

**The widespread resumption of in-person hearings is premature at this time, and the DWC should consider delaying this order.**

We're all tired of COVID, and we're also tired of cultural wars over masking and vaccinations. I get it.

However, while the DWC announcement indicates that mask coverings will be required regardless of vaccination status or county mandates, California is still in the throes of a significant wave of Delta variant cases.

**Vaccination rates vary in different areas of the state, but this order would apply to all areas, even ones with low vaccination rates.**

Consider a few of the following factors according to figures noted in a Los Angeles Times article written the same day that the DWC announced the planned resumption (see article link below):

Only about half of black and Latinos in California are at least partially vaccinated. That same article noted that California last week saw 13,908 new COVID cases a day. That compares with 990 a day in June 2021.

85 Californians died of COVID last week, a 77% increase from the prior week.

Last week California ICUs were still seeing an increase in COVID patients, and some counties were seeing more COVID ICU activity than at any time in the pandemic.

California's positivity rate was still 4.6%, though that had improved from the week before.

Looking at the last 14 days, COVID cases in California were up 18% and deaths up 67%.

**It is unclear why the DWC is in a rush to resume in person widespread hearings. This order strikes me as tone deaf.**

Yes, the COVID trends may be getting better, but one of the problems in this pandemic has been the inconsistent and confusing messaging from a hodgepodge of different governmental entities.

For example, the Los Angeles Community Colleges are now requiring students and staff to be vaccinated. State of California workers must be vaccinated or submit to periodic testing.

In the City of San Francisco if I want to eat inside a restaurant I must show proof of vaccination. According to a recent PPIC poll, 61% of Californians favor such a policy. Yet, the WCAB policy would apparently not require litigants at the San Francisco WCAB to have proof of vaccination status or proof of recent test results.

**While I am sure there are some stakeholders anxious to get back to things as usual, it would be more prudent to wait a couple of months to make sure this surge has really cooled. Almost everyone I've spoken to has been amazed that the system has worked pretty well on a virtual basis.**

The reality is that if in-person hearings resume on October 1, there will be lots of unvaccinated people coming down to crowded WCAB district offices. Some of the boards are notorious for how crowded they can be, and this is just asking for trouble. And who will enforce the mask mandate once people get into the WCAB waiting rooms?

The DWC Newsline gives little detail on any nuances of the proposed October 1 resumption.

**What should the DWC say instead?**

At a minimum, the DWC should outline a protocol if one or more of the parties objects and requests the hearing be held by remote means. Until the pandemic further wanes, health concerns on the part of judges, reporters, applicants, defendants, attorneys and lien claimants should be given some credence.

Given the context of the pandemic, the party objecting to the in-person hearing should not be required to show personal health data to be exempted. Rather, **if there is an objection to in-person hearings, the party still wanting the in-person hearing should show good cause why an in-person hearing is necessary under the current conditions, with the objecting party being allowed the opportunity to respond.**

September 23, 2021

Workers' Compensation Appeals Board  
Attention: Julie Podbereski, Regulations Coordinator  
455 Golden Gate Avenue  
Ninth Floor  
San Francisco, CA. 94102

**Subject: Notice of Proposed Amendments to the Workers' Compensation Appeals Board's Rules of Practice and Procedure**

State Compensation Insurance Fund appreciates the opportunity to provide input regarding the Workers' Compensation Appeals Board's (WCAB) proposed amendments to its Rules of Practice and Procedure. State Fund respectfully submits the following comments for your consideration.

Recommended revisions to the WCAB's proposed regulations are indicated by underscore for added language and ~~strikeout~~ for deleted language.

**I. § 10305 Definitions**

**Discussion:**

The WCAB proposes a definition for "Electronic":

*(i) "Electronic" means by any available technological means.*

Here, the proposed definition is too broad and does not account for technology that may be compromised and/or present a security threat to a party's system. State Fund suggests requiring that the technological means used be secure and agreed upon by the parties.

**Recommendation:**

Change the definition to:

(i) "Electronic" means by any *agreed upon, secured* available technological means.

Additionally, State Fund proposes to incorporate into Section 10305 the specific terms and definitions for "electronic service," "electronic transmission," and "electronic notification" as currently found in, and defined by 8 CCR §36.7, the QME Electronic Service Emergency Regulation in Response to COVID-19.

