursement limitations and exclusions¹⁷

¹⁶ See Rule 7: “The following applicants who have, or previously had, any of the following relationships with the lawyer shall be excluded from receiving reimbursement from the Fund:

- (a) The spouse, child, parent, grandchild, grandparent, sib-ling, including relationships by adoption, and a person sharing living quarters with a lawyer;
- (b) partner, associate or employer or employee of the lawyer;
- (c) an insurer, surety, or bonding agency or company which seeks reimbursement for payment made under an insurance or surety contract or bond covering the risk involved in the lawyer’s dishonest conduct;
- (d) any business entity controlled by (1) the lawyer, (2) any person described in paragraph (a) or (b) hereof, or (3) any entity either described in paragraph (c) hereof or in turn controlled by the lawyer or a person or entity described in paragraphs (a), (b) or (c) hereof;
- (e) an assignee, lienholder, or creditor of the applicant or lawyer; or
- (f) a governmental entity or agency.”

¹⁷ Derived from amendments to Rule 4(c) that were adopted in March 2009: “For losses occurring prior to January 1, 2009 after January 1, 1982, the maximum allowable payment is \$50,000. For losses occurring on or after January 1, 2009, the maximum allowable payment is \$100,000. Cumulative reimbursement payments to an applicant shall not exceed \$100,000 with respect to any individual lawyer.” The March 9 draft proposes this as Rule 4.438: “For losses occurring after January 1, 1982, but before Month Day,

- (A) For losses occurring on or after January 1, 2009, the maximum allowable reimbursement is \$100,000, and cumulative reimbursements to an applicant may not exceed \$100,000 with respect to any individual attorney. For losses occurring before January 1, 2009, the maximum allowable reimbursement is \$50,000, and cumulative reimbursements to an applicant may not exceed \$50,000 with respect to any individual attorney.
- (B) The Fund may not reimburse
- (1) interest or a consequential loss;¹⁸
 - (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;¹⁹
 - (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;²⁰ or
 - (4) a loss from a loan or investment,²¹ unless it meets the requirements of Rule 3.436.

2009, the maximum allowable reimbursement is \$50,000 and cumulative reimbursements to an applicant may not exceed \$50,000 with respect to any individual lawyer. For losses occurring on or after Month Day 2009, the maximum allowable reimbursement is \$100,000 and cumulative reimbursements to an applicant may not exceed \$100,000 with respect to any individual lawyer.”

¹⁸ See Rule 5(a). “No payment from the Fund shall be made for interest on or consequential damages resulting from any reimbursable loss.” Reimbursement from the Fund may be made upon clear and convincing proof that an applicant expended reasonable costs, including a reasonable attorney fee, to recover or reduce the amount of the dishonestly caused loss; and that the proof submitted by the applicant shows clearly and convincingly that, but for the reasonable expenses incurred by the applicant, the Fund would have been subjected to a reimbursable claim in excess of the sum of the net reimbursable loss plus reasonable costs spent by the applicant.”

¹⁹ See Rule 8: “The Fund shall not reimburse a loss if the reimbursable portion thereof was covered by any insurance or by any fidelity or similar bond or benefit, whether of the lawyer or the applicant or otherwise. This exclusion shall not apply if the insurer or administrator of any bond or benefit possesses a cause of action against the applicant for recovery of the sums paid by such insurance, bond, or benefit.”

²⁰ See Rule 5(a), which provides that “Reimbursement from the Fund may be made upon clear and convincing proof that an applicant expended reasonable costs, including a reasonable attorney fee, to recover or reduce the amount of the dishonestly caused loss; and that the proof submitted by the applicant shows clearly and convincingly that, but for the reasonable expenses incurred by the applicant, the Fund would have been subjected to a reimbursable claim in excess of the sum of the net reimbursable loss plus reasonable costs spent by the applicant.”

