



## JUDICIAL COUNCIL OF CALIFORNIA

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### MEMORANDUM

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Date	Action Requested
August 27, 2018	Please read before August 30 subcommittee conference call
To	Deadline
Members of the Appellate Advisory Committee's Joint Appellate Technology Subcommittee	August 30, 2018
From	Contact
Christy Simons, Attorney, Legal Services	Christy Simons 415-865-7694 christy.simons@jud.ca.gov
Subject	
Review of new and pending suggestions for changes to appellate rules and forms	

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#### Introduction

As we indicated in the e-mail to you about setting the subcommittee meeting, the main purpose of this meeting is to assist the full committee in preparing its proposed annual agenda for the 2018-2019 committee year (November 2018-October 2019). The subcommittee does this by reviewing suggestions received by the committee for changes to the appellate rules and forms (other than those reviewed by the Rules Subcommittee and the Appellate Division Subcommittee) and making recommendations to the committee about which of those suggestions should be considered/potentially worked on by the committee this year and their prioritization. The full committee will consider these recommendations at its September 11 meeting. The proposed annual agenda for the committee will then be submitted to the Judicial Council's Rules and Project Committee (RUPRO) – the internal Judicial Council committee with oversight responsibility for the Appellate Advisory Committee – in late October for approval of the items the committee may work on for the 2018-2019 committee year.

## Suggestions and Prioritization

Attached for your review is a list of items for the subcommittee to consider recommending for possible inclusion in the proposed annual agenda, including:

- Suggestions that remain pending from the committee's 2017-2018 annual agenda;
- New suggestions received by the committee to date this year; and
- Suggestions that the committee deferred last year (please note, as explained below, the subcommittee will not be discussing these suggestions unless a member requests that a particular suggestion be discussed).

If you have additional suggestions for committee projects, please send those to the subcommittee chair, Justice Mauro, and to me before the subcommittee meeting and we will distribute them to the subcommittee members.

For the past several years, the committee's rule and form projects have been limited in light of the economic crisis in the courts. These limits reflect concerns both about the economic impact on courts of any proposed modification of a rule or form and about the economic burden on the courts of reviewing and responding to proposals for modifications to rules and forms. In light of these concerns, RUPRO has established the following criteria for advisory committees to consider in determining whether a rule or form proposal is a high priority – priority 1 – and should be developed within the same committee year (for this year, these would be rules and form changes proposed for circulation in spring 2019 to be effective January 1, 2020):

- The proposal is urgently needed to conform to the law;
- The proposal is urgently needed to respond to a recent change in the law;
- A statute or council decision requires the adoption or amendment of rules or forms by a specified date;
- The proposal will provide significant cost savings and efficiencies, generate significant revenue, or avoid a significant loss of revenue;
- The change is urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; or
- The proposal is otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk.

Committees can ask to work on other rule and form proposals within their subject matter areas that do not meet the criteria for priority 1 projects. The criteria for such projects – priority 2 projects – are:

- The proposal is useful, but not necessary, to implement statutory changes; or

- The proposal is helpful in otherwise advancing Judicial Council goals and objectives.

Proposals with priority level 2 are generally considered for circulation the second year after they are approved for inclusion on a committee's annual agenda – so any new priority 2 proposals included on this year's annual agenda would be developed for potential circulation in the spring of 2020 to be effective January 1, 2021. RUPRO has cautioned that committees should expect that new priority 2 proposals may not be approved for the current year due to the ongoing fiscal situation affecting the judicial branch.

In applying RUPRO's criteria for prioritizing rule and form suggestions, it is often important to consider the following:

- Is the problem/issue identified in a suggestion something that arises frequently or infrequently?
- If the proponent suggests that there would be savings in time or money for the courts, what is the likely amount of such savings?
- Are there likely to be costs for the trial courts, appellate courts, or litigants associated with implementing a suggestion?

