JUDICIAL COUNCIL OF CALIFORNIA

APPELLATE ADVISORY COMMITTEE

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APPELLATE ADVISORY COMMITTEE - RULES SUBCOMMITTEE OPEN MEETING AGENDA

Open to the Public (Cal. Rules of Court, rule 10.75(c)(1))
THIS MEETING IS BEING CONDUCTED BY ELECTRONIC MEANS
THIS MEETING IS BEING RECORDED

Date:	July 2, 2021
Time:	11:00 a.m.
Public Call-in Number:	1-408-419-1715; **Meeting ID:** 415 865 893 3

Meeting materials will be posted on the advisory body web page on the California Courts website at least three business days before the meeting.

Agenda items are numbered for identification purposes only and will not necessarily be considered in the indicated order.

I. OPEN MEETING (CAL. RULES OF COURT, RULE 10.75(C)(1))

Call to Order and Roll Call

Chair's Report

II. PUBLIC COMMENT (CAL. RULES OF COURT, RULE 10.75(K)(1))

Written Comment

This meeting will be conducted by electronic means with a listen only conference line available for the public. As such, the public may submit comments for this meeting in writing. In accordance with California Rules of Court, rule 10.75(k)(1), written comments pertaining to any agenda item of a regularly noticed open meeting can be submitted up to one complete business day before the meeting. For this specific meeting, comments should be e-mailed to aac@jud.ca.gov. Only written comments received by July 1, 2021 at 2:00 p.m. will be provided to advisory body members prior to the start of the meeting.

III. DISCUSSION AND POSSIBLE ACTION ITEMS (ITEMS 1–2)

Item 1

Update Electronic Filing Rules to Permit Electronic Signatures and Make Minor Corrections (Action Required)

Review comments on proposal to amend rule 8.75 to allow electronic signatures on documents requiring signatures of multiple parties and amend rule 8.70 to make minor corrections.

Item 2

Appellate Procedure: Appeal After Plea of Guilty or Nolo Contendere or Admission of Probation Violation (Action Required)

Review comments on proposal to amend rule 8.304 to modify the procedure for notices of appeal filed after a plea without a certificate of probable cause.

IV. ADJOURNMENT

Adjourn

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
June 29, 2021

To
Members of the Appellate Advisory Committee's Rules Subcommittee

From
Christy Simons
Attorney, Legal Services

Subject
Proposal to amend rules 8.70 and 8.75 to authorize electronic signatures

Action Requested
Please review

Deadline
July 2, 2021

Contact
Christy Simons
415-865-7694 phone
christy.simons@jud.ca.gov

Introduction

Earlier this year, the Appellate Advisory Committee recommended circulating for public comment a proposal to amend two rules of court governing electronic filing in the appellate courts to permit the use of electronic signatures and make other updates. The proposed amendments were based on recent amendments to the parallel trial court rules. The proposal would add to rule 8.70 a definition for electronic signature and update several other definitions. The proposed amendments to rule 8.75 would authorize the use of electronic signatures on electronic documents filed with the court and reorganize parts of the rule to improve clarity and eliminate redundancies.

The proposal was intended to foster modern e-business practices, promote consistency in the rules and efficiency among stipulating parties, and reduce unnecessary transmission of paper documents. The Judicial Council's Rules Committee approved the recommendation for circulation and the proposal was circulated for public comment from April 9, 2021 through May 21, 2021 as part of the regular spring cycle. A copy of the invitation to comment and the

proposed amended rules as they circulated for public comment are included in your meeting materials.

This memorandum and the attached materials discuss the public comments received on the proposal. Prior to the subcommittee meeting, members should review this memo and the attached comment chart. In the memo, possible modifications based on comments received, and subject to the subcommittee's review, are highlighted in blue.

Comments and Issues to Consider

The committee received nine comments on this proposal. Six commenters, the California Department of Child Support Services, the Child Support Directors Association, a private law firm, the Orange County Bar Association (OCBA), the Superior Court of San Diego County, and the Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee (JRS), agreed with the proposal. The California Academy of Appellate Lawyers (CAAL), the Committee on Appellate Courts, Litigation Section, of the California Lawyers Association (CAC), and the Court of Appeal for the Third Appellate District (Third District) agree with the proposal if modified. The full text of the comments received and staff's proposed committee responses are set out in the attached draft comment chart.

The comments unanimously support authorizing electronic signatures and clarifying the rules. The child support services organizations both described the positive impact these changes would have on their programs. Most of the commenters also submitted suggestions for clarifying and simplifying the language of the rules, including extensive suggestions from the CAAL and the CAC. The comments are summarized below, including some recommendations.

Staff recommends careful consideration of whether to make any of the suggested modifications, particularly the most substantial ones, at this time. The proposal did not start with a blank slate; the instant amendments are modeled on trial court rules drafted by the Information Technology Advisory Committee that circulated for public comment in proposals over the last several years. The most recent of those amendments have been in place since January of 2020. The suggestions may have merit, but staff believes they should be discussed with ITAC before moving forward.

Definition of "electronic signature"

The CAAL expressed concern that the definition of "electronic signature" could be confusing to appellate practitioners. "For example, an appellate practitioner lacking a technical background will be unlikely to understand what is meant by rule 8.70(c)(10)'s definition of an 'electronic signature' as 'an electronic sound, symbol, or process attached to or logically associated with an electronic record'—even if that definition is consistent with some industry standard. Nor will the average practitioner understand what is meant by rule 8.75(a)(1)'s proposed requirement that 'the electronic signature must be . . . linked to data such that, if the data are changed, the

electronic signature is invalid.' (See also proposed rule 8.75(b)(2)(B) [containing similar language].) Adding further confusion is rule 8.75(c)'s statement that a 'party or other person is not required to use a digital signature on an electronically filed document.' A new proposed Advisory Committee Comment to rule 8.75 suggests there is some difference between an 'electronic signature' and a 'digital signature,' but fails to explain what that difference is."

The CAAL recommends that the Advisory Committee Comments be expanded to provide non-technical guidance on what satisfies the electronic signature definition. For example, does the insertion into a document of an image of a person's signature comply with the rule? Does the "/s/ [attorney name]" method used for electronic federal court filings comply? Must an attorney use one of the "secure electronic signature internet services" referenced in the proposal to comply?

In addition, the CAAL noted that Rule 8 of the Supreme Court Rules Regarding Electronic Filing currently provides that "[u]se of a registered TrueFiling user's username and password to electronically file a document is the equivalent of placing the registered user's electronic signature on the document." The CAAL recommended including this provision with the other amendments to rule 8.75 to provide assurance that a document filed through the TrueFiling system would be in compliance with the rule's electronic signature requirements.

Simplify the electronic signature requirement

The CAC contends that 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 one with most of the features of 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 seems 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.

The CAC contends that the second, more stringent signature type is never necessary, and cites the fact that attorneys receive electronic copies of documents filed through the TrueFiling system. This 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.

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…

Digital signature/separate the two definitions of electronic signature

CAC contends the inclusion of a provision regarding digital signatures in rule 8.75 is confusing and that the two different types of electronic signature should have separate definitions.

The amended 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) (*note: with the exception of complying with regulations issued by the Secretary of State*), 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).

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.

Reorganize rule 8.75

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.

Omit the reference to an "electronic sound"

In its comments, the Third District questions whether the definition of electronic signature should be modified to omit reference to an electronic sound. According to the court, "[i]t is unclear what an 'electronic sound' is or how it would be presented in court operations. At a minimum, an explanation should be provided. Alternatively, if it has no practical application for court operations, it should probably be removed from the definition."

The definition of electronic signature in this proposal is modeled on the definition of electronic signature in trial court rule 2.257(a), which in turn was modeled after the definitions used in the Uniform Electronic Transactions Act (UETA) and Code of Civil Procedure section 1633.2. Staff recommends retaining "electronic sound" as part of the definition to remain consistent with the trial court rule. More research would shed light on the significance of including "electronic sound" in the definition; one possibility is that it may address accessibility issues.

Remove the references to "other persons"

The Third District also recommends removing the references to "other persons" that have been added to several provisions in rules 8.70 and 8.75. The court points out that "other persons" is not defined in the rules and could suggest that filings or submissions by non-parties is routinely allowed. The proposed addition of "other persons" is also based on amendments to the parallel trial court rules, and it is certainly the case that "other persons" who may file or submit records are more common in trial court proceedings than appellate court proceedings. The court cites rule 8.200(c) governing filing of amicus curiae briefs and rule 8.1120(a)(1) governing requests to publish as permitting filings or

submissions by non-parties. In addition, there are juvenile appellate rules that contemplate filings or submissions by non-parties who are involved in the case. (See comment from CDCSS.)

In the alternative, the Third District suggests defining the term "other persons" in rule 8.10 to clarify its scope for purposes of submitting documents in a case as proscribed by the rules of court. The subcommittee should consider whether to add a definition of "other persons" to rule 8.10. Note, however, that this rule is not a part of the current proposal.