²¹ See Rule 10: “If the subject of the application for reimbursement from the Fund is a loss occasioned by a transaction proposed by a lawyer as a loan or investment with, or through, him or her, such loss will not be reimbursable unless it arose out of and in the course of the attorney-client relationship; and but for the fact

- (C) A reimbursable loss of non-monetary property is its fair market value at the time of loss.²²

Rule 3.435 Factors that may limit reimbursement²³

To fulfill the purposes of the Fund, the Commission may deny reimbursement in whole or in part for any of the following reasons:

- (A) the attorney and applicant participated or intended to participate in illegal or tortious conduct related to the subject matter of the application;
- (B) the applicant failed to act reasonably to protect against the loss, considering the circumstances of the transaction, the past dealings with the attorney, and differences in their education and business sophistication;
- (C) the nature of the applicant's loss, its amount, or the financial or administrative circumstances of the Fund require that reimbursement be limited or denied; or
- (D) the applicant is a fictitious person.

Rule 3.436 Attorney-client relationship required to reimburse loan or investment loss²⁴

that the dishonest lawyer enjoyed an attorney-client relationship with the applicant, such loss could not have occurred."

²² See Rule 4(b): "The amount of an applicant's non-monetary loss shall be deemed to be its fair market value at the time of loss."

²³ See Rule 2: "Any payments from the Fund shall be discretionary and shall be subject to these rules and such other regulations and conditions as the Board shall prescribe. The Board or any body designated by the Board to act upon applications for reimbursement from the Client Security Fund may limit or deny an application for reimbursement when it is necessary to do so in order to fulfill the purposes of said Fund. Without limiting the foregoing, reimbursement may be denied, in whole or in part, if any of the following circumstances are present:

- (a) The lawyer and applicant participated, or intended to participate, in any illegal or tortious conduct related to the subject matter of the application;
- (b) The applicant has failed to act reasonably to protect himself, herself or itself against loss considering the circumstances of the transaction, the course of past dealings between the applicant and lawyer, and their respective educational backgrounds and business sophistication;
- (c) Given the nature of the applicant's loss, its amount, or the financial or administrative circumstances of the Fund, it is necessary that reimbursement be limited or denied;
- (d) Applicant is a fictitious person."

²⁴ See Rule 10: "If the subject of the application for reimbursement from the Fund is a loss occasioned by a transaction proposed by a lawyer as a loan or investment with, or through, him or her, such loss will not be reimbursable unless it arose out of and in the course of the attorney-client relationship; and but for the fact that the dishonest lawyer enjoyed an attorney-client relationship with the applicant, such loss could not have occurred. In considering whether that standard has been met, the following factors will be considered:

- (A) A loss resulting from a transaction proposed by an attorney as a loan or investment with or through the attorney is not reimbursable unless
- (1) it arose out of and in the course of the attorney-client relationship; and
 - (2) it could not have occurred but for the relationship.
- (B) To determine whether a loan or investment meets the requirements of this rule, the Commission may consider the following factors:
- (1) whether authority to practice law in California was required for a principal part of the transaction;
 - (2) whether the attorney initiated the transaction;
 - (3) the professional and business reputation of the attorney;
 - (4) the amount charged for legal services or as a finder's fee;
 - (5) the number of prior transactions between the applicant, the attorney, or other attorneys or entities;
 - (6) the relative bargaining power, education, and business sophistication of the attorney and applicant;
 - (7) whether normal prudence of the applicant was unduly affected by the attorney-client relationship;