Often, additional information about these issues helps the subcommittee/committee assess the need for and priority of a particular suggestion. To this end, ***you are encouraged to seek information about these issues from those with whom you work that may have experience in the areas raised in the suggestions.***

In addition to RUPRO's prioritization criteria, there are several other things subcommittee members may want to keep in mind in reviewing/prioritizing these suggestions:

- There are more suggestions for rule and form changes than the committee will be able to work on during the upcoming year. For the proposed annual agenda to realistically represent what projects the committee is actually able to undertake this coming year, the subcommittees and the full committee will need to prioritize among those suggestions that are identified as good ideas, but not urgent. Last year, the committee worked on 10 projects, some of which involved several different suggestions. Subcommittee members should assume that during the upcoming year, the committee will be able to take on around that same number of projects, including projects being considered by the Rules Subcommittee and the Appellate Division Subcommittee.
- Because the combined list of new suggestions and those pending from last year's annual agenda is long, as noted above, the subcommittee will not be reviewing items on the "deferred" list at this time unless a subcommittee member specifically requests that an item be considered for inclusion in the annual agenda.

- In some cases, there may be multiple suggestions relating to the same rule or same topic. These can be combined into a single project for purposes of the annual agenda.
- Inclusion of a project on the annual agenda does not mean that the committee is obligated to pursue the suggested rule or form change. As has happened with items in past years, the committee could determine later in the year not to pursue a particular project on its annual agenda. This would be reported to RUPRO in the advisory committee's subsequent annual agenda update.

#### Rules Subcommittee Task

The subcommittee's task is to review the suggestions in the attached tables and to recommend to the full committee which of them should be:

- Included in the draft annual agenda as priority 1 proposals (urgent proposals with a proposed January 1, 2020 effective date);
- Included in the draft annual agenda as priority 2 proposal (non-urgent proposals that the committee would like to work on this year or next year);
- Not included in the draft annual agenda, but deferred for possible future consideration;
- Referred to a different subcommittee or another judicial council body; or
- Not pursued at all.

# POTENTIAL JATS PROJECTS FOR 2018-2019

## *Current Projects*

### **1. Modernize Appellate Court Rules for E-Filing and E-Business**

*Overview and goals:* Review appellate rules to ensure consistency with e-filing practice; evaluate, identify and prioritize potential rule modifications where outdated policy challenges or prevents e-business. Consider rule modifications to remove requirements for paper versions of documents (by amending individual rules or by introducing a broad exception for e-filing/e-service). Consider potential amendments to rules governing online access to court records for parties, their attorneys, local justice partners, and other government agencies.

- **Rule amendments re access:**

*Status:* This project is pending the development of rule amendments at the trial court level. JATS will review what is ultimately proposed and use that as a base for developing a companion proposal for access to appellate court records.

*Background:* ITAC is developing an initial draft of possible amendments to address online access to trial court records for parties, their attorneys, local justice partners, and other government agencies.

- **Bookmarking**

*Status:* This project was combined with exhibits (see below) and deferred earlier this year to expand the scope to address formatting for electronic documents in the appellate courts.

*Background:* The 2016 trial court rules modernization changes include a new requirement, added to rule 3.1110(f), that electronic exhibits be electronically bookmarked. (It requires that electronic exhibits “include electronic bookmarks with links to the first page of each exhibit and with book mark titles that identify the exhibit number or letter and briefly describe the exhibit.”) This issue was set aside by JATS for 2016, to give those courts new to e-filing (or not yet on e-filing) a chance to gain some experience with e-filing before participating in a decision as to what to require.

*See item 9 under New Suggestions*

- **Exhibits**

*Status:* This project was combined with bookmarking (see above) and deferred earlier this year to expand the scope to address formatting for electronic documents in the appellate courts.

*Background:* The suggestion is to create a requirement that exhibits submitted in electronic form be submitted in electronic volumes, rather than individually (previously considered, in connection with consideration of bookmarking requirements). This was suggested in a comment by D’vora Tirschwell, a writ attorney at the First District, commenting on the 2016 appellate e-filing rules proposal.