Retaining wet signatures or copies thereof

In response to the request in the invitation to comment for specific comments as to whether the procedure described in proposed rule 8.75(b)(2)(A) regarding documents with multiple signatures, such as stipulations, comports with current practice, the OCBA stated that it does not. "Current practice regarding such documents is often for the parties' counsel to email each other regarding a stipulation. Once the parties' counsel agree to the substance and language of the stipulation, the filing party's counsel will inquire whether he/she has permission from the opposing party's counsel to "electronically sign" on the opposing counsel's behalf. Opposing counsel will respond via email confirming the filing party's counsel has permission. The filing party's counsel will then use a simple "/s/ Opposing Counsel" on the signature line, representing to the Court that both parties' counsel have agreed to the stipulation. The procedure in Rule 8.75(b)(2)(A) would still require the Opposing Counsel to either sign the stipulation manually and send it back, or sign it via electronic signature with a digital certificate." The OCBA adds that any doubts about whether opposing counsel authorized the electronic signature can be resolved by producing the email correspondence authorizing the filing.

The CAC provided similar comments in support of minimizing and use or reliance on wet signatures and hard copies. These comments are consistent with discussions in this subcommittee and the full advisory committee regarding current practice. However, modifying this provision of the rule would be a significant change and would be inconsistent with the trial court rule. This may be a suggestion to consider at another time, possibly with ITAC.

Revise heading for rule 8.75(c)

The San Diego superior court suggested that the heading for rule 8.75(c) (formerly (d)) be revised for clarity as shown in blue:

~~(d)~~(c) Digital signatures not required

Staff recommends this modification, but note that it is not consistent with the trial court rule.

Change "sole control" to "sole authority"

Finally, the JRS notes that proposed amended rule 8.75(a)(1) for documents signed under penalty of perjury requires the electronic signature to be under the "sole control" of the declarant. "This

may present an implementation challenge, as many attorneys give signing authority to other attorneys on a case, as well as personnel. Similarly, many litigants give their attorneys signing authority." The JRS suggested changing the language from "sole control" to "sole authority" as a more feasible and efficient option.

The relevant portion of the rule showing the proposed change in blue is below.

(a) Documents signed under penalty of perjury

~~If~~ When a document to be filed electronically must be signed under penalty of perjury, the ~~following procedure applies~~ document is deemed to have been signed by the declarant if filed electronically, provided that either of the following conditions is satisfied:

(1) ~~The document is deemed signed by the declarant if, before filing, the declarant has signed a printed form of the document.~~ The declarant has signed the document using an electronic signature and declares under penalty of perjury under the laws of the State of California that the information submitted is true and correct. If the declarant is not the electronic filer, the electronic signature must be unique to the declarant, capable of verification, under the sole ~~control~~ authority of the declarant, and linked to data such that, if the data are changed, the electronic signature is invalidated; or

The subcommittee should discuss whether to recommend this change.

Correct grammar

The CAAL suggests an edit to maintain parallel structure. Rule 8.75(b)(2)(B) would be amended as follows:

The ~~party or other person has~~ parties or other persons have signed the document using an electronic signature and that electronic signature is unique to the person using it, capable of verification, under the sole control of the person using it, and linked to data such that, if the data are changed, the electronic signature is invalidated.

Subcommittee Task

The subcommittee's task is to consider the comments received, discuss the draft rule amendments and any modifications based on the comments, and approve or modify staff suggestions for responding to these comments. The subcommittee may:

- Recommend that the proposal be submitted to the full advisory committee as currently drafted or as amended; or
- Recommend that the proposal not move forward; or
- Request additional information or research from subcommittee members or staff.

Attachments

1. Draft amended rules as circulated for public comment; two modifications in blue highlight.
2. Comment chart with draft committee responses
3. Invitation to Comment

Rules 8.70 and 8.75 of the California Rules of Court would be amended, effective January 1, 2022, to read:

Rule 8.70. Application, construction, and definitions

(a) Application

Notwithstanding any other rules to the contrary, the rules in this article govern filing and service by electronic means in the Supreme Court and the Courts of Appeal.

(b) Construction

The rules in this article must be construed to authorize and permit filing and service by electronic means to the extent feasible.

(c) Definitions

As used in this article, unless the context otherwise requires:

(1) "The court" means the Supreme Court or a Court of Appeal.

(2) A "document" is~~:~~

~~(A)~~ any ~~filing~~ writing submitted to the reviewing court by a party or other person, including a brief, a petition, an appendix, or a motion~~;~~.

~~(B)~~ ~~Any~~ A document is also any writing transmitted by a trial court to the reviewing court, including a notice or a clerk's or reporter's transcript~~;~~, and

~~(C)~~ any writing prepared by the reviewing court, including an opinion, an order, or a notice.

~~(D)~~ A document may be in paper or electronic form.

(3) "Electronic service" is service of a document on a party or other person by either electronic transmission or electronic notification. Electronic service may be performed directly by a party or other person, by an agent of a party or other person including the party~~'s~~ or other person's attorney, through an electronic filing service provider, or by a court.

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

Rules 8.70 and 8.75 of the California Rules of Court would be amended, effective January 1, 2022, to read:

(5) "Electronic notification" means the notification of a party or other person that a document is served by sending an electronic message to the electronic service 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 can be viewed and downloaded.

(6) "Electronic service address" ~~of a party~~ means the electronic address at or through which ~~the~~a party or other person has authorized electronic service.

(7) An "electronic filer" is a ~~party~~ person filing a document in electronic form directly with the court, by an agent, or through an electronic filing service provider.

(8) "Electronic filing" is the electronic transmission to a court of a document in electronic form for filing. Electronic filing refers to the activity of filing by the electronic filer and does not include the court's actions upon receipt of the document for filing, including processing and review of the document and its entry into the court's records.

(9) An "electronic filing service provider" is a person or entity that receives an electronic ~~filing~~ document from a party or other person for retransmission to the court or for electronic service on other parties, or both. In ~~submission of~~ submitting electronic filings, the electronic filing service provider does so on behalf of the electronic filer and not as an agent of the court.

(10) An "electronic signature" is an 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.

Advisory Committee Comment

The definition of "electronic service" has been amended to provide that a party may effectuate service not only by the electronic transmission of a document, but also by providing electronic notification of where a document served electronically may be located and downloaded. This amendment is intended to ~~modify the rules on electronic service to~~ expressly authorize electronic notification as ~~a legally effective~~ an alternative means of service ~~to electronic transmission~~. This ~~rules~~ amendment is consistent with the amendment of Code of Civil Procedure section 1010.6, effective January 1, 2011, to authorize service by electronic notification. (See Stats. 2010, ch. 156 (Sen. Bill 1274).) The amendments change the law on electronic service as understood by the

Rules 8.70 and 8.75 of the California Rules of Court would be amended, effective January 1, 2022, to read:

appellate court in *Insyst, Ltd. v. Applied Materials, Inc*. (2009) 170 Cal.App.4th 1129, which interpreted the rules as authorizing only electronic transmission as ~~the only~~ an effective means of electronic service.

Rule 8.75. Requirements for signatures on documents

(a) Documents signed under penalty of perjury

~~If~~ When a document to be filed electronically must be signed under penalty of perjury, the ~~following procedure applies~~ document is deemed to have been signed by the declarant if filed electronically, provided that either of the following conditions is satisfied:

(1) ~~The document is deemed signed by the declarant if, before filing, the declarant has signed a printed form of the document.~~ The declarant has signed the document using an electronic signature and declares under penalty of perjury under the laws of the State of California that the information submitted is true and correct. If the declarant is not the electronic filer, the electronic signature must be 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; or

(2) The declarant, before filing, has physically signed a printed form of the document. By electronically filing the document, the electronic filer certifies that ~~(1) has been complied with and that~~ the original signed document is available for inspection and copying at the request of the court or any other party. In the event this second method of submitting documents electronically under penalty of perjury is used, the following conditions apply:

~~(3)~~(A) At any time after the electronic version of the document is filed, any other party may serve a demand for production of the original signed document. The demand must be served on all other parties but need not be filed with the court.

~~(4)~~(B) Within five days of service of the demand under ~~(3)~~(A), the party or other person on whom the demand is made must make the original signed document available for inspection and copying by all other parties.

~~(5)~~(C) At any time after the electronic version of the document is filed, the court may order the ~~filing party~~ electronic filer to produce the original signed document ~~in court~~ for inspection and copying by the

Rules 8.70 and 8.75 of the California Rules of Court would be amended, effective January 1, 2022, to read:

court. The order must specify the date, time, and place for the production and must be served on all parties.

(b) Documents not signed under penalty of perjury

(1) If a document does not require a signature under penalty of perjury, the document is deemed signed by the ~~party if the document is filed electronically~~ electronic filer.