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- (a) *The disparity in bargaining power between the lawyer and the applicant and their respective educational backgrounds and business sophistication.*
 - (b) *The extent to which the fact that there was an attorney-client relationship overcame the normal prudence of the applicant.*
 - (c) *The extent to which the lawyer, by virtue of the attorney-client relationship with the applicant, became privy to information as to the applicant's financial affairs. It is significant if the lawyer knew of the fact that the applicant had available assets or was expecting to receive assets which were ultimately wrongfully converted by lawyer.*
 - (d) *Whether a principal part of the transaction arose out of a relationship requiring a license to practice law in the State of California as opposed to one that did not. In making this evaluation, consideration will be given to (1) whether the transaction originated with the lawyer or not; (2) the reputation of the lawyer in the vicinage of his or her practice as to the scope and nature of his or her practice and/or business involvements; (3) the amount of the charge made for legal services, if any, and that for a finder's fee, if any, and (4) the number of prior transactions of either a similar or different nature in which the client participated, either with the lawyer involved or any other lawyer, person or business organization.*
 - (e) *The extent to which the lawyer failed to make full disclosure to the applicant in compliance with the Rules of Professional Conduct, including disclosure of the lawyer's financial condition and his or her intended use of the money or property."*

- (8) whether the attorney-client relationship allowed the attorney to learn about the applicant's financial affairs or prospects; and
- (9) whether the attorney failed to fully make the disclosures required by the Rules of Professional Conduct, including those regarding his or her financial condition and intended use of the applicant's money or property.

Article 3. Applications and action on applications

Rule 3.440 Application for reimbursement²⁵

- (A) A applicant seeking reimbursement from the Fund must submit a Client Security Fund Application for Reimbursement. The application contains the following statement: “**IMPORTANT NOTICE.** The State Bar of California has no legal responsibility for the acts of individual attorneys. Payments from the Client Security Fund are solely within the discretion of the State Bar. By applying to the Client Security Fund, the applicant acknowledges that he or she may be giving up the right to pursue a civil action for the same recovery against a third party.”²⁶
- (B) The application must identify the applicant and the attorney allegedly responsible for the reimbursable loss and set forth a general statement of facts regarding the loss, including its amount, when it was incurred, when it was discovered, and the extent to which it is or has been covered by insurance, fidelity guarantee, bond, or similar indemnity.
- (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 a current address and to promptly notify the State Bar of a change in this address; 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.²⁷
- (D) The application must be completed in accordance with instructions and executed under penalty of perjury.

²⁵ See Rule 13.

²⁶ This sentence attempts to shorten the original sentence in Rule 13: “The applicant acknowledges that by applying to the Client Security Fund, the applicant may be giving up the right to pursue a civil action, for the same recovery against a third party.”

²⁷ From Rule 19: “Payments on approved applications shall be made from the Fund only upon condition that the State Bar of California receives, in consideration for any payment from the Fund, a pro tanto assignment from the applicant of the applicant's rights against the lawyer involved and against any third party or entity concerning the dishonestly caused loss for which the applicant is receiving reimbursement from the Fund.”

- (E) An application for reimbursement must be filed no more than four years after the loss was discovered or through reasonable diligence should have been discovered.
- (F) An applicant may apply to the Fund without exhausting other remedies.
- (G) An applicant need not be represented by a lawyer. If an applicant is represented by a lawyer, the lawyer is encouraged to provide his or her services pro bono publico to maximize the benefits available to the applicant. A lawyer may, however, represent an applicant for a reasonable attorney fee.²⁸

Rule 3.441 Review of applications

- (A) The Fund may investigate an application as it deems appropriate.²⁹
- (B) Upon due consideration of an application, Fund counsel may close it without prejudice, issue a Notice of Intention to Pay,³⁰ or submit it to the Commission for Tentative Decision.
- (C) In considering applications for reimbursement, the Commission may require further investigation; require submission of declarations under penalty of perjury;³¹ appoint a panel to recommend a Tentative Decision; issue a Tentative Decision;³² conduct hearings at which it receives evidence; administer oaths and affirmations; and compel by subpoena the attendance of witnesses and the production of books, papers and documents.³³ A party who refuses to obey a subpoena is subject to the

²⁸ From Rule 18: “Since the purpose of the Fund is to relieve or mitigate an applicant’s losses caused by a lawyer’s dishonest conduct, members of the State Bar are encouraged to represent applicants in matters affecting the Fund on a pro bono publico basis whenever possible in order to maximize the benefits available to the members of the public who might have suffered a loss which the Fund was designed to reimburse. Nevertheless, a member of the State Bar who represents an applicant in pursuing an application before the Commission may contract with the applicant for an attorney fee.”