These terms are currently not included in Section 10305. Clarity is needed to define "electronic service" in order to avoid misuse and misinterpretation for service of a document on another party. Further, any random "available electronic method" may not be secure and documents served may include PII (e.g. service of a document on a party's unused but open social media account – risk of receiving party not knowing that documents were served coupled with higher risk of PII potentially being exposed to

unintended parties). State Fund believes that adding these terms to the WCAB Rules of Practice and Procedure would help support the WCAB's intent to formalize the process for electronic communications in general, as well as provide consistency within the WCAB's regulations.

**Recommendation:**

State Fund recommends adding the following terms and definitions to Section 10305:

(j) "Electronic service" means the service of a document on a party or other person by either electronic transmission or electronic notification.

(k) "Electronic transmission" means the transmission of a document by electronic means to the electronic service address at or through which a party or other person has authorized electronic service.

(l) "Electronic notification" means the notification of the party or other person that a document is served by sending an electronic message to the electronic address at or through which the party or other person has authorized electronic service, specifying the exact name of the document served, and providing a hyperlink at which the served document may be viewed and downloaded.

The addition of these three terms requires a re-lettering of the subsequent definitions in this section.

**II. § 10625. Service by Parties.**

**Discussion:**

Here, the WCAB seeks to add "electronic service" as one of the methods for serving a document under Section 10625 (b)(2):

(b) A document may be served using the following methods:

...

(2) Electronic service;

State Fund strongly believes, and respectfully recommends, that electronic service should be allowed only when there is a written agreement to be served electronically and other safeguards for electronic service (below) are adopted. An unsecured or compromised mode of electronic service presents security concerns for a receiving party, by exposing the receiving party's computer network to potential harm arising from possible phishing attacks and viruses. In turn, this creates an undue burden on an organization's IT staff and resources.

In view of these concerns, State Fund recommends adopting the safeguards and conditions for electronic service from 8 CCR §36.7, QME Electronic Service Emergency Regulation in Response to Covid-19, with slight revisions for context, as set forth below. These regulations provide that electronic service should be allowed only by written agreement of the parties, through a secured, agreed upon electronic address, maintained and provided by the receiving party/or entity, among others below.

State Fund further recommends two additional conditions: 1) The parties may revoke such agreements at any time; and 2) The receiving party/entity shall have the right to refuse electronic service from a sending party/entity when the sender's network has been compromised. These conditions will provide additional safeguards and will improve the ability of the parties and entities to protect their IT networks from viruses and other potential harm.

**Recommendation:**

For the reasons indicated above, State Fund recommends the following revisions to subsection (b)(2):

*(2) Electronic ~~service~~; only if the following additional requirements are met:*

*(i) The parties agree to electronic service and written confirmation of that agreement is made. At the time of giving consent to electronic service, a party or entity shall provide the party's electronic address for the purpose of receiving electronic service.*

*(ii) For purposes of electronic service of a document, the document must be transmitted to an electronic address maintained by the person or entity on whom it is served, using the most recent electronic address provided to the serving party by the party who consented to accept service electronically.*

*(iii) Service is complete at the time of transmission. Any period of notice and any right or duty to act or make any response within any period or on a date certain after service of the document, shall be extended by two business days.*

*(iv) The agreement to electronic service may be revoked in writing at any time by the serving or receiving parties.*

*(v) The receiving party/entity shall have the right to refuse electronic service from a sending party/entity when the sender's network has been compromised.*

**Discussion**

Section (b)(5) of Rule 10625 allows the parties to select another method of service when the serving and receiving parties have agreed to such service. Consistent with the changes made above to subsection (b)(2), State Fund wishes to propose adding that the

agreement for alternative method must be in writing, and that it may also be revoked in writing at any time.

Section (b) (5) of Rule 10625 currently provides:

*(b) A document may be served using the following methods:*

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*(5) Another method if the serving and receiving parties have ~~previously agreed to some other method of service.~~*

### **Recommendation**

State Fund recommends the following revisions to subsection (b)(5):

*(5) Another method if the serving and receiving parties have ~~previously agreed in writing to some other method of service.~~ The agreement may be revoked in writing at any time by the serving or receiving parties.*

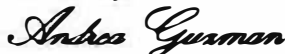
### **III. §10815. Electronic Hearings Before the Workers' Compensation Appeals Board.**

#### **Overall Comment**

State Fund acknowledges and appreciates the WCAB's transition to virtual operations in response to the COVID-19 pandemic. We recognize the WCAB's efforts to ensure that processes remain in place to allow parties to safely conduct business with the WCAB, while also meeting the needs of injured workers and employers. As the public health situation with COVID-19 continues to evolve, we encourage the WCAB to continue with virtual operations, including virtual trials, as it has proven to be efficient and effective during this public health crisis. We promote and support the health and safety of our employees and the workers' compensation community that normally would have to travel to/from the WCAB's locations, which includes our State Fund attorneys and lien representatives' attendance for hearings.