~~(c) Documents requiring signatures of multiple parties~~

(2) When a document to be filed electronically, such as a stipulation, requires the signatures of multiple ~~parties~~ persons, ~~the following procedure applies~~ the document is deemed to have been signed by those persons if filed electronically, provided that either of the following procedures is satisfied:

~~(1)~~(A) The ~~party filing the document~~ electronic filer ~~must obtain~~ has obtained all the signatures ~~of all parties~~ either in the form of an original signature on a printed form of the document or in the form of a copy of the signed signature page of the document. The electronic filer must maintain the original signed document and any copies of signed signature pages and must make them available for inspection and copying as provided in (a)(2)(B). The court and any ~~other~~ party may demand production of the original signed document and any copies of signed signature pages as provided in (a)(2)(A)–(C). By electronically filing the document, the electronic filer indicates that all ~~parties~~ persons whose signatures appear on it have signed the document and that the filer has possession of the signatures of all ~~parties~~ those persons in a form permitted by this rule ~~in his or her possession.~~; or

~~(2)~~(B) ~~The party filing the document must maintain the original signed document and any copies of signed signature pages and must make them available for inspection and copying as provided in (a)(2). The court and any other party may demand production of the original signed document and any copies of signed signature pages in the manner provided in (a)(3)–(5).~~ The ~~party or other person has~~ parties or other persons have signed the document using an electronic signature and that electronic signature is unique to the person using it, capable of verification, under the sole control of the person using it, and linked to data such that, if the data are changed, the electronic signature is invalidated.

Rules 8.70 and 8.75 of the California Rules of Court would be amended, effective January 1, 2022, to read:

~~(d)~~(c) Digital signatures not required

A party or other person is not required to use a digital signature on an electronically filed document.

~~(e)~~(d) Judicial signatures

If a document requires a signature by a court or a judicial officer, the document may be electronically signed in any manner permitted by law.

Advisory Committee Comment

The requirements for electronic signatures that are compliant with the rule do not impair the power of the courts to resolve disputes about the validity of a signature.

Subdivision (c). 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).)

SPR21-01

Appellate Procedure: Electronic Signatures (Amend Cal. Rules of Court, rules 8.70 and 8.75)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	California Academy of Appellate Lawyers By Rochelle Wilcox Chair, Rules Committee	AM	The California Academy of Appellate Lawyers (CAAL) is an election-only organization of approximately 100 members devoted to excellence in appellate practice. The CAAL has active committees devoted to amicus curiae participation and input on appellate rule changes, and seeks to improve appellate practice and access to justice in the California appellate courts. The CAAL supports proposal SPR21-01 and agrees that the option to use electronic signatures provides litigants with a potentially faster and more convenient way to obtain needed signatures on documents to be filed in the appellate courts, which is important and relevant during the coronavirus pandemic and in the future event of similar public emergencies. The CAAL also supports the goal of updating the rules governing electronic signatures in the appellate courts to provide clarity and consistency with the trial court rules. However, the CAAL is concerned that the incorporation of the definition of an "electronic signature" that is currently used in the trial court rules will be potentially confusing to appellate practitioners. For example, an appellate practitioner lacking a technical background will be unlikely to understand what is meant by rule 8.70(c)(10)'s definition of an " 'electronic signature' " as "an electronic sound, symbol, or process attached to or logically associated with an electronic record"—even if that definition is consistent	The committee thanks the commenter for submitting this feedback. The committee notes the commenter's support for the proposal. The committee notes the commenter's concern with the use of technical language in several proposed amendments to the rules. As indicated in the invitation to comment, the language is based on recent amendments to the trial court rules. One goal of the rules modernization project has been to maintain consistency between the trial court rules and the appellate rules to the extent it is appropriate. The committee is unaware of any issues for trial court practitioners, but will retain these comments and consider further amendments if it appears that appellate practitioners find the language confusing. [Does the subcommittee agree? Should any of the identified provisions be modified?]

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	Committee Response
			with some industry standard. Nor will the average practitioner understand what is meant by rule 8.75(a)(1)'s proposed requirement that "the electronic signature must be . . . linked to data such that, if the data are changed, the electronic signature is invalid." (See also proposed rule 8.75(b)(2)(B) [containing similar language].) Adding further confusion is rule 8.75(c)'s statement that a "party or other person is not required to use a digital signature on an electronically filed document." A new proposed Advisory Committee Comment to rule 8.75 suggests there is some difference between an "electronic signature" and a "digital signature," but fails to explain what that difference is. The CAAL recommends that the Advisory Committee Comments be expanded to provide non-technical guidance on what satisfies the newly added electronic signature definition. For example, does the insertion into a document of an image of a person's signature comply with the rule? Does the "/s/ [attorney name]" method used for electronic federal court filings comply? Must an attorney use one of the "secure electronic signature internet services" referenced in the proposal to comply? What is meant by the requirement that the electronic signature be "linked to data such that, if the data are changed, the electronic signature is invalid"? And how is an "electronic" signature different than a "digital" signature? A practitioner reading the rule should not be obliged to search the internet or do other research in order to	[Should digital signature be further clarified?] [Does the subcommittee agree with expanding the advisory committee comments? If so, which provisions in the rules should be clarified?]

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	Committee Response
			understand these requirements and what is intended or permitted. The Advisory Committee Comments should either directly address these questions, or refer practitioners to a source (or sources) containing the answers. The CAAL notes that Rule 8 of the Supreme Court Rules Regarding Electronic Filing currently provides that "[u]se of a registered TrueFiling user's username and password to electronically file a document is the equivalent of placing the registered user's electronic signature on the document." The CAAL recommends that an identical provision be included with the other amendments to rule 8.75. Such inclusion would provide assurance to practitioners that, regardless of their understanding of the rule's other technical requirements, a document filed through the TrueFiling system will be in compliance with the rule's electronic signature requirements. The CAAL offers two other minor suggestions: 1. Rule 8.75(b)(2) pertains to documents that require the signatures of multiple parties. To preserve parallelism, subdivision (b)(2)(B) might be modified as follows: The party parties or other person persons has have signed the document using an electronic signature and that electronic signature is unique to the person using it, capable of verification, under the sole control of the person using it, and linked to data such that, if the data are changed, the electronic signature is invalidated.	[Incorporate this provision?] The committee agrees with this point of grammar and has modified subdivision (b)(2)(B).

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR21-01

Appellate Procedure: Electronic Signatures (Amend Cal. Rules of Court, rules 8.70 and 8.75)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			2. Page 2 of proposal SPR21-01 refers to the definitions in "rule 2.250(c)," but likely intended to cite rule 2.250(b), as that rule has no subdivision (c).	The committee notes this typographical error.
2.	California Department of Child Support Services By John Ziegler Attorney III	A	The California Department of Child Support Services (Department) has reviewed the proposal identified above for potential impacts to the child support program, the local child support agencies, and our case participants. Below please find specific feedback regarding provisions of the rules with potential impacts to the Department and its stakeholders. REQUEST FOR SPECIFIC COMMENTS: 1) Does the proposal appropriately address the stated purpose? Please see the general comment, below. 2) Should the definition of "electronic signature" be added to rule 8.70(c) as presented, or to rule 8.75 as new subdivision (a)? Please see the general comment, below. 3) Does the procedure in rule 8.75(b)(2)(A) for documents with multiple signatures reflect current practice for validating those signatures and preserving evidence of them? If not, should alternative procedures be provided. If yes, please describe. See general comment, below. GENERAL COMMENTS: The proposal appropriately addresses the stated purpose and would positively impact the statewide child support program. First, by	The committee appreciates the commenter's feedback on this proposal. See below. See below. See below. The committee notes the commenter's support for the proposal and appreciates the feedback on how

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	Commenter	Position	Comment	Committee Response
			allowing electronic signatures on documents filed electronically in the appellate courts, the proposal recognizes the increased viability of electronic signatures in an era where business practices have increasingly become remote, and the physical presence of the signatories is less common, and often discouraged. This viability is particularly enhanced in appellate matters where there are more than two parties, as is frequently the case with child support-related appeals. Second, with the exception of certain organizational differences, the proposed changes to rules 8.70 and 8.75 align them with the parallel trial court rules, so the proposal promotes consistency between the forums. Lastly, the proposed changes add requisite clarity for situations when even non-parties must e-file documents in a pending appeal, which occasionally arise within the child support context. Altogether, the Department supports the proposal. Regarding the definition of "electronic signature," while the Department does not have a strong opinion concerning the matter, the "Definitions" section under rule 8.70(c) is seemingly the most appropriate place to include it. Having a single rule articulating the definitions of terms used throughout the applicable article is generally desirable because it creates an obvious first place to search for definitions of terms, particularly for filers who are otherwise unfamiliar with the pertinent rules. Though filers more accustomed to the	the rule amendments would positively impact the statewide child support program. No response required.