²⁹ See rule 14, which provides at subsection (b) that “Upon filing, counsel shall screen or direct the screening of each application for reimbursement. Counsel may refer the application to State Bar Offices under the direction of the Chief Trial Counsel in connection with a pending disciplinary matter” and at 14(c) allows for “screening and any appropriate investigation by counsel.”

³⁰ See Rule 3.442.

³¹ Code of Civil Procedure § 2015.5.

³² See Rule 14(c): “Upon completion of screening and any appropriate investigation by counsel, the Commission shall tentatively decide the action which shall be taken on the application including the holding of an oral hearing, or designating one or more Commission members or counsel to serve as a fact-finding panel. A panel composed of less than a quorum of Commission members shall report its findings to the full Commission for consideration in reaching its tentative decision.”

³³ See Rule 16(a): “In general Upon consideration of applications for reimbursement, the Commission may:

contempt procedures of Rule 187 of the Rules of Procedure of the State Bar.³⁴ If the Commission decides to issue a Tentative Decision, it may postpone doing so until the conclusion of any related disciplinary action or court proceeding either pending or contemplated.³⁵

- (D) The Commission may consolidate applications related to one or more respondents when no substantial rights are prejudiced.³⁶
- (E) When an application involves more than one respondent, the Commission may consider each respondent as the subject of a separate application if no substantial rights are prejudiced.³⁷
- (F) In the interest of justice and for good cause, the Commission may waive a requirement of these rules that bars reimbursement of an application otherwise qualified for reimbursement.³⁸
- (G) An application filed by a husband and wife is deemed to be two separate applications, unless the loss occurred before January 1, 2009. For such a loss, the application is deemed to be a single application.³⁹

(1) Take and hear evidence pertaining to the application.

(2) Administer oaths and affirmations.

(3) Compel, by subpoena, the attendance of witnesses and the production of books, papers and documents pertaining to the application. Any subpoena duces tecum may provide that the books, papers or other documents be produced at an administrative office of the State Bar in care of the director or his or her delegates."

³⁴ See Rule 16(a): "Upon the refusal of a party to obey a subpoena directed to it, the contempt procedures of rule 187, Rules of Procedure of the State Bar shall apply."

³⁵ See Rule 15(d): "The Commission may postpone consideration of any application until after any disciplinary action or any pending or contemplated court proceeding has been completed."

³⁶ See Rule 16(b)(1): "When two or more applications involve the same lawyer or lawyers the Commission may order the applications consolidated if no substantial rights will be prejudiced."

³⁷ See Rule 16(b)(2): "When an application involves more than one lawyer, the Commission may order the bifurcation of proceedings with respect to each individual lawyer if no substantial rights will be prejudiced."

³⁸ See Rule 30: "In the interest of justice, for good cause shown, the Commission may waive any requirement set forth in these rules which would bar reimbursement on a claim that would otherwise qualify for reimbursement."

³⁹ Derived from March 2009 amendments to Rule 4(a): "Applications filed by a husband and wife shall be regarded as having been made by one person two persons, but may not exceed the amount of the actual loss suffered."

- (G) The applicant and respondent must supply relevant evidence under oath to support allegations or objections based on fact.⁴⁰ Proceedings on such evidence need not be conducted according to technical rules applicable to evidence and witnesses. Any relevant evidence is admissible if of the sort that responsible persons customarily rely on in the conduct of serious affairs, even if such evidence might be inadmissible in a civil action.⁴¹
- (H) A decision to reimburse a loss must be based on a preponderance of the evidence.⁴²
- (I) Testimony presented to the Commission or a fact-finding panel it appoints may be recorded and transcribed in whole or in part as directed by the Commission.⁴³

Rule 3.442 Notice of Intention to Pay⁴⁴

⁴⁰ See 20(c): “The applicant shall have the duty to supply relevant evidence under oath to support the application and the lawyer shall have the duty to supply relevant evidence under oath to support factually based objections to the application.” [Check REF. Is this Rule 16(c)?]