In closing, State Fund appreciates the opportunity to provide input regarding the WCAB's proposed amendments to its Rules of Practice and Procedure.

Sincerely,



Andrea Guzman  
Claims Regulatory Director  
Claims Medical and Regulatory Division

cc: Elsa Tan, Corporate Claims Technical Officer, Claims Medical and  
Regulatory Division  
Sheila Monson, Claims Operations Manager, Claims Medical and  
Regulatory Division  
Mark L. Beatty, Deputy Chief Counsel  
Mary R. Huckabaa, Assistant Chief Counsel

Proof of Service by Mail

I declare that:

I am (resident of / employed in) the county of \_SONOMA COUNTY\_ California.

I am over the age of eighteen years, my (business / residence) address is:

6000 STATE FARM DRIVE, ROHNERT PARK CA

On 9/23/2021, I served the attached

NOTICE OF PROPOSED AMENDMENTS TO THE WORKERS' COMPENSATION APPEALS BOARD  
RULES OF PRACTICE AND PROCEDURE

on the parties listed below in said case, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully paid, in the United State mail at ROHNERT PARK addressed as follows:

Workers' Compensation Appeals Board  
Attention: Julie Podbereski, Regulations Coordinator  
455 Golden Gate Avenue  
Ninth Floor  
San Francisco, CA. 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on 9/23/2021, at ROHNERT PARK, California.

Type or print name DEBORAH GRANTHAM

Signature





September 22, 2021

Workers' Compensation Appeals Board  
Attention: Julie Podbereski, Regulations Coordinator  
455 Golden Gate Avenue  
Ninth Floor  
San Francisco, CA 94102

Regarding: Proposed Changes to the Rules of Practice and Procedure Sections 10300-10995

**INTRODUCTION:** The WCAB has proposed that all law offices participating in the California Workers Compensation System begin accepting service of documents by EMAIL starting in January. While the definition of electronic service at proposed Section 10305(i) provides that "electronic" is "any technological means" the reality of the other changes proposed in Sections 10400(b)(3) / 10401(c) and 10625(b)(3) create an environment where EMAIL becomes an unavoidable legal service method for every work comp law office in the state. This is in essence MANDATING that law firms accept service by EMAIL – a material change to how business has been conducted in the industry up to now. The EAMS Uniform Assigned Names (UAN) list managed by the DWC is reliable evidence that **72%** of law firms specifically do NOT want to be served by email in today's environment. Therefore, service by email is not the "current practice" of most law firms, which was a reason given in the Initial Statement of Reasons. We also point out that the COVID-19 State of Emergency Miscellaneous En Banc Orders nos. 260-266 did not include any provision for mandated acceptance of email service for law firms, so this change is not simply making permanent the changes made in response to the pandemic, as was also mentioned in the ISOR. The point we are making here is not that electronic service in general should not be encouraged and brought into the regulations, but that these are SUBSTANTIVE changes being made, and should be made with great care to protect the law firms from various risks described herein.

**CONSEQUENCES TO CONSIDER:** Before we get to our proposed amendments to the WCAB's draft, we believe the WCAB should be made aware of some important data that is publicly available. One of the major consequences of mandating email is that email is the NUMBER ONE method cyber criminals use to penetrate business networks connected to the internet, according to the FBI's Cyber-Crime 2020 report. This report and many others show that cyber-crime has skyrocketed in 2020 and 2021 with the increase in employees working remotely. According to Sonic Wall's 2020 Cyber Threat report, PDF and Microsoft Office attachments sent via email were the delivery vehicles of choice for cybercriminals, and these are the very file types that will be attached to emails and sent to law offices under the WCAB's proposed changes. Another favorite of cyber criminals is a link in email with pretext that causes the person to land on a dangerous site and execute malicious code. We personally know of several work comp law firms that fell victim to data breach crimes in 2020 and had all their files crypto-locked because an employee opened a nefarious email. There are other risks associated with mandating email service for law offices, including forcing the many law firms that continue to keep paper files to PRINT all incoming mail, including voluminous medical reports and records. Rather than saving money in the system, mandating email service simply SHIFTS the expense from the sender to the recipient. Another factor is smaller law firms often lack modern operating systems, servers, software, and support teams to help them manage a high-volume in-box appropriately. Forcing email service on these smaller firms with aging attorneys, outdated Windows PCs and servers (we are seeing this now with recent changes to the EAMS website) that are no longer supported, and with only basic email services is like feeding them to