	Commenter	Position	Comment	Committee Response
			parallel trial court rules may expect to see the definition included in rule 8.75 just as it is included in rule 2.257(a), the next most conspicuous place to locate it would likely be within the rule that provides the definitions applicable to e-filing in appellate proceedings, so any resulting confusion would presumably be short-lived. Lastly, in appellate proceedings, the Department is represented by the Department of Justice, Office of the Attorney General. Since the Department does not itself practice before appellate courts, the Department has no comment on the third Request for Specific Comments.	No response required.
3.	California Lawyers Association; Committee on Appellate Courts, Litigation Section By Erin Smith Chair Saul Bercovitch Director of Governmental Affairs	AM	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	The committee thanks the commenter for providing feedback on this proposal. The committee notes the commenter's support for updating electronic signature rules.

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	Commenter	Position	Comment	Committee Response
			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	The committee notes the commenter's concerns that the proposed language will cause confusion and uncertainty. No response required. No response required.

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	Commenter	Position	Comment	Committee Response
			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.	The committee notes the commenter's strong preference for minimizing the use of wet signatures and hard copies. [Does the subcommittee agree with easing the electronic signature requirements?]

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	Commenter	Position	Comment	Committee Response
			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	The committee notes the commenter's point that there appear to be two different types of electronic signature. In one important way, the electronic signature required in rule 8.75(a)(1) and (b)(2)(B) differs from a digital signature under Government Code section 16.5(a). Rule 8.75 does not include the requirement that a digital signature must conform to regulations adopted by the Secretary of State. (Govt. Code, § 16.5(a)(5).)

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	Commenter	Position	Comment	Committee Response
			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.	[Does the subcommittee agree?] [Should signature requirements be less stringent in light of other evidence of authorization?]

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	Commenter	Position	Comment	Committee Response
			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	The committee notes the suggested alternative procedure.

	Commenter	Position	Comment	Committee Response
			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	

	Commenter	Position	Comment	Committee Response
			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	

	Commenter	Position	Comment	Committee Response
			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	

	Commenter	Position	Comment	Committee Response
			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.	
4.	Child Support Directors Association Judicial Council Forms Committee By Lisa Saporito Chair	A	The Child Support Directors Association Judicial Council Forms Committee (Committee) has reviewed the proposal identified above for potential impacts to the child support program, the local child support agencies (LCSA), our judicial partner, and our case participants. Specific feedback related to the provisions of the proposed legislation with potential impacts	The committee appreciates the commenter's feedback on the proposal.

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	Commenter	Position	Comment	Committee Response
			to the LCSA and its stakeholders is set forth below. REQUEST FOR SPECIFIC COMMENTS: 1) Does the proposal appropriately address the stated purpose? Yes. The proposed revision to California Rules of Court rules 8.70 and 8.75 appropriately address its purpose to foster modern e-business practices, promote consistency in the rules and efficiency among stipulating parties, and reduce unnecessary transmission of paper documents by changing the rules to allow electronic signatures and to simplify the appellate procedures. 2) Should the definition of "electronic signature" be added to rule 8.70(c) as presented, or to rule 8.75 as a new subdivision (a)? The electronic signature definition logically is placed in rule 8.70(c) along with the other definitions. Although this does not exactly mirror the recent changes to the trial court rules, it does make sense. That said, we do believe that the definition could have been appropriately been placed in either rule 8.70(c) or rule 8.75 as a new subdivision (a). 3) Does the procedure in rule 8.75(b)(2)(A) for documents with multiple signatures reflect current practice for validating those signatures and preserving evidence of them? If not, should alternative procedures be provided? If yes, please describe. The proposal is not inconsistent	The committee notes the commenter's support for the proposal. No further response required. No further response required.

	Commenter	Position	Comment	Committee Response
			with current practices for validating signatures and preserving evidence. Thank you for the opportunity to provide input, express our ideas, experiences, and concerns with respect to the proposed legislation. If you have any questions or concerns regarding this matter, please contact Lisa Saporito at (415) 345-2905.	No further response required.
5.	Court of Appeal, Third Appellate District By Colette M. Bruggman Assistant Clerk/Executive Officer	AM	Rule 8.70 Rule 8.70(c)(10) defines an electronic signature as "an 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." It appears this language is from the ESIGN Act of 2000. It is unclear what an "electronic sound" is or how it would be presented in court operations. At a minimum, an explanation should be provided. Alternatively, if it has no practical application for court operations, it should probably be removed from the definition. Rules 8.70 and 8.75 The proposals for rules 8.70 and 8.75 include adding the language "other persons" to the scope of the rules to account for others who may be involved in a case but are not parties. "Other persons" is not defined anywhere in the rules of court and does not appear to be consistent with the current language of the rules. The addition of this language makes it appear that filings or	

	Commenter	Position	Comment	Committee Response
			submissions by non-parties is routine; however, filings or submissions by non-parties are not routinely allowed. Currently, only two rules allow for filing of documents by non-parties, namely: rule 8.200(c) governing filing of amicus curiae briefs and rule 8.1120(a)(1) governing requests to publish. Any other submissions by non-parties are received or filed by permission of the court only. The addition of this language is too vague to be helpful and places an operational burden on the Clerk's Office in dealing with filings submitted by "other persons." As an example, from time to time we get what I will refer to as a "lobbying effort," wherein non-parties write to us to try to influence the process or outcome of a case. In one case, we received 21 letters from victims in a criminal case, requesting the case be fast-tracked. Adding "other persons" to the rules makes it appear that submissions such as these are properly received or filed in a case. They are not proper submissions, and it is up to the discretion of the court how these submissions will be handled. Sometimes they will be received, but more often, they will be returned. Suggestions: Remove the language "other persons" from these rules. Add a definition of "other persons" to rule 8.10 that limits who "other persons" are for purposes	

	Commenter	Position	Comment	Committee Response
			of submitting documents in a case as proscribed in the rules of court.	
6.	Meechan, Rosenthal & Karpilow, P.C. By Rebecca Slay Paralegal	A	Yes! Let's make it easier for individuals to access their rights!!!	The committee notes the commenter's support for the proposal.
7.	Orange County Bar Association By Larisa M. Dinsmoor President	A	The OCBA provides the following responses to the Request for Specific Comments: 1. The proposal addresses the stated purpose. 2. The definition of "electronic signature" should remain in Section 8.70. 3. The procedure described in proposed rule 8.75(b)(2)(A) regarding documents with multiple signatures, such as stipulations, **does not** comport with current practice. Current practice regarding such documents is often for the parties' counsel to email each other regarding a stipulation. Once the parties' counsel agree to the substance and language of the stipulation, the filing party's counsel will inquire whether he/she has permission from the opposing party's counsel to "electronically sign" on the opposing counsel's behalf. Opposing counsel will respond via email confirming the filing party's counsel has permission. The filing party's counsel will then use a simple "/s/ Opposing Counsel" on the signature line, representing to the Court that both parties' counsel have agreed to the stipulation. The procedure in Rule 8.75(b)(2)(A) would still require the Opposing Counsel to	The committee notes the commenter's support for the proposal. No further response required. No further response required. The committee appreciates this feedback.

	Commenter	Position	Comment	Committee Response
			either sign the stipulation manually and send it back, or sign it via electronic signature with a digital certificate. This is a more onerous process than is used in the trial court. Further, any doubts about whether the opposing counsel authorized the electronic signature by the filing party's counsel can be resolved by simple production of the email correspondence authorizing the filing.	
8.	Superior Court of California, County of San Diego By Mike Roddy Executive Officer	A	• Does the proposal appropriately address the stated purpose? **Yes.** • Should the definition of "electronic signature" be added to rule 8.70(c) as presented, or to rule 8.75 as new subdivision (a) **The definition of "electronic signature" should remain as presented within rule 8.70(c). In addition, it is recommended that the following subdivision header in rule 8.75 be revised for clarity as follows: (d)(c) Digital signature not required** • Does the procedure in rule 8.75(b)(2)(A) for documents with multiple signatures reflect current practice for validating those signatures and preserving evidence of them? If not, should alternative procedures be provided? If yes, please describe? **Yes. It is the practice of the appeals staff to check for signatures for cases in which electronic filing is currently permitted in San Diego Superior Court (unlimited civil,**	The committee notes the commenter's support for the proposal and appreciates the responses to the request for specific comments. The committee agrees and has modified the subdivision header. No further response required.

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	Commenter	Position	Comment	Committee Response
			probate, limited civil up to certification of the appeal record, and family). • Would the proposal provide cost savings? If so, please quantify. **No.** • What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? **Staff in the business office would need to be trained. It is difficult to quantify the amount of training, but it should not be overwhelming. The information would need to be incorporated into written procedures.** • Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **Yes, for areas that already accept e-filing.** • How well would this proposal work in courts of different sizes? **There should be no disparate impact between courts of different sizes.**	No further response required. The committee appreciates this feedback on implementation requirements for the court. No further response required. No further response required.
9.	TCPJAC/CEAC Joint Rules Subcommittee (JRS) On behalf of:	A	The JRS notes the following impact to court operations: • Impact on existing automated systems (e.g., case management system, accounting system,	The committee appreciates these comments regarding the impact of the proposal to court operations.