⁴¹ This provision derives from Rule 16(c): “Evidence proceedings had upon applications need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence under oath shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in court proceedings. The applicant shall have the duty to supply relevant evidence under oath to support the application and the lawyer shall have the duty to supply relevant evidence under oath to support factually based objections to the application.” Rule 16(c) in turn derives from Government Code § 11513(c).

⁴² See Rule 15(e): “Before the Commission directs that payment from the Fund be made, it must find that a reimbursable loss as defined in these rules has been established and the extent of said loss, based upon a preponderance of the evidence.”

⁴³ See Rule 20(d): “Hearings at which testimony is presented before the Commission or a fact-finding panel may be recorded by a certified shorthand reporter or by electronic equipment and methods approved by the Board of Governors as directed by the Commission. The transcript of all or a portion of such proceedings shall be prepared upon direction of the Commission.”

⁴⁴ See Rule 41: “The Director, under standards set by the Commission, is authorized to issue Notices Of Intention To Pay. The Notice shall inform the lawyer of the allegations made by an applicant, and advise the lawyer of the intention to have reimbursement issued to that applicant in a stated amount. This action by the Director may be made provided each of the following conditions is clearly met:

- (a) Receipt of a properly completed application.
- (b) Documentation confirming the amount of loss.
- (c) Sufficient evidence of the eligibility for reimbursement under all other rules of the Commission. For applications requesting \$5,000.00 or less, prima facie evidence shall be sufficient to establish eligibility for reimbursement under the rules.
- (d) The filing of a discipline complaint by the applicant, unless waived by the Director, if the lawyer has not been disbarred or tendered his or her resignation from the State Bar with charges pending.

The requirements of paragraph (b)(1) of rule 9 are waived.

A Notice of Intention to Pay shall be mailed to the lawyer at his or her membership records address by first class mail. The lawyer shall have 30 days from the date of mailing in which to submit a written objection to payment being made. In that event, processing for issuance of a reimbursement payment shall cease.

- (A) A Notice of Intention to Pay advises an attorney of the allegations made by an applicant and an intention to reimburse the applicant in a stated amount. In compliance with standards set by the Commission, the Director may issue the notice provided an applicant has
- (1) submitted a complete application in accordance with instructions;
 - (2) submitted documentation confirming the amount of the loss;
 - (3) provided sufficient evidence of eligibility for reimbursement as required by these rules; and
 - (4) filed a discipline complaint against the attorney, unless the Director waives this requirement.
- (B) For applications requesting \$5,000.00 or less, prima facie evidence is sufficient to establish eligibility for reimbursement under this rule.
- (C) The attorney must be served with a Notice of Intention to Pay in accordance with Rule 3.445.
- (D) The attorney has thirty days from the date of service to submit a written objection to a Notice of Intention to Pay. If the attorney objects, the Fund will conduct further review in accordance with these rules. If the attorney does not object, the Fund may pay the applicant the reimbursement amount stated in the notice.
- (E) An applicant reimbursed pursuant to a Notice of Intention to Pay may object to the amount of payment by submitting a written objection under penalty of perjury within thirty days of the date on which reimbursement issues. Acceptance of the reimbursement does not waive the right to object. An objection requires further review in accordance with these rules.
- (F) In issuing a Notice of Intention to Pay, the Director may waive Rule 3.432 (A).

Rule 3.443 Tentative Decisions⁴⁵

Further review of the application shall then be conducted in accordance with all other applicable rules of procedure. If the lawyer does not submit a written objection, then the reimbursement amount stated in the notice shall be paid to the applicant.