*See item 9 under New Suggestions*

- **Numbering of materials in requests for judicial notice**

*Status:* Work on this project has not begun.

*Background:* Consider amending rule 8.252 which requires that materials to be judicially noticed be numbered consecutively, starting with page number one. But such materials are attached to a motion and declaration(s) and are electronically filed as one document, making pagination and reference to these materials in the briefs confusing for litigants and the courts.

## **2. Privacy Resource Guide (Branch and Model Court Privacy Policies on Electronic Court Records and Access in the Appellate Courts)**

*Status:* The committee has reviewed draft appellate provisions of the Privacy Resource Guide.

*Background:* This is ITAC's project to (a) develop a comprehensive statewide privacy policy addressing electronic access to appellate court records and data to align with both state and federal requirements, and (b) develop a model appellate court privacy policy, outlining the key contents and provisions to address within each court's specific policy.

## **3. Rules regarding certification of electronic records, electronic signature, and paper copies**

*Status:* A proposal has not yet been submitted to JATS for review.

*Background:* • ITAC is looking at rules to govern certification of electronic records, standards for electronic signatures, and whether parties should have to submit paper copies of documents when filing electronically. (In the trial courts, some changes will require legislation, as there are statutory requirements for the trial courts regarding electronic filing, service and signatures. See Code of Civil Procedure section 1010.6.) As these changes move forward for the trial courts, JATS may wish to offer input on changes that will affect the appellate courts. This again is an area where JATS's work must wait until the project is moved forward by ITAC. In addition, this project may eventually result in rules work to be done by JATS. In future years, after ITAC has resolved these issues for the trial courts, JATS may wish to consider proposing changes to the appellate court rules on these issues.

## **4. Document management system**

*Status:* Phase I is in progress. The Third Appellate District and the Fifth Appellate District will pilot initial implementation. JATS is monitoring and providing input through its chair.

*Background:* Monitor and provide input on implementation of a new document management system in the appellate courts.

## ***New Suggestions***

### **5. Amend rule 8.405(b)(1)(B)**

*Description:* Rule 8.405 is the rule governing the filing of the appeal in juvenile cases. The suggestion is to remove the requirement that the clerk notify the court reporter "by telephone and in writing" to prepare a transcript. This appears to be a provision that was missed during the course of earlier rules modernization efforts. The suggestion is from Tricia Penrose, Director – Juvenile Operations/Region 4 at the Los Angeles Superior Court.

## Rule 8.405. Filing the appeal

### (b) Superior court clerk's duties

(1) When a notice of appeal is filed, the superior court clerk must immediately:

(A) \* \* \*

(B) Notify the reporter ~~by telephone and in writing~~ to prepare a reporter's transcript and deliver it to the clerk within 20 days after the notice of appeal is filed.

### **6. Amend rule 10.1028 and consider developing a Court of Appeal Records Manual**

Suggestion from Colette Bruggman, Assistant Clerk/Executive Officer, Third District Court of Appeal: "Rule 10.1028 governs the preservation and destruction of Court of Appeal records. Under subdivision (a), we are referred to rule 10.854 for the standards or guidelines for the creation, maintenance, reproduction, and preservation of records. Rule 10.854 sets for the standards and guidelines for trial court records and further refers to the Trial Court Records Manual. The Trial Court Records Manual is 121 pages without a fully developed index.

"Because we would like to scan our records and store them electronically, we have to put procedures in place that comply with the rules, and the rules require us to comply with the Trial Court Records Manual. I asked Darlene to review the Trial Court Records Manual to determine how much of it was applicable to us, and it was her opinion that perhaps 10-15% was applicable to Court of Appeal records.

"I write to inquire whether rule 10.1028 could be reviewed and amended to eliminate the overly burdensome requirement that we follow the Trial Court Records Manual. Perhaps a manual should be developed that addresses Court of Appeal Records."