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	Commenter	Position	Comment	Committee Response
	Trial Court Presiding Judges Advisory Committee (TCPJAC) and Court Executives Advisory Committee (CEAC)		technology infrastructure or security equipment, Jury Plus/ACS, etc.). There is a potential for impact to automated systems in adapting/modifying existing configurations. • Results in additional training, which requires the commitment of staff time and court resources. Potential for some training around requirements of the new rules as proposed but not significant. **Request for Specific Comments** **Does the proposal appropriately address the stated purpose?** • 8.75(a)(1) defines the use of electronic signatures, and (a)(2) deals with wet signatures. However, 8.75(b)(2)(A) provides further requirements for wet signatures, and (b)(2)(B) with electronic signatures. Although the stated purpose is satisfied with these proposed revisions, the change in ordering of the provisions between the two subsections may lead to confusion. • 8.75(a)(1) requires the signature to be under the "sole control" of the declarant. This may present an implementation challenge, as many attorneys give signing authority to other attorneys on a case, as well as personnel. Similarly, many litigants give their attorneys signing authority. Suggest "sole authority" may be a more feasible and efficient option allowing the signator to authorize the esigning.	No further response required. The committee acknowledges the change in ordering. These proposed amendments are based on trial court rule 2.257, specifically subdivision (b)(1) and (2) and subdivision (c)(2)(A) and (B). The committee will consider modification if any confusion arises. The committee appreciates this observation and the suggested modification. [Note to subcommittee: modify rule 8.75(a)(1)?]

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SPR21-01

Appellate Procedure: Electronic Signatures (Amend Cal. Rules of Court, rules 8.70 and 8.75)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			Should the definition of "electronic signature" be added to rule 8.70(c) as presented, or to rule 8.75 as new subdivision (a)? • 8.70 is helpful to set the standard.	No further response required.
			Does the procedure in rule 8.75(b)(2)(A) for documents with multiple signatures reflect current practice for validating those signatures and preserving evidence of them? • Yes.	No further response required.
			Would the proposal provide cost savings? • Yes, for the litigants filing, who spend substantial time securing appropriate originals.	No further response required.
			Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? • Yes.	No further response required.
			How well would this proposal work in courts of different sizes? • Assuming case management impact question is not substantial, this should work well.	No further response required.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue . San Francisco, California 94102-3688
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INVITATION TO COMMENT

SPR21-__

Title
Appellate Procedure: Electronic Signatures

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 8.70 and 8.75

Proposed by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Action Requested
Review and submit comments by May 27, 2021

Proposed Effective Date
January 1, 2022

Contact
Christy Simons, 415-865-7694
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Executive Summary and Origin

The Appellate Advisory Committee proposes amending two rules of court governing electronic filing in the appellate courts to permit the use of electronic signatures and make other updates. The trial court electronic filing rules have been amended several times recently, including to allow electronic signatures. Several similar amendments for the parallel appellate rules are now being proposed to foster modern e-business practices, promote consistency in the rules and efficiency among stipulating parties, and reduce unnecessary transmission of paper documents. The proposed amendments to rule 8.70 would add a definition for electronic signature and update several other definitions. The amendments to rule 8.75 would authorize the use of electronic signatures on electronic documents filed with the court and reorganize parts of the rule to improve clarity and eliminate redundancies. This proposal originated from the suggestion of an attorney in private practice.

Background

Rule 8.70(c)[1] sets forth definitions of terms used in the electronic filing rules. Rule 8.75 governs the requirements for signatures on documents to be filed electronically. Under rule 8.75(a), electronic filers of a document signed under penalty of perjury must use and retain a printed form of the document with the original signature.[2] Rule 8.75(c) requires electronic filers of documents

[1] All rule references are to the California Rules of Court.
[2] In this invitation to comment, "original" signature means the wet ink signature on a paper form of the document. See JC Report Appellate Procedure: Signatures on Filed Documents, Aug. 2, 2013, at pp. [discussing amendments to predecessor rule 8.77; original signatures as contrasted with copies of the signed signature page]; JC Report Court Technology: Electronic Filing Pilot Program in the Court of Appeal, Second Appellate District, Apr. 5, 2010, at pp.

with multiple signatures such as stipulations to either use and retain a printed copy with the original signature or copies of the signed signature page of the document.

Effective January 1, 2019, the Judicial Council amended rule 2.257, the parallel trial court rule governing requirements for signatures on documents, to add a definition of "electronic signature" and authorize the use of electronic signatures on documents signed under penalty of perjury.

One year later, effective January 1, 2020, rule 2.257 was amended again to authorize using an electronic signature for a document signed under penalty of perjury when the declarant is not the filer. The option to use electronic signatures was also added for documents not signed under penalty of perjury, including stipulations and other documents requiring multiple signatures.

Many private law firms and government agencies now use secure electronic signature internet services as frequently as possible to sign contracts and agreements. These services avoid the inefficiency of printing, physically signing, and then either scanning or mailing a document back to the originator.

The appellate rule governing signatures on documents has not been updated and does not provide an electronic signature option. Thus, for example, an opposing counsel's stipulation in an appellate court still requires that the filer obtain "an original signature on a printed form of the document or in the form of a copy of the signed signature page of the document," "maintain the original signed document and any copies of signed signature pages and . . . make them available for inspection and copying" upon request. (Rule 8.75(c).)

The Proposal

This proposal would add the option of using electronic signatures on documents filed electronically in the appellate courts, including documents requiring multiple signatures, by including a definition of "electronic signature" in rule 8.70 and including procedures for electronic signatures in rule 8.75. It would also update several other definitions in rule 8.70 for additional clarity and consistency with the trial court rules.

Rule 8.70

The proposal would add a new definition of electronic signature and amend several other definitions in rule 8.70(c). The new definition is identical to that used in the trial court rules. Unlike the trial court rules, which include the definition of electronic signature in the rule on requirements for signatures on documents (rule 2.257(a)), this proposal would place the definition in rule 8.70(c) with other definitions of terms used in the electronic filing rules.

The other proposed amendments largely mirror the parallel trial court rule providing definitions of electronic filing terms, rule 2.250(c). The proposal would:

1–4 [adopting predecessor rule 8.77; requiring the party electronically filing a document with multiple signatures to retain the "original signed document" for inspection and copying].)

- Amend and reorganize the definition of "document" to avoid using the word "document" in the definition, maintain internal consistency by referring to "any writing" rather than "any filing,"[3] and maintain parallel structure with the rest of the subdivision.

- Amend the definition of "electronic filing" to clarify that it refers to the action of filing by the filer and does not include the steps taken by the court upon receipt of the document.

- Amend definitions for "electronic service," "electronic filer," and "electronic filing service provider" to add provisions related to electronic filing and service by or on a nonparty. Specifically, in addition to "a party," the definitions would also include "or other person" to account for others who may be involved in a case but are not parties.

- Amend several definitions to improve clarity and accuracy.

Rule 8.75

The proposal would amend this rule to mirror trial court rule 2.257(b) and (c), both in its organization and its substance. The proposal would:

- Add the option of using electronic signatures.

- Require that the electronic signature must be (1) unique to the declarant, (2) capable of verification, (3) under the sole control of the declarant, and (4) linked to data such that, if the data are changed, the electronic signature is invalid. These requirements are designed to ensure that the application of the signatures is the act of the person signing, can be proven as such, and is invalidated if the document appears to have been altered after being electronically signed.

- Strike the subdivision (c) heading, "Documents requiring signatures of opposing parties," and instead incorporate the requirements from subdivision (c) into subdivision (b), which governs documents not signed under penalty of perjury. Subdivision (c) is no longer necessary for signatures of opposing parties under penalty of perjury as those requirements are captured in subdivision (a). Therefore, the only remaining requirements would be for signatures not under penalty of perjury.

- Include "other persons" in addition to parties within the scope of the rule to account for others who may be involved in a case but are not parties.

[3] The change from "any *filing* submitted to the reviewing court" to "any *writing* . . ." is also intended to reflect that the definition includes documents that are submitted to the reviewing court but not filed, such as documents that are lodged.

- Add an advisory committee comment to clarify that the rule's electronic signature requirements do not alter the courts' authority to resolve disputes about the validity of a signature.

- Add an advisory committee comment regarding the distinction between an electronic signature and a digital signature.

Because electronic signatures do not require the physical presence of the signer or an exchange of mailed paper documents, the option to use them may provide litigants a potentially faster and more convenient way to obtain needed signatures. These issues are even more important and relevant during the coronavirus pandemic, as social distancing measures lead more litigants and attorneys to work from home and to communicate digitally to avoid transmission of the virus on paper documents.

Alternatives Considered

The committee considered taking no action but concluded that updating the rules to permit electronic signatures would assist litigants with obtaining signatures, simplify procedures, and reduce the use of paper and exchange of documents by mail.

The committee also considered adding provisions regarding electronic signatures without making other changes to the rules, but rejected this alternative. The parallel trial court rules have been updated several times in the last three years. Delaying the other updates for the appellate rules would be inefficient and would preserve inconsistencies, redundancies, and outdated terminology and procedures.