the internet wolves. Many firms will likely be forced to invest in updated (patchable) computers, updated servers, and subscribe to email filtering services – and the consequence of THAT will be attorneys NOT SEEING important documents that were served on him/her that the email filtering technology automatically quarantined/removed. Mandated email acceptance will likely become one of the top reasons District Offices will be forced to re-schedule hearings, because attorneys will show up to the hearing and say they never received the documents.

**ELECTRONIC SERVICE IS ENCOURAGED:** Our intention here is not to dissuade the WCAB from encouraging electronic service between law firms. Our intention is to make the WCAB aware of several risks and consequences of the proposal as currently drafted, and to offer some suggestions for how “electronic service”, rather than “Email Service”, could be encouraged. With that said, the WCAB may want to consider more discussions and gather stake-holder input before introducing such a material change. We doubt many stakeholders and attorneys have yet grasped the fact that these proposed changes mandate EMAIL acceptance or have thought about the risks and consequences of such a change to their practices. Most will only fully realize the threats of these changes once they fall victim to a cyber-attack and/or malpractice because their email filter quarantined an important document that they failed to act upon.

#### **OUR SUGGESTED AMENDMENTS TO THE WCAB’S PROPOSED DRAFT:**

To allow law offices to accept electronic service over safer and more effective methods than email, and to protect the privacy rights of injured workers, we propose the following changes:

(1) Section **10305(i)** be amended before adoption to state *“‘Electronic’ means any electronic delivery method, format and address identified by the representative being served consistent with Sections 10400(b)(3) and 10401(c)(1), or in the absence of a preferred electronic service method, through standard email consistent with this subsection. Documents electronically served shall not include any directly editable content, and shall not include any scripts, trackers, links or executable code of any kind without the express permission of the recipient. An email that contains a link that must be followed, rather than the document being served, is not considered electronic service unless the recipient has agreed to be served in this manner. Emails shall not exceed 25 megabytes in total size without prior consent from the intended recipient. Legally protected personal information of the injured worker or any other person shall not be served by email unless encrypted with a reasonably strong password that is unique to each attachment, and the password must not be included in the email with the attachment. Documents electronically served in a manner not compliant with this subsection or related sections are not considered legally served. Violations of the requirements contained in this subsection or the instructions provided by recipients in writing and/or consistent with Section 10400(b)(3) or 10401(c)(1) may subject the sender to sanctions under Labor Code Section 5813.”*

(2) Sections **10400(b)** and **10401(c)(1)** be amended to include *“The email address or other electronic service method, address and any necessary credentials to be used for electronic service of documents upon the representative. Representatives may periodically update the other parties with any changes to their electronic service information, and notified senders are responsible for using this new information for all future service.”*

**(3) Section 10625(b)(2)** be amended to include “Electronic service *in a manner consistent with Section 10305(i) and the intended recipient’s electronic service information provided consistent with Section 10400(b) or 10401(c)(1)*”.

**(4) Section 10625(c)** amended to include “*If a document is served electronically, the proof of service must also state the names and electronic address of the person serving electronically and the person served electronically.*”

**(5) Section 10625(d)** be amended to include “*Where a serving party receives notification that the service to one or more parties failed, the server shall re-serve the document on all intended recipient(s) and execute a new proof of service or provide a courtesy copy and new proof of service to the recipient(s) on whom the service failed, within a reasonable amount of time.*”

#### **SOME ADDITIONAL POINTS IN SUPPORT OF OUR PROPOSED AMENDMENTS TO THE WCAB’S DRAFT:**

We appreciate that the WCAB encourages brevity in submitted comments, but this is a big change, and we feel the WCAB would benefit from considering all of the following points:

**(A) RECIPIENTS SHOULD NOT BE HELD TO THE SERVER’S ELECTRONIC METHOD CHOICE:** As written, Section 10305(i) gives the serving party the choice of the technological method that may be used to “electronically serve” the recipient. The current language is overly broad. Technically, a serving party could choose an electronic method that is burdensome to the recipient, or even unknown to the recipient. The choice should be flipped... it should be the recipient that dictates the Electronic method and credentials needed, and if the server does not agree then the server can serve by paper/postal.

