TO: Hon. Louis R. Mauro, Chair
Appellate Advisory Committee

CC: Christy Simons, Judicial Council of California

DATE: May 27, 2021

RE: Appellate Procedure: Electronic Signatures - SPR21-01

The Committee on Appellate Courts of the Litigation Section of the California Lawyers Association ("CAC") submits the following comments on proposed Amended California Rule of Court, rules 8.70 and 8.75.

The CAC consists of appellate practitioners and court staff, drawn from a wide range of practice areas, from across the state. As elaborated below, the CAC agrees with the purpose behind the rule change—that signature rules should evolve to accommodate rapid changes in the practice of law. By allowing parties to affix electronic signatures for certain submissions to the Court of Appeal, the Appellate Advisory Committee's ("AAC") proposed rules change will promote efficiency and ease administrative burdens for attorneys and staff.

But the CAC is concerned that the proposed language will cause confusion and uncertainty for practitioners, self-represented litigants, and legal assistants. The proposed language is likely to increase the number of inquiries and non-compliant submissions to the court, exacerbating appellate courts' already burdensome workload. In the comments below, the CAC offers suggestions on achieving greater clarity.

Stated Purpose of Amending Rules 8.70 and 8.75

The CAC shares the AAC's goal to liberalize the use of electronic signatures in appellate court submissions. In federal practice, the typewritten signature with the backslash has proliferated for documents submitted through the ECF system, and correspondingly, the "wet ink signature" has fallen into disuse. The advent of sophisticated electronic-signature programs such as DocuSign, with their added security features, have also changed consumer practices more broadly. Important legal documents, such as loan applications and real estate purchase agreements, are now routinely executed by way of an electronic signature.

Even before 2020, these technological innovations have resulted in more remote work, including by attorneys. That trend was catalyzed by the COVID-19 pandemic, as California attorneys and their staff have largely shifted to working from home. Experts have predicted that remote and hybrid work arrangements will continue to grow going forward. Working from home presents a new set of logistical challenges. As members of the CAC can attest, the requirement to "retain a printed form of the document with the original signature" for electronically filed documents signed under penalty of perjury creates administrative burdens, particularly as the signatory and the legal assistant may both be working from home. The CAC therefore fully supports any rule that eschews requiring the physical presence of the signer or an exchange of mailed paper documents.

But the CAC has concerns that the proposed rules do not go far enough in liberalizing the use of electronic signatures. Specifically, rather than stringent requirements on the form of electronic signature, the CAC recommends that the rules allow parties to use more streamlined electronic signatures (e.g., the typewritten "/s/" signature popular in federal court), as there is little risk of fraudulent signatures being used in appellate practice. Alternatively, if more stringent signature requirements are to be included for certain documents, the CAC has some concerns about the specific language proposed and provides suggestions on ways to achieve greater clarity in the proposed rules.

Recommended Changes to Proposed Rules 8.70 and 8.75

A. The CAC recommends a simple electronic signature requirement for all documents

Proposed Rules 8.70 and 8.75 contemplate two different types of "electronic signature."

Proposed Rule 8.70(c)(10) defines an "electronic signature" broadly as "electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign a document or record created, generated, sent, communicated, received or stored by electronic means" per Civil Code section 1633.2(h). This definition would seem to include, for example, the simple electronic signatures often used in federal court ("/s/").

But Rule 8.75(a)(1) and (b)(2)(B) limit an acceptable "electronic signature" to a "digital signature" per Government Code section 16.5(a), or one that is "unique to the declarant, capable of verification, under the sole control of the declarant, and linked to data such that, if the data are changed, the electronic signature is invalidated." This definition would seem to be limited to signatures obtained by sophisticated electronic-signature programs such as DocuSign. Under the proposed rules change, this more stringent type of electronic signature would be required for (1) documents signed under penalty of perjury (where filed by someone other the signatory) and (2) documents with signatures from multiple parties, such as a stipulation.

But the CAC doubts the second, more stringent signature type (a "digital signature") is truly necessary in *any* scenario. In particular, the fact that attorneys receive electronic copies of documents filed through the TrueFiling system eliminates any realistic threat that anyone will file a document purporting to have the authorization of an attorney that has not actually authorized that filing.

For example, a party who files a stipulation bearing the purported electronic "signature" of other parties will invariably have some other evidence (e.g., email correspondence) showing that the other parties indeed authorized the filing. By contrast, any attorney who receives an electronic copy of a stipulation they did not authorize but which nonetheless bears their electronic signature could (and would) immediately raise this issue with the court.

Nor is it realistic to expect that an attorney's staff will file documents in which the attorney purported to sign under penalty of perjury without securing the attorney's express authorization to do so. And even if this did occur, the attorney—having again received notice of the unauthorized filing through TrueFiling—would be able to take corrective action.