The committee also considered placing the definition of "electronic signature" in rule 8.75 as new subdivision (a), to mirror trial court rule 2.257(a), rather than in rule 8.70(c), which defines terms used in the electronic filing rules. For internal consistency, the committee decided to include the new definition in the rule with other definitions. The committee requests comments on this issue.

Fiscal and Operational Impacts

Because electronic signatures do not require the physical presence of the signer or an exchange of mailed paper documents, the option to use them should offer litigants a potentially faster and more convenient way to obtain needed signatures. The committee expects that the proposed amendments will provide greater clarity in the rules for parties, attorneys, courts, and other court users, and improved consistency between the appellate rules and the trial court rules. The proposal is not expected to result in any costs for the courts.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should the definition of "electronic signature" be added to rule 8.70(c) as presented, or to rule 8.75 as new subdivision (a)?
- Does the procedure in rule 8.75(b)(2)(A) for documents with multiple signatures reflect current practice for validating those signatures and preserving evidence of them? If not, should alternative procedures be provided? If yes, please describe.

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rules 8.70 and 8.75, at pages 6–10

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
June 28, 2021

To
Members of the Appellate Advisory Committee's Rules Subcommittee

From
Christy Simons
Attorney, Legal Services

Subject
Proposal to amend rule 8.304

Action Requested
Please review

Deadline
July 2, 2021

Contact
Christy Simons
415-865-7694 phone
christy.simons@jud.ca.gov

Introduction

Earlier this year, the Appellate Advisory Committee recommended circulating for public comment a proposal to amend the rule that governs initiating an appeal in a felony case after a plea or an admission of a probation violation to modify the procedure for notices of appeal filed without a certificate of probable cause. In these cases, a certificate of probable cause is required if the defendant seeks to appeal an issue that challenges the validity of the plea or admission. Currently, the rule requires the trial court clerk to mark a notice of appeal "Inoperative" if the defendant did not file the statement requesting a certificate of probable cause or the trial court denied a certificate. However, because an appeal can be based on grounds that do not require a certificate, the clerk must review the notice of appeal and decide whether it should be filed notwithstanding the lack of a certificate.

The proposed amendments were intended to reorganize the rule, simplify procedures, and eliminate the onus on the clerk to make a legal decision. The Judicial Council's Rules Committee approved the recommendation for circulation and the proposal was circulated for public comment from April 9, 2021 through May 21, 2021 as part of the regular spring cycle. A copy of

the invitation to comment and the proposed amended rule as it circulated for public comment are included in your meeting materials.

This memorandum and the attached materials discuss the public comments received on the proposal. Prior to the subcommittee meeting, members should review this memo and the attached comment chart. In the memo, proposed amendments that circulated during the comment period are highlighted in yellow; possible modifications based on comments received, and subject to the subcommittee's review, are highlighted in blue.

Comments and Issues to Consider

The committee received seven comments on this proposal. Four commenters, the Superior Court of Los Angeles County, the Superior Court of San Diego County, the Central California Appellate Project on behalf of all the appellate projects (the appellate projects), and member of the public agreed with the proposal. The Committee on Appellate Courts, Litigation Section, of the California Lawyers Association (CLA) agreed with the proposal if modified. The Orange County Bar Association (OCBA), disagreed with the proposal. The seventh commenter, an attorney who practices criminal law, did not take a position but suggested adding a third category of appeals that do not require a certificate of probable cause. The full text of the comments received and staff's proposed committee responses are set out in the attached draft comment chart.

Of the commenters who agreed with the proposal, the Los Angeles court opined that the amendments would likely result in more timely preparation of the record, while the San Diego court expected no impact because the court already follows the proposed practice. Both the Los Angeles court and the CLA noted that, because the record is prepared upon the filing of an operative notice of appeal, the amendments may result in appellate records being prepared for some cases even when they do not present appealable issues. However, neither commenter indicated that this was a reason for concern; the benefits of the proposal outweigh any possible issue.

Comments regarding subdivision (b)(2)(B)

Both the CLA and the appellate projects suggested clarifications to subdivision (b)(2)(B) regarding appeals that do not require a certificate of probable cause. The CLA recommended removing the qualifier, "as a substantive matter," as unnecessary and because it may cause confusion about the appealability of issues that only secondarily or incidentally "affect the plea's validity." Staff recommends accepting this suggestion and modifying the subdivision as shown below in blue.

(2) Appeal not requiring a certificate of probable cause

To appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation on grounds that do not challenge the validity of the plea or admission, the defendant need not file the written statement

required by Penal Code section 1237.5 for issuance of a certificate of probable cause. No certificate of probable cause is required for an appeal based on:

(A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or

(B) Grounds that arose after entry of the plea or admission and do not ~~affect the plea's validity, as a substantive matter,~~ challenge the validity of the plea or admission.

The appellate projects suggested simplifying the language of subdivision (b)(2)(B) by using the language of notice of appeal form CR-120. The they suggest is highlighted in blue:

(B) ~~Grounds that arose after entry of the plea or admission and do not affect the plea's validity, as a substantive matter, challenge the validity of the plea or admission~~ The sentence or other matters occurring after the plea that do not affect the validity of the plea.

The subcommittee should discuss whether to accept these suggested modifications.

Requested addition to subdivision (b)(2)

Criminal defense attorney Adrian Contreras did not take a position on the proposal but contends that the amendments to subdivision (b)(2) are problematic. In his view, "the proposed amendment seeks to enumerate the entire universe of orders that require a certificate of probable cause and those that don't." He points out that, for example, appeals under Penal Code section 1473.7 from the denial of a motion to vacate a conviction do not fit into the proposed language of the rule. Subdivision (f) of section 1473.7 expressly provides for an appeal authorized by section 1237(b), for which no certificate of probable cause is required. Mr. Contreras suggests a "catch-all" provision stating that a certificate of probable cause is not needed if some other statute expressly states it is not needed (such as section 1473.7(f)). The subcommittee should discuss whether such an addition is warranted. Possible language highlighted in blue:

(2) Appeal not requiring a certificate of probable cause

To appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation on grounds that do not challenge the validity of the plea or admission, the defendant need not file the written statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. No certificate of probable cause is required for an appeal based on:

(A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or

(B) Grounds that arose after entry of the plea or admission and do not ~~affect the plea's validity~~, as a substantive matter, challenge the validity of the plea or admission.

(C) Any other order for which an appeal is expressly authorized under Penal Code section 1237(b).

Comment opposing the proposal
The OCBA opposes the proposed amendments out of concern for litigants and attorneys who would no longer be notified when a defendant does not file the written statement required by Penal Code section 1237.5 or the superior court denies a certificate of probable cause. Currently, the defendant and the appellate project receive notice when a notice of appeal is marked "inoperative." Under the amendments, the appeal will be limited to issues that do not require a certificate of probable cause.

OCBA believes this change will penalize litigants and attorneys who do not understand the certificate of probable cause process and needed to, but did not, request a certificate to have certain appellate issues considered by reviewing courts. They might not know they made a mistake and might not have the ability to correct the mistake. The subcommittee should discuss whether this issue should be addressed and, if so, what modifications should be made.

Although the amendments remove the requirement that defendants and the appellate projects be notified of an inoperative notice of appeal, the notice requirement in subdivision (c) remains. Under subdivision (c)(1), "[w]hen a notice of appeal is filed, the superior court clerk must promptly send a notification of the filing to the attorney of record for each party, to any unrepresented defendant, to the reviewing court clerk, to each court reporter, and to any primary reporter or reporting supervisor." Under subdivision (c)(3), the notification must include a copy of the notice of appeal and any certificate of probable cause.

The notice requirement could be amended to include the appellate project for any unrepresented defendant and to require that the notice clearly state that the appeal is limited issues that do not require a certificate of probable cause if none was requested or granted. Two options highlighted in blue (add the requirements to (c)(1) or add a new (c)(4) are presented below.

(c) Notification of the appeal

(1) When a notice of appeal is filed, the superior court clerk must promptly send a notification of the filing to the attorney of record for each party, to any unrepresented defendant and the appellate project, to the reviewing court clerk, to each court reporter, and to any primary reporter or reporting supervisor. If the appeal is limited to issues that do not require a certificate of probable cause, the notification must state

this limitation. ~~If the defendant also files a statement under (b)(1), the clerk must not send the notification unless the superior court files a certificate under (b)(2).~~

(2) The notification must show the date it was sent, the number and title of the case, and the dates the notice of appeal and any certificate under ~~(b)(2)~~ (b)(1)(B) were filed. If the information is available, the notification must also include:

(A) The name, address, telephone number, e-mail address, and California State Bar number of each attorney of record in the case;

(B) The name of the party each attorney represented in the superior court; and

(C) The name, address, telephone number and e-mail address of any unrepresented defendant.

(3) The notification to the reviewing court clerk must also include a copy of the notice of appeal, any certificate filed under (b)(1), and the sequential list of reporters made under rule 2.950.

