

LITIGATION



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TO: Baltazar Vazquez, Assistance Clerk/Executive Officer
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FROM: Committee on Appellate Courts, Litigation Section

DATE: October 19, 2020

RE: Invitation to Comment on Proposed Local Rule 4

The Committee on Appellate Courts of the Litigation Section of the California Lawyers Association respectfully submits the following comments on proposed Local Rule 4. The Committee consists of staff attorneys at appellate courts, including the Supreme Court, and appellate practitioners drawn from a wide range of practice areas from across the state, including the Sixth District. As elaborated below, the Committee believes the proposed rule may have unintended and even adverse consequences that call for careful consideration before it is adopted.

Preliminarily, Local Rule 4 may be inconsistent with the California Rules of Court. The proposed rule would allow an appeal to be dismissed, the strongest sanction on appeal, despite compliance with California Rule of Court 8.100(g) governing the Civil Case Information Statement. (See Cal. Rules of Court, rule 8.20; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1352-1353.) Because consistency with statewide rules was presumably considered in crafting the proposed rule, the Committee will focus on certain aspects assuming the rule actually goes into effect.

Although the Committee appreciates the Court's objective of expediting its threshold determination of appellate jurisdiction, the additional requirements of Local Rule 4 may create barriers to access to justice for litigants, particularly parties proceeding without counsel, that outweigh the expected increase in efficiency and speed of jurisdiction checks. Different requirements for attachments to the Civil Case Information Statement in the Rules of Court and on form APP-004, versus the Local Rule, may also cause confusion and uncertainty for appellate practitioners, who often practice statewide, since no other district has adopted such additional requirements.

The lack of any comparable rule elsewhere is likely to increase the number of inquiries to the Court as to how to comply and, contrary to the judicial economy understandably animating the proposed rule, increase work for the Court in reviewing

and processing non-compliant and follow-up responses. In this respect, Local Rule 4 is likely not only to increase the burden and confusion for litigants; it may burden clerks fielding inquiries and policing compliance.

The additional requirements imposed by Local Rule 4 appear especially onerous at this time because litigants, counsel, and legal staff may need to risk exposure to COVID-19 to obtain the necessary documents. Although counsel and litigants would do their best to comply, the pandemic has restricted access to self-help clinics and similar services. The same risk applies to the trial courts. The proposed rule may increase the number of people needing access to the court and interacting with court staff to obtain documents bearing on appellate jurisdiction.

Local Rule 4(a): Required Documents

The Committee further perceives potential issues arising from the additional requirements of part (a). It may prove difficult for self-represented litigants to identify, locate, and acquire the additional documents from the superior court or former counsel. Self-represented litigants will likely have difficulty understanding how to prepare a compliant statement under penalty of perjury, and whether such a statement is necessary. For all litigants, mandating additional and different documents than what is set forth on form APP-004 may create confusion as to how to comply.

For these reasons, the Committee respectfully suggests that Local Rule 4 not be adopted as currently drafted. If it is adopted, based on the experience of our members, the Committee suggests that, instead of requiring the documents to be attached to APP-004, the Court should create and supply an optional local form allowing litigants to check off and attach the required documents or sign a court-provided pre-written statement that the document does not exist. Such a form would make compliance clearer and less burdensome for both self-represented litigants and counsel (and reduce clerk inquiries). An optional local form could be included with an initial welcome letter or otherwise sent early in the appellate proceedings.

Local Rule 4(b): Consequences for Failure to Comply

The Committee has three concerns with part (b) of the proposed rule.

First, requiring litigants to provide a statement under penalty of perjury not only that a document does not exist, but *why* that document does not exist, may prove difficult. This is especially so for self-represented litigants, who may be unable to identify or articulate to the Court why a requested item does not exist (if they have access to that information at all).

For example, if a document was supposed to be filed by another party or entered or issued by the Court, but was not, the appellant may not know or be able to ascertain why this did not occur. If the Court adopts the proposed rule, the Committee believes that this requirement should be omitted and that a statement that the document does

not exist, such as is required in part (a), should suffice. Alternatively, the Committee suggests that the statement explaining why a document does not exist not be required to be signed under penalty of perjury. Appellate jurisdiction is of course vital to the Court's work, but efforts to establish it should not carry the possibility of criminal penalties.

Second, the Committee believes that, if part (b) is adopted, it should be amended to specify a minimum amount of time the Court will give a litigant to comply, such as the deadline set forth in California Rule of Court Rule 8.100(g)(1). Given that the appeal may be dismissed for noncompliance, specifying the period allowed to cure is both crucial and fair. This would help litigants and their counsel by eliminating uncertainty as to whether they have adequately complied, and, if they are notified that they have not, to anticipate how quickly they must cure the defect. To facilitate compliance and provide notice, when the Civil Case Information Statement is filed, the Court could generate an automatic notice, accompanied by a request for the necessary documents, and specify a due date.

Third, the Committee respectfully proposes that if Local Rule 4 is adopted, except in cases where appellate jurisdiction is plainly lacking, the penalty for failure to comply be reduced to something less severe than dismissing the appeal. In light of the potential for confusion and any difficulty acquiring documents or identifying why a document is missing or non-existent, particularly for self-represented litigants, dismissal is a harsh consequence for noncompliance with a local rule.

Respectfully submitted,

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