**(B) BLACKLISTS, SPAM FILTERS, JUNK MONITORS, AND SIZE LIMITATIONS WILL CAUSE SIGNIFICANT WASTED HEARING TIME AT THE DISTRICT OFFICES:** It would be irresponsible for any law office to allow their public email server to bring outside electronic files (attachments) into their network and PCs without significant layers of cyber-security PROTECTION that FILTERS emails and attachments that could be of risk. Many of these security solutions block the emails entirely and do so without notifying either the recipient or the sender. The same blocking occurs when an email exceeds the size limit of the receiver’s server. In both instances, the sender assumes the email was successfully delivered, and the receiver has no idea such a document was sent to them. With these proposed changes and MANDATED EMAIL SERVICE upon law offices, the WCAB can expect a significant rise in failed/wasted hearings when attorneys show up but did not see important documents related to the hearing. This will likely become a top cause of delayed claim resolution in our system, reduced efficiency in managing claims, and is completely avoidable by NOT mandating use of email for service.

**(C) THE CIVIL COURTS ALLOW ELECTRONIC SERVICE ONLY AFTER A PARTY HAS AUTHORIZED THE METHOD:** California Code of Civil Procedure Section 1010.6 governs electronic service of documents and requires a party or non-party to AUTHORIZE a method of the RECIPIENT’S choice for electronic service, unless a court has directed otherwise. A sending party may not make the choice for the recipient to receive email service, or how that email manages transmission of the attachment (such as with links, or passwords). The California Rules Of Court follow the same authorization requirement at Rule 2.251. Law offices participating in the workers compensation system should be provided the opportunity to CHOOSE if they want to be served electronically or not, and choose a METHOD for electronic service that is not automatically mandated as EMAIL. In today’s world, email simply carries excessive risk, both

from a cyber-security standpoint, but also from a usability standpoint – too many emails get filtered out before reaching the intended person. Also consider that workers compensation claims may include several quasi-parties, such as providers and billing companies, that serve massive volumes of mail, and many of whom have an adversarial relationship with law offices. Forcing law firms to accept email from ANY source, and not just true case parties they are aware of puts them at more risk than civil attorneys. Mandating BLIND acceptance of email service from ANY outside source, as these proposed changes provide, puts work comp law firms at a disadvantage when protecting themselves from nefarious code hitting their networks. The WCAB should continue to allow law firms to CHOOSE how they wish to be served.

**(D) EMAIL SERVICE UNNECESSARILY EXPOSES THE INJURED WORKER'S PRIVATE PERSONAL INFORMATION TO HACKERS THE WORLD OVER:** Emails travel through the open world wide web, usually with little to no encryption or security. With WCAB MANDATED email service, senders will be encouraged to serve medical reports and records that contain sensitive private personal health information of the injured worker using this public communication tool. At the very least, the WCAB should amend these regulations to specifically remove any document or attachment containing private health information about the worker, or their home address, or social security number, etc. from being allowed/encouraged to be sent by Email... at least not without requiring strong and secure encryption on such files/information.

## **CLOSING**

We appreciate the opportunity to interact with the WCAB on these important changes. Given the lengthy comments above, it seems prudent to give the WCAB some idea of who I am, and what my background is. I have personally been working in the California workers compensation system since 1982, providing tech solutions such as Case Management Systems, Billing and Collections Software, PD rating software and phone Apps, AMA Guides Impairment software, EAMS Third Party Filing software (we pioneered the Third Party Filers with Judge Ellison and were the first to be authorized), Jet Filing software (which we still operate and support), Third Party Mailing and Electronic Delivery solutions (which we hold several patents in), Automated Mail Classification And Filing SaS, as well as several work comp books, charts, and other useful tools that were provided free of charge to the work comp community through a well-known company we sold in 2012. I have been part of various projects with the DWC connected to a group of copy service providers and have submitted many comments to various DIR public hearings. I provided the data and worked closely with the DWC and the Berkeley Research Group in development of the copy service fee schedule report to CHSWC back in 2013. I manage a popular blog on various legal issues at the ScanFiles website. Once again, thank you for giving me the opportunity to share my thoughts with you on this important topic.

Stephen Schneider