An applicant may object to the amount of payment provided the applicant submits a written objection within 30 days of the date on which payment is made to him or her. The applicant may accept the reimbursement payment without waiving his or her right to file objections. In such an event, the Commission shall likewise consider the objection and issue a decision.”

⁴⁵ See 14(c): “Upon completion of screening and any appropriate investigation by counsel, the Commission shall tentatively decide the action which shall be taken on the application including the holding of an oral hearing, or designating one or more Commission members or counsel to serve as a fact-

- (A) A Tentative Decision must be in writing, include a statement of the findings or reasons on which the decision is based, and be served in accordance with Rule 3.445.
- (B) The parties have thirty days from the date of service to provide the Fund and the other party a written objection to the Tentative Decision. The objection must state the precise legal or factual grounds for the objection and be executed under penalty of perjury. The objection may include supporting documentation; a request for an oral hearing; or in lieu of a request for an oral hearing additional declarations executed under penalty of perjury.⁴⁶
- (C) In lieu of granting an oral hearing, the Commission may require that any facts alleged in an objection to a Tentative Decision be supported by one or more declarations under penalty of perjury.⁴⁷
- (D) If the Fund receives no timely written objections, a Tentative Decision may be deemed a Final Decision.⁴⁸

Rule 3.444 Final Decisions⁴⁹

- (A) After providing the parties an opportunity to submit objections, requests, or declarations in response to a Tentative Decision; requiring any additional

finding panel. A panel composed of less than a quorum of Commission members shall report its findings to the full Commission for consideration in reaching its tentative decision. Such tentative decision shall include such proposed findings or reasons as are necessary to permit adequate review by the applicant, and the lawyer. The Commission's tentative decision shall be served on the applicant and the lawyer and the applicant and the lawyer shall each be given a period of thirty (30) days to file with the Commission's counsel and serve upon the other party any objections to that proposed recommendation. An objection of a party to the tentative decision shall be in writing, shall state the precise legal and/or factual grounds on which it is based and may include a request supported by written reasons for an oral hearing. In lieu of such oral hearing, a party may submit for the Commission's consideration or the Commission may require from a party in support of any asserted factual basis for objection one or more declarations under penalty of perjury as set forth in section 2015.5 of the Code of Civil Procedure."

⁴⁶ Code of Civil Procedure § 2015.5.

⁴⁷ Code of Civil Procedure § 2015.5.

⁴⁸ See 15(c): "If no service has been made of the tentative decision on the respondent because the respondent is deceased, the applicant may waive the time to file an objection by submitting a waiver in writing. Upon receipt of the waiver, a final decision will be entered."

⁴⁹ See Rule 15(a): "After opportunity has been given to the applicant or the lawyer pursuant to rule 14(c) to object to the tentative decision of the Commission, and to timely submit such declarations under penalty of perjury in support of factual contentions as may be requested or desired, the Commission shall take final action on the application."

investigation or conducting an oral hearing it deems necessary; and considering the record relevant to the application, the Commission issues a Final Decision.

(B) A Final Decision issued by the Commission

- (1) must be in writing;
- (2) may direct or deny reimbursement with or without prejudice;
- (3) may establish any conditions for reimbursement deemed appropriate; and
- (4) must be served in accordance with Rule 3.445.

(C) A Final Decision of the Commission constitutes the final action of the State Bar.

Rule 3.445 Service of decisions and Notice of Intention to Pay⁵⁰

- (A) Service of a Notice of Intention to Pay must be made by first-class mail to the attorney and any lawyer representing the attorney in connection with the application.
- (B) Service of a Tentative Decision and Final Decision must be made by first-class mail to the applicant,⁵¹ 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.
- (D) An attorney and a lawyer representing either an attorney or an applicant must be served at the address of record.