*Note that this project was also included in materials for the rules subcommittee to consider.*

### **7. Consider rules regarding PowerPoint and other electronic presentations at jury trials**

Suggestion from Jonathan Grossman, SDAP Staff Attorney and committee member:

"Increasingly, prosecutors and defense attorneys are relying on, and making objections to, PowerPoint presentations at jury trials. The rules of court should be amended to include as part of the normal record on appeal the PowerPoint slides shown to or excluded from the jury. The current practice of chasing down the PowerPoint presentation from the party that presented it is cumbersome and time consuming."

*Note that this issue arose in comments on a proposal recently circulated by the Prop 66 Working Group regarding preparation of the record in death penalty appeals.*

*Note that this project was also included in materials for the rules subcommittee to consider.*

## **8. Amend rule 8.77 to clarify the filing date of an e-filed document**

Suggestion from the California Lawyers Association, by Paul Killion, Committee on Appellate Courts, and Saul Bercovitch, Director of Governmental Affairs: Amend the rule to clarify that an e-filed document received by the court before midnight is deemed filed that day. This is the popular understanding, but there is an ambiguity in how the rule actually reads. *See attached letter at pages 10-14 for full text of this suggested project.*

The suggested fix:

### **Rule 8.77. Actions by court on receipt of electronic filing**

#### **(a) Confirmation of receipt and filing of document**

##### *(1) Confirmation of receipt*

When the court receives an electronically submitted document, the court must arrange to promptly send the electronic filer confirmation of the court's receipt of the document, indicating the date and time of receipt. A document is considered received at the date and time the confirmation of receipt is created.

##### *(2) Confirmation of filing*

If the document received by the court under (1) complies with filing requirements, the court must arrange to promptly send the electronic filer confirmation that the document has been filed **as of the date received as indicated on the confirmation of receipt in (1) above**. The filing confirmation must indicate the date and time of filing and is proof that the document was filed on the date and at the time specified. The filing confirmation must also specify: ....

## **9. Modernize Appellate Court Rules: uniform appellate format rules for electronic documents**

Suggestion from Justice Mauro: Amend rule 8.74(b) or draft a new rule. Include uniform font preferences (see 2DCA preferences), etc. (This is the expanded project to replace the current bookmarking and exhibits projects.)

## **10. Modernize Appellate Court Rules: amend rule 8.70**

Suggestion from Justice Mauro: Amend the rule to fix problems:

- Rule 8.70(c)(2)(B) defines a document as a document;
- Rule 8.70(c)(2)(C) has an extraneous “on” in the sentence; and
- Rule 8.70(c)(2)(D) is not parallel with the rest of (c)(2) and does not fit.

## **11. Inmate e-filing and e-readers**

Suggestion from Justice Mauro: Work with other branches of government and CDCR to arrange for inmate e-filing and e-readers in state prisons.

- Michigan has an inmate e-filing program.
- CDCR permits e-readers for digital textbooks; what about for legal documents?
- Other jurisdictions (such as Arizona) permit tablets in prisons.



## ***Deferred***

### **Consider a fix for link rot**

**Suggestion:** Link rot refers to broken hyperlinks. In May 2017, Reporter of Decisions Lawrence Striley briefed the appellate court librarians on the in-house solution developed by the Supreme Court. It will be administered by the Reporter's office, and will be rolled out later this year. Mr. Striley will share what they have done, but this solution will not be available to appellate courts; they would have to get a server and implement it themselves. One option for appellate courts is perma.cc, which was developed by Harvard's Law Library, is sponsored by a group of law libraries around the U.S., and is free. Mr. Striley indicated that this was his second choice, but the in-house solution worked better for the Supreme Court. The suggestion is to address this issue for the appellate courts. Suggestion received and deferred 2017.