(4) If the appeal is limited to issues that do not require a certificate of probable cause, the notification under (1) must state this limitation and must be sent to the appellate project for an unrepresented defendant.

~~(4)~~(5) A copy of the notice of appeal is sufficient notification under (1) if the required information is on the copy or is added by the superior court clerk….

Subcommittee Task

The subcommittee's task is to consider the comments received, discuss the draft rule amendments and any modifications based on the comments, and approve or modify staff suggestions for responding to these comments. The subcommittee may:

- Recommend that the proposal be submitted to the full advisory committee as currently drafted or as amended; or
- Recommend that the proposal not move forward; or
- Request additional information or research from subcommittee members or staff.

Attachments

1. Draft amended rules as circulated for public comment
2. Comment chart with draft committee responses
3. Invitation to Comment

Rule 8.304 of the California Rules of Court would be amended, effective January 1, 2022, to read:

Rule 8.304. Filing the appeal; certificate of probable cause

(a) Notice of appeal

(1) To appeal from a judgment or an appealable order of the superior court in a felony case—other than a judgment imposing a sentence of death—the defendant or the People must file a notice of appeal in that superior court. To appeal after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must also comply with (b).

(2) As used in (1), "felony case" means any criminal action in which a felony is charged, regardless of the outcome. A felony is "charged" when an information or indictment accusing the defendant of a felony is filed or a complaint accusing the defendant of a felony is certified to the superior court under Penal Code section 859a. A felony case includes an action in which the defendant is charged with:

(A) A felony and a misdemeanor or infraction, but is convicted of only the misdemeanor or infraction;

(B) A felony, but is convicted of only a lesser offense; or

(C) An offense filed as a felony but punishable as either a felony or a misdemeanor, and the offense is thereafter deemed a misdemeanor under Penal Code section 17(b).

(3) If the defendant appeals, the defendant or the defendant's attorney must sign the notice of appeal. If the People appeal, the attorney for the People must sign the notice.

(4) The notice of appeal must be liberally construed. Except as provided in (b), the notice is sufficient if it identifies the particular judgment or order being appealed. The notice need not specify the court to which the appeal is taken; the appeal will be treated as taken to the Court of Appeal for the district in which the superior court is located.

(b) Appeal after plea of guilty or nolo contendere or after admission of probation violation

(1) Appeal requiring a certificate of probable cause

Rule 8.304 of the California Rules of Court would be amended, effective January 1, 2022, to read:

~~(1)~~(A) ~~Except as provided in (4),~~ To appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation on grounds that challenge the validity of the plea or admission, the defendant must file in that superior court—with the notice of appeal required by (a)—the written statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause.

~~(2)~~(B) Within 20 days after the defendant files a written statement under ~~(1)~~Penal Code section 1237.5, the superior court must sign and file either a certificate of probable cause or an order denying the certificate.

(2) Appeal not requiring a certificate of probable cause

To appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation on grounds that do not challenge the validity of the plea or admission, the defendant need not file the written statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. No certificate of probable cause is required for an appeal based on:

(A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or

(B) Grounds that arose after entry of the plea or admission and do not ~~affect the plea's validity~~, as a substantive matter, challenge the validity of the plea or admission.

~~(3) If the defendant does not file the statement required by (1) or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal "Inoperative," notify the defendant, and send a copy of the marked notice of appeal to the district appellate project.~~

(3) Appeal without a certificate of probable cause

If the defendant does not file the written statement required by Penal Code section 1237.5 or the superior court denies a certificate of probable cause, the appeal will be limited to issues that do not require a certificate of probable cause.

~~(4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on:~~

Rule 8.304 of the California Rules of Court would be amended, effective January 1, 2022, to read:

~~(A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or~~

~~(B) Grounds that arose after entry of the plea and do not affect the plea's validity.~~

~~(5) If the defendant's notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1).~~

(c) Notification of the appeal

(1) When a notice of appeal is filed, the superior court clerk must promptly send a notification of the filing to the attorney of record for each party, to any unrepresented defendant, to the reviewing court clerk, to each court reporter, and to any primary reporter or reporting supervisor. ~~If the defendant also files a statement under (b)(1), the clerk must not send the notification unless the superior court files a certificate under (b)(2).~~

(2) The notification must show the date it was sent, the number and title of the case, and the dates the notice of appeal and any certificate under ~~(b)(2)~~ (b)(1)(B) were filed. If the information is available, the notification must also include:

(A) The name, address, telephone number, e-mail address, and California State Bar number of each attorney of record in the case;

(B) The name of the party each attorney represented in the superior court; and

(C) The name, address, telephone number and e-mail address of any unrepresented defendant.

(3) The notification to the reviewing court clerk must also include a copy of the notice of appeal, any certificate filed under (b)(1), and the sequential list of reporters made under rule 2.950.

(4) A copy of the notice of appeal is sufficient notification under (1) if the required information is on the copy or is added by the superior court clerk.

Rule 8.304 of the California Rules of Court would be amended, effective January 1, 2022, to read:

(5) The sending of a notification under (1) is a sufficient performance of the clerk's duty despite the discharge, disqualification, suspension, disbarment, or death of the attorney.

(6) Failure to comply with any provision of this subdivision does not affect the validity of the notice of appeal.

Advisory Committee Comment

Subdivision (a). Penal Code section 1235(b) provides that an appeal from a judgment or appealable order in a "felony case" is taken to the Court of Appeal, and Penal Code section 691(f) defines "felony case" to mean "a criminal action in which a felony is charged. ~~. . .~~" Rule 8.304(a)(2) makes it clear that a "felony case" is an action in which a felony is charged *regardless of the outcome of the action*. Thus the question whether to file a notice of appeal under this rule or under the rules governing appeals to the appellate division of the superior court (rule 8.800 et seq.) is answered simply by examining the accusatory pleading: if that document charged the defendant with at least one count of felony (as defined in ~~Penal~~ Pen. Code, ~~section~~ § 17(a)), the Court of Appeal has appellate jurisdiction and the appeal must be taken under this rule *even if the prosecution did not result in a punishment of imprisonment in a state prison*.

It is settled case law that an appeal is taken to the Court of Appeal not only when the defendant is charged with and convicted of a felony, but also when the defendant is charged with both a felony and a misdemeanor (Pen. Code, § 691(f)) but is convicted of only the misdemeanor (e.g., *People v. Brown* (1970) 10 Cal.App.3d 169); when the defendant is charged with a felony but is convicted of only a lesser offense (Pen. Code, § 1159; e.g., *People v. Spreckels* (1954) 125 Cal.App.2d 507); and when the defendant is charged with an offense filed as a felony but punishable as either a felony or a misdemeanor, and the offense is thereafter deemed a misdemeanor under Penal Code section 17(b) (e.g., *People v. Douglas* (1999) 20 Cal.4th 85; *People v. Clark* (1971) 17 Cal.App.3d 890).

Trial court unification did not change this rule: after as before unification, "Appeals in felony cases lie to the [C]ourt of [A]ppeal, regardless of whether the appeal is from the superior court, the municipal court, or the action of a magistrate. *Cf.* Cal. Const. art. VI, § 11(a) [except in death penalty cases, Courts of Appeal have appellate jurisdiction when superior courts have original jurisdiction 'in causes of a type within the appellate jurisdiction of the [C]ourts of [A]ppeal on June 30, 1995~~. . . .~~']." ("~~Recommendation on~~ Trial Court Unification: Revision of Codes" (July 1998) 28 *Cal. Law Revision Com. Rep.* 455–456.)

Subdivision (b). ~~Under (b)(1), the defendant is required to file both a notice of appeal and the statement required by Penal Code section 1237.5(a) for issuance of a certificate of probable cause. Requiring a notice of appeal in all cases simplifies the rule, permits compliance with the signature requirement of rule 8.304(a)(3), ensures that the defendant's intent to appeal will not be~~

Rule 8.304 of the California Rules of Court would be amended, effective January 1, 2022, to read:

~~misunderstood, and makes the provision consistent with the rule in civil appeals and with current practice as exemplified in the Judicial Council form governing criminal appeals.~~

~~Because of the drastic consequences of failure to file the statement required for issuance of a certificate of probable cause in an appeal after a plea of guilty or nolo contendere or after an admission of probation violation, (b)(5) alerts appellants to a relevant rule of case law, i.e., that, although such an appeal may be maintained without a certificate of probable cause if the notice of appeal states the appeal is based on the denial of a motion to suppress evidence or on grounds arising after entry of the plea and not affecting its validity, no *issue* challenging the validity of the plea is cognizable on that appeal without a certificate of probable cause. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1104.)~~ Subdivision (b)(1) reiterates the requirement set forth in Penal Code section 1237.5(a) that to challenge the validity of a plea or the admission of a probation violation on appeal under Penal Code section 1237(a), the defendant must file both a notice of appeal and the written statement required by section 1237.5(a) for the issuance of a certificate of probable cause. (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1098 [probable cause certificate requirement is to be applied strictly].)