Thus, rather than require a signature with increased verification requirements, the CAC proposes that the rules instead require filers to certify that they have the express authorization to file the document on behalf of any attorneys who have signed thereto.

So, for example, for stipulations among multiple parties, the rules should simply require the party filing the stipulation to include a statement on the filing that he/she/they received the other party's consent to sign on the latter's behalf. This would effectively mirror a local rule of the Federal District Court for the Central District of California that has been widely and successfully adopted by litigants for party stipulations. That rule, C.D. Cal. L.R. 5-4.3.4(a)(2)(i), reads as follows:

> [T]he signatures of all signatories may be indicated on the document with an "/s/," and the filer must attest on the signature page of the document that all other signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing…

In other words, the burdens on self-represented litigants, attorneys, and litigation assistant would be eased if the party filing a stipulation may simply: (1) obtain consent from the other party that the latter has agreed to a stipulation; and (2) attest that such consent was obtained. Stipulations in appellate courts typically involve routine requests such as extensions of time to file a brief, and it would promote efficiency and cost-savings to minimize signature requirements. The experience of attorneys practicing before the Central District of California has shown this rule to work. And to guard against misrepresentations or foul play, the attestation requirement provides a strong deterrent for licensed attorneys.

B. If digital signatures will be required in certain scenarios, the CAC recommends a reorganization of Proposed Rules 8.70 and 8.75 .

The CAC perceives two ambiguities in the proposed versions of Rules 8.70 and 8.75 rule that could be cured by changes to the organizational structure of the rules.

First, as noted above, the rules seem to contemplate two different types of "electronic signature." The first type (defined in Rule 8.70(c)(1)) follows the definition of "electronic signature" in the Uniform Electronic Transactions Act, Civil Code section 1633.2(h). The second type (defined in 8.75(a)(1) and (b)(2)(B)) follows the requirements of a "digital signature" in Government Code section 16.5(a). As noted in the proposed Advisory Committee comment: "Rule 8.70 defines 'electronic signature' but not 'digital signature.' A digital signature is a type of electronic signature as defined in Government Code section 16.5(d). (Civ. Code, § 1633.2(h).)"

The CAC believes it may be confusing to refer to both types of signatures as "electronic signatures" when their requirements vary so significantly. In addition, as proposed to be amended, the rules would define "electronic signature" and use but not define the term "digital signature" in Rule 8.75(c). Adding to potential confusion, Rule 8.75(c) would say: "A party or other person is not required to use a digital signature on an electronically filed document." Because "digital signature" is not defined, it is not clear what is not required. Moreover, the proposed language in Rule 8.75(a)(1) and (b)(2)(B) follows the statutory requirements of a "digital signature" under Government Code section 16.5(a), and that type of electronic signature would be required under the specified circumstances.

To the extent the rules will require different standards of signature verification depending on the document, the CAC would propose that the rules refer to these signatures by different names–such as an "electronic signature" or "digital signature"–and define *both* terms. Thus, for example, signatures that need not meet the requirements set forth in Rule 8.75(a)(1) and (b)(2)(B) would be called "electronic signatures," while the signatures that must satisfy Rule 8.75(a)(1) and (b)(2)(B) would be called "digital signatures." This change would also require the removal of Rule 8.75(c), for the reasons discussed above.

By offering separate definitions for each respective signature type, Rule 8.75 could then simply use the defined term for each signature type without having to repeat the definition of the acceptable signature type on each occasion where a signature type is discussed. Among other things, this would facilitate better organization of Rule 8.75, as discussed immediately below.

Second, and relatedly, the CAC believes that organizing proposed Rule 8.75 into categories based on whether a document must be signed under penalty of perjury creates confusion as to when the more stringent signature type is required.

Organizing the rule based on whether documents must be signed under penalty of perjury would have made sense if the more stringent signature type was only reserved for penalty-of-perjury situations. But Rule 8.75(b)(2) contemplates that when a document "requires the signatures of multiple parties," it too must be signed with the more stringent signature even though it is not a document signed under penalty of perjury.

Thus, rather than organize the rule based on whether documents must be signed under penalty of perjury, the CAC recommends that the rule be organized based on when a "digital signature" is (or is not) required. So, for example, subsection (a) of Rule 8.75 might simply list the situations in which a "digital signature" is required (i.e., (1) documents signed under penalty of perjury where the filer is someone other than the declarant, (2) documents that require the signatures of multiple parties). Subsection (b) could then specify that for all other documents except those listed in subsection (a), a simple "electronic signature" will suffice.

Organizing the rule in this fashion would be easy and intuitive if the rules used different names for the two signature types contemplated by the proposed versions of Rule 8.70(c)(10), and Rule 8.75 (a)(1) and (b)(2)(B) (i.e., "electronic" versus "digital" signatures). Accordingly, creating labels for the two different signature types contemplated by the rules—and then organizing Rule 8.75 based on when the two different signature requirements apply—would significantly enhance the clarity of the rules as a whole.

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