**Source:** Holly Lakatos, appellate court librarian, 3DCA

### **Attachments**

1. Letter dated August 1, 2018 from California Lawyers Association, at pp. 10-14

**TO:** Judicial Council of California, Appellate Advisory Committee

**FROM:** Committee on Appellate Courts, Litigation Section

**DATE:** August 1, 2018

**RE:** Proposed Change to E-Filing Rule of Court 8.77 Clarifying that Documents Received Before Midnight Are Considered "Filed" the Same Day

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The Committee on Appellate Courts of the California Lawyers Association, Litigation Section writes to propose a change to Rule 8.77. As written, the current rule is vague as to whether an e-filed appellate filing, if received before midnight, is considered “filed” that same day. While Rule 8.77(c) makes clear that if a document is *received* after 11:59 p.m., it is considered *received* the next day, no rule states that a document received before midnight is deemed *filed* that day, though that is the popular understanding. Particularly where the filing date is jurisdictional (e.g. a statutory writ), vagueness on this issue raises serious concern. To correct this problem, the Committee on Appellate Courts proposes a change to California Rules of Court, rule 8.77 to clear up this ambiguity and to bring the rule in line with what we believe was the original intent behind the e-filing rules.

#### **A. Background**

It is commonly thought that California’s new e-filing rules permit the *filing* of documents in the Court of Appeal up until midnight the day they are due, similar to the rules in federal appellate court. But that is not how the rules actually read. Under Rule 8.77 of the Rules of Court (copy attached), there is a distinction between documents “received” by the Court of Appeal, and documents “filed” in the Court of Appeal.

Under Rule 8.77(a)(1), an e-filed document is initially “received” by the Court, and a confirmation of receipt is generated. Then, once the court confirms that the document received complies with the filing requirements, a confirmation of “filing” is generated, pursuant to Rule 8.77(a)(2). Rule 8.77(c) makes clear that if a document is *received* after 11:59 p.m., it is considered received the next day. But no rule states that a document received before midnight is deemed *filed* that day.

As a practical matter, when the document is received after the close of business at the clerk’s office, it is not reviewed by the court clerk until the next day. If the clerk then determines

the document received the day before complies with the rules, is it deemed filed on the day received? Or on the day it is reviewed? Surprisingly, the e-filing rules do not clearly answer this question.

Rule 1.20 states that “Unless otherwise provided, a document is deemed filed on the date it is received by the court clerk.” This would suggest that electronic receipt by the clerk’s office before midnight ought to mean the document is “filed” by the court.

A member of the Committee on Appellate Courts recently had a situation in the Fifth District, however, where a writ petition was e-filed on Day #1 at 5:30 p.m. It was reviewed on Day #2 and determined to have complied with the filing requirements, but it was docketed as “filed” on Day #2, not on Day #1 when it was received. The clerk did not change the filing date when a correction was requested. It is a real trap for the unwary.

An informal survey of all the Districts, including all three divisions of the Fourth District, indicates that the common practice is for the court clerk to “back-date” the filing date to the receipt date when a document is e-filed after hours and subsequently determined the next day to be in the correct format. But again, the rules do not actually state this.

Even the local rules governing e-filing are of little help. The e-filing rules for the First, Third, Fifth and Sixth Districts all state: “Filing documents electronically does not alter any filing deadlines. In order to be timely filed on the day they are due, all electronic transmissions of documents must be completed (i.e., received completely by the Clerk of the Court) prior to midnight.” This certainly suggests that documents “completely received...prior to midnight” shall be “timely filed on the day they are due,” but again the Rules of Court do not state this directly and the Fifth District apparently interprets this *same* local rule differently from the First, Third and Sixth Districts. (There are no local rules addressing the midnight filing issue in the Second District or Fourth District.)

Particularly where an appellate due date is jurisdictional (e.g. a statutory writ), vagueness in the e-filing rule raises serious concern. If an e-filed writ petition must be received by the clerk’s office in time for it to be reviewed and “filed” on the same day, how is a litigant to know how much time the clerk needs? And what if the hours of the clerk’s office differ between the Districts? A uniform application of Rule 8.77 is essential for fairness, and we suggest it starts with a clearly stated rule.