⁵⁰ See Rule 15.5:

- (a) *“Service of the tentative decision and final decision shall be made by mail in a sealed envelope, with first-class postage paid:*
 - (1) *To the applicant, and any attorney representing him or her before the Commission, at their respective last known addresses;*
 - (2) *To the respondent lawyer at the address listed in the official membership records of the State Bar. Also to any attorney representing the respondent lawyer at his or her last known address.*
- (b) *If the respondent is deceased, no service need be made on the respondent of either the tentative decision or the final decision.*
- (c) *If no service has been made of the tentative decision on the respondent because the respondent is deceased, the applicant may waive the time to file an objection by submitting a waiver in writing. Upon receipt of the waiver, a final decision will be entered.”*
- (d)

⁵¹ Rule 3.440(C) requires an applicant to agree to promptly notify the State Bar of a change in address.

Article 4. Superior court review; repayment; collection

Rule 3.450 Superior court review⁵²

The Final Decision of the Commission to grant or deny reimbursement to an applicant may be reviewed in superior court pursuant to a request for review filed by the applicant or attorney in accordance with Code of Civil Procedure section 1094.5. The request must be filed no more than ninety days after the date the decision was served.

Rule 3.451 Repayment of reimbursement by attorney⁵³

An attorney must repay the Fund for any reimbursement, with simple interest and an assessment of processing costs. The rate of interest, set forth in the Schedule of Charges and Deadlines, is adopted by the Board of Governors upon the recommendation of the Commission and may not exceed the maximum legal rate. Processing costs are the estimated average processing costs for similar applications in the most recent calendar year for which data is available.⁵⁴

Rule 3.452 Enforcement of State Bar rights⁵⁵

⁵² See Rule 17: “The final decision of the Commission to grant or deny reimbursement to an applicant may be reviewed by the applicant or the respondent lawyer in the superior courts of the state pursuant to the provisions of section 1094.5 of the Code of Civil Procedure.”

⁵³ See Rule 5(b), which provides that “A lawyer shall reimburse the Fund for all moneys paid out as a result of his or her conduct, with interest, and an assessment of the procedural costs of processing the claims. Interest payable shall be simple interest at a rate set by the Commission or Board from time to time, not to exceed the maximum legal rate. Processing costs shall be assessed by the Commission or Board for the sum of the estimated average expenses, including interdepartmental transfers, of processing reimbursement requests of the category involved for the most recent calendar year for which data is available.”

⁵⁴ See Business & Professions Code § 6140.5(d).

⁵⁵ See Rule 19: “Assignment of applicant’s rights and subrogation. Payments on approved applications shall be made from the Fund only upon condition that the State Bar of California receives, in consideration for any payment from the Fund, a pro tanto assignment from the applicant of the applicant’s rights against the lawyer involved and against any third party or entity concerning the dishonestly caused loss for which the applicant is receiving reimbursement from the Fund. The collection of the aforementioned assignment shall be handled by the Office of The General Counsel of the State Bar under the supervision of the Board of Governors or in such other manner as may from time to time be directed by the Board of Governors. In order to effect collection of said assignment, general counsel may disclose such information concerning the application and the consideration thereof by the State Bar as in general counsel’s discretion is necessary and general counsel may disclose matters otherwise confidential under these rules as deemed required by general counsel in filing or responding to any pleading or contention. Upon commencement of an action by the State Bar of California, pursuant to its subrogation rights, and within the time limits provided by Business and Professions Code section 6140.5(b), it shall give written notice thereof to the applicant at his last known address.”

The Office of General Counsel of the State Bar is authorized to collect assignments made by applicants reimbursed by the Client Security Fund and to enforce the State Bar's rights as permitted by law. To effect collection of an assignment, General Counsel has discretion to disclose information about the application that would otherwise be confidential.