## **B. Proposed Change**

A possible fix to the problem is to make the following underlined change to Rule 8.77(a):

### **(a) Confirmation of receipt and filing of document**

#### *(1) Confirmation of receipt*

When the court receives an electronically submitted document, the court must arrange to promptly send the electronic filer confirmation of the court's receipt of the document, indicating the date and time of receipt. A document is considered received at the date and time the confirmation of receipt is created.

(2) *Confirmation of filing*

If the document received by the court under (1) complies with filing requirements, the court must arrange to promptly send the electronic filer confirmation that the document has been filed as of the date received as indicated on the confirmation of receipt in (1) above. The filing confirmation must indicate the date and time of filing and is proof that the document was filed on the date and at the time specified.

Another option is to make a clear reference to Rule 1.20 in 8.77(a).

Attached is a redlined copy of the full text of Rule 8.77.

We appreciate your consideration of the Committee's comments and proposed change. Please do not hesitate to contact us if you have questions or would like to discuss these comments further.

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Attachment

## **Proposed Amendment to CRC 8.77(a)(2)**

2018 California Rules of Court

### **Rule 8.77. Actions by court on receipt of electronic filing**

#### **(a) Confirmation of receipt and filing of document**

##### *(1) Confirmation of receipt*

When the court receives an electronically submitted document, the court must arrange to promptly send the electronic filer confirmation of the court's receipt of the document, indicating the date and time of receipt. A document is considered received at the date and time the confirmation of receipt is created.

##### *(2) Confirmation of filing*

If the document received by the court under (1) complies with filing requirements, the court must arrange to promptly send the electronic filer confirmation that the document has been filed as of the date received as indicated on the confirmation of receipt in (1) above. The filing confirmation must indicate the date and time of filing and is proof that the document was filed on the date and at the time specified. The filing confirmation must also specify:

- (A) Any transaction number associated with the filing; and
- (B) The titles of the documents as filed by the court.

##### *(3) Transmission of confirmations*

The court must arrange to send receipt and filing confirmation to the electronic filer at the electronic service address that the filer furnished to the court under rule 8.74(a)(4). The court or the electronic filing service provider must maintain a record of all receipt and filing confirmations.

##### *(4) Filer responsible for verification*

In the absence of confirmation of receipt and filing, there is no presumption that the court received and filed the document. The electronic filer is responsible for verifying that the court received and filed any document that the electronic filer submitted to the court electronically.

*(Subd (a) amended effective January 1, 2017; previously amended effective January 1, 2011.)*

#### **(b) Notice of rejection of document for filing**

If the clerk does not file a document because it does not comply with applicable filing requirements, the court must arrange to promptly send notice of the rejection of the document for

filing to the electronic filer. The notice must state the reasons that the document was rejected for filing.

*(Subd (b) amended effective January 1, 2017.)*

**(c) Document received after close of business**

A document that is received electronically by the court after 11:59 p.m. is deemed to have been received on the next court day.

*(Subd (c) amended effective January 1, 2011.)*

**(d) Delayed delivery**

If a filer fails to meet a filing deadline imposed by court order, rule, or statute because of a failure at any point in the electronic transmission and receipt of a document, the filer may file the document on paper or electronically as soon thereafter as practicable and accompany the filing with a motion to accept the document as timely filed. For good cause shown, the court may enter an order permitting the document to be filed nunc pro tunc to the date the filer originally sought to transmit the document electronically.

*(Subd (d) amended effective January 1, 2017.)*

**(e) Endorsement**

- (1) The court's endorsement of a document electronically filed must contain the following: "Electronically filed by [Name of Court], on \_\_\_\_ (date)," followed by the name of the court clerk.
- (2) The endorsement required under (1) has the same force and effect as a manually affixed endorsement stamp with the signature and initials of the court clerk.
- (3) A record on appeal, brief, or petition in an appeal or original proceeding that is filed and endorsed electronically may be printed and served on the appellant or respondent in the same manner as if it had been filed in paper form.