Article 5. Records

Rule 3.460 Records shared with Chief Trial Counsel⁵⁶

- (A) To assist with its investigation and consideration of an application, the Commission and its staff may access confidential records of the Office of Chief Trial Counsel regarding an attorney who is the subject of an application. The records remain confidential despite any such use.
- (B) The State Bar Office of Chief Trial Counsel may have access to any Commission records related to an investigation or prosecution.⁵⁷

Rule 3.461 Public access to records and proceedings⁵⁸

- (A) The following are confidential: applications for reimbursement from the Client Security Fund; hearings on applications; deliberations of the Commission; and any records created by staff with regard to an application or related investigation.

⁵⁶ See Rule 20(e): “The Commission, and its counsel during consideration of an application may have access to State Bar disciplinary files and records which have not become public. All consideration of such confidential disciplinary files and records shall be confidential and in camera and no member of the public may have access to such confidential disciplinary files and records, unless the Board of Governors of the State Bar shall have first so ordered.”

⁵⁷ See Rule 20(d): “Notwithstanding the provisions of this rule, all aspects of the deliberations of the Commission on applications for reimbursement shall be confidential as shall all reports or memoranda prepared by or for counsel concerning the investigation of an application or which would be considered as “attorney work product,” except that the State Bar offices under the direction of the Chief Trial Counsel may have access to any of said records which bear on investigation or prosecution of an attorney disciplinary matter.”

⁵⁸ This provision derives from three current rules. See Rule 20(a), which provides that “All applications for reimbursement to the Client Security Fund are confidential, unless formal disciplinary charges have been filed with the State Bar Court based upon the same facts as the application for reimbursement”; Rule 20(b), which provides that “All hearings on Fund applications shall be confidential unless formal disciplinary charges have been filed with the State Bar Court, based upon the same facts as the application for reimbursement”; and Rule 20(d), which provides that “Notwithstanding the provisions of this rule, all aspects of the deliberations of the Commission on applications for reimbursement shall be confidential as shall all reports or memoranda prepared by or for counsel concerning the investigation of an application or which would be considered as “attorney work product,” except that the State Bar offices under the direction of the Chief Trial Counsel may have access to any of said records which bear on investigation or prosecution of an attorney disciplinary matter.”

- (B) If disciplinary charges related to the application have been filed against the attorney, the public may have access to the application; oral hearings the Commission grants to an applicant and attorney; Tentative and Final Decisions; and briefs or pleadings filed by any party to a Commission proceeding; but not to records created by staff with regard to an application or related investigation.⁵⁹
- (C) In the interest of public protection, the following information regarding a reimbursement is public record: the names of the applicant and respondent; the amount and date of the reimbursement; and whether there are disciplinary charges related to the application.⁶⁰
- (D) Copies of public records are available for the fee set forth in the Schedule of Charges and Deadlines.⁶¹

⁵⁹ See Rule 20 at subsections (a) and (b). Subsection (a) states, “In those cases where such formal disciplinary charges have been filed, the application for reimbursement, and the tentative and final decisions of the Commission or of the State Bar Court on such an application, as well as any brief or pleading filed by any party to a Fund proceeding shall be available for public inspection during State Bar office hours at the office of the State Bar where those records are maintained.” Subsection (b) states, “All hearings on Fund applications shall be confidential unless formal disciplinary charges have been filed with the State Bar Court, based upon the same facts as the application for reimbursement. In those matters where such formal disciplinary charges have been filed, any hearing is open to the public.”

⁶⁰ See Rule 20(c), which provides, “Notwithstanding the provisions of paragraphs (a) and (b), in any case where reimbursement is directed, in the interest of public protection, the following information shall be a matter of public record:

- i. the name of the lawyer,
- ii. the name of the applicant,
- iii. the amount of reimbursement; and
- iv. the date of reimbursement.

If no formal disciplinary charge has been filed against the lawyer with the State Bar Court based upon the same facts as the application for reimbursement, that information shall also be part of the public record.”

⁶¹ Rule 20(a) provides that these records “be available for public inspection during State Bar office hours at the office of the State Bar where those records are maintained. Copies may be made only at the expense of the person requesting them. The Commission may establish and charge a reasonable fee for such copies.”