Subdivision (b)(2) identifies exceptions to the certificate of probable cause requirement. These include an appeal that challenges the denial of a motion to suppress evidence under Penal Code section 1538.5 (see *People v. Stamps* (2020) 9 Cal.5th 685, 694) and an appeal under Penal Code section 1237(b) that does not challenge the validity of the plea or the admission of a probation violation (see, e.g., *id.* at pp. 694–698 [appeal based on a post-plea change in the law]; *People v. Arriaga* (2014) 58 Cal.4th 950, 958–960 [appeal of the denial of a motion to vacate a conviction based on inadequate advisement of potential immigration consequences under Penal Code section 1016.5]; and *People v. French* (2008) 43 Cal.4th 36, 45–46 [appeal that challenges a post-plea sentencing issue that was not resolved by, and as a part of, the negotiated disposition]).

Subdivision (b)(3) makes clear that if a defendant raises an issue on appeal that requires a certificate of probable cause, but the defendant does not file the written statement required by Penal Code section 1237.5 or the superior court denies a certificate, then the appeal is limited to issues, such as those identified in subdivision (b)(2), that do not require a certificate of probable cause. (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1088–1089.)

SPR21-02

Appellate Procedure: Appeal After Plea of Guilty or Nolo Contendre or Admission of Probation Violation

(Amend Cal. Rules of Court, rule 8.304)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	California Lawyers Association; Committee on Appellate Courts, Litigation Section By Erin Smith Chair Saul Bercovitch Director of Governmental Affairs	AM	The Committee on Appellate Courts of the Litigation Section of the California Lawyers Association submits the following response to a proposal to amend Rule of Court, rule 8.304. The Committee broadly supports this proposed amendment, but suggests that one point of ambiguity be addressed before adoption. Criminal defendants who enter a no-contest or guilty plea must generally request a certificate of probable cause prior to filing an appeal that challenges the validity of the plea. However, issues that do not challenge the validity of a plea (or that challenge the denial of a suppression motion) may be raised on appeal even without the certificate of probable cause. The determination of whether an issue challenges the validity of a plea may ultimately be litigated by the parties, and certainly involves legal decision-making. Nevertheless, current rule 8.304 requires the superior court clerk to decide whether a certificate is required at the outset of an appeal—i.e., the clerk must determine whether an appeal will challenge the validity of a plea at the time a notice of appeal is initially filed. If the clerk determines that an appeal will present a certificate issue, and no certificate has been obtained, the rule requires the clerk to mark that notice of appeal as "inoperative."	The committee notes the commenter's support for the proposal if modified and appreciates the thoughtful comments. No response required. No response required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR21-02

Appellate Procedure: Appeal After Plea of Guilty or Nolo Contendre or Admission of Probation Violation
(Amend Cal. Rules of Court, rule 8.304)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			The Committee agrees with the Invitation to Comment that this current procedure "inappropriately requires clerks to make legal decisions." The Committee also notes that the current rule frequently leads to unnecessary delays: when clerks inaccurately deem an appeal to be "inoperative," the process of preparing an appellate record is deferred, leading to subsequent delays in resolution of the appeal.	No response required.
			The Committee therefore generally supports the proposed amendment to eliminate the clerk's role in determining whether appeals should be operative. The current proposal appropriately removes legal decision-making from the court clerk, while still limiting post-plea appeals in general to "issues that do not require a certificate of probable cause." The change properly vests this determination entirely with the court, rather than the clerk.	No response required.
			However, the Committee offers the following minor suggestion for the proposed amendment. The current proposal would amend rule 8.304 (b)(2)(B) as follows: "Grounds that arose after entry of the plea or admission and ~~do not affect the plea's validity~~, as a substantive matter, challenge the validity of the plea or admission." But the qualifier "as a substantive matter" appears to be unnecessary, and may open the door to confusion about the appealability of issues that only secondarily or incidentally	The committee agrees with this suggestion and has removed the phrase, "as a substantive matter," from the text of the rule. [Does subcommittee agree?]

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	Committee Response
			"affect the plea's validity." The Committee therefore recommends either omitting the qualifier or retaining the prior language. Retaining the prior language would also ensure consistency with the existing body of case law—where the term "affect the plea's validity" has already been well-defined by California courts. The Committee also notes that clerk's and reporter's transcripts must be prepared by the superior court once an operative notice of appeal has been filed. The amendment may therefore result in appellate records being prepared for some cases even when they do not present appealable issues. Since notices of appeals in felony matters are generally filed by attorneys rather than the litigants themselves, these will hopefully be uncommon. However, a review of internal court statistics involving inoperative appeals—comparing the number that are subsequently deemed operative with the number that receive no further action—would help reveal the scope of this potential hurdle. Superior court clerks and staff may have additional insight, assuming adoption of the proposed amendment, on whether the amended rule has required the use of additional resources.	The committee appreciates these thoughts on whether the proposed new procedure may result in preparation of appellate records in cases that do not raise appealable issues.
2.	Central California Appellate Program By Lena Thorpe Executive Director	A	**Appellate projects' interest** The Court of Appeal projects [FN 1 Another project, the California Appellate Project, San Francisco (CAP-SF), administers appointed	The committee notes the commenter's support for the proposal and appreciates the information on the role and perspective of the appellate projects.

	Commenter	Position	Comment	Committee Response
	On Behalf of: Elaine A. Alexander, Executive Director Appellate Defenders, Inc. Patrick McKenna, Executive Director Sixth District Appellate Program Jonathan Soglin, Executive Director First District Appellate Project Rick Lennon, Executive Director California Appellate Project, Los Angeles		death penalty cases in the California Supreme Court.] are non-profit corporations created pursuant to California Rules of Court, rule 8.300(e), which contract with the Courts of Appeal through the Judicial Council of California, Appellate Court Services, to oversee the system of court-appointed counsel on appeal in their respective districts. [FN 2 The Court of Appeal projects include the First District Appellate Project (FDAP), located in Oakland; California Appellate Project, Los Angeles (CAP-LA), serving the Second District; Central California Appellate Program (CCAP), located in Sacramento and serving the Third and Fifth Districts; Appellate Defenders, Inc. (ADI), located in San Diego and serving the Fourth District; and Sixth District Appellate Program (SDAP), in San Jose.] The central goal of the offices is to improve the quality of indigent representation on appeal, assist the Court of Appeal in administering criminal, juvenile, and limited civil appeals by indigents who are entitled to the appointment of counsel at public expense. Their caseload covers criminal, juvenile delinquency and dependency, and civil commitment appeals, certain writs, and other proceedings requiring appointed counsel in the appellate courts. The projects also handle non-capital appointed cases from their respective districts in the California Supreme Court. The guiding concept of the projects is to strengthen the resources of appellate	Nor further response required.

	Commenter	Position	Comment	Committee Response
			practitioners, to oversee this work, and attempt to assure consistently satisfactory representation of all clients. In fulfillment of its goals, the projects perform the preliminary case processing of notices of appeal. This includes the screening of notices of appeal once they have been filed and processed by the Court of Appeal. Also, California Rule of Court, rule 8.406(c) requires that the superior court clerk must mark a late or inoperative notice of appeal as received but not filed and send a copy of the marked notice of appeal to the district appellate project. This places a responsibility on the appellate project to screen the notice of appeal and the clerk's notice. In certain instances, the appellate project communicates with the superior court to request reconsideration of the determination that a notice was untimely or failed to meet other requirements. Also, the appellate project may communicate with the party and trial attorney based on the clerk's notice. In some instances, the late or inoperative filing is only noticed after a notice of appeal has been processed, a record prepared, and before or after the appointment of counsel. In those instances, it is the appointed counsel project that is responsible for interacting with the party whose appeal has been dismissed or assisting the appointed counsel upon the dismissal of the appeal. [FN 3 The appellate projects have a number of other contractual responsibilities, not	No further response required.

	Commenter	Position	Comment	Committee Response
			specified here because they are not directly related to the subject of this comment.] **Projects' position** The appellate projects favor a rule change that facilitates the processing of the notices of appeal in criminal cases that follow a plea of guilty or no contest or an admission of a probation violation. **Request for Specific Comments** **1. Does the proposal appropriately address the stated purpose?** The proposed rule amendments are a useful improvement to reach the committee's stated goals. The addition of the revised rule 8.304(b)(3) clarifies that an appeal is operative after a certificate of probable cause has been denied. The trial court's denial of a certificate allows the appeal to proceed on limited issues. Currently, the clerk's determination is relatively easy if the form notice of appeal, CR-120, is used because either box 2.a.(1) (sentencing only) or box 2.a.(2) (motion to suppress under Penal Code section 1538.5) is marked. The onus on the clerk comes when trial counsel or a defendant in propria persona fashions their own notice that requires review of paragraphs or pages of description to distill whether the appeal fits within one of the form boxes.	The committee notes the commenters' support for the proposal. The committee appreciates this response to its request for specific comments.

SPR21-02

Appellate Procedure: Appeal After Plea of Guilty or Nolo Contendre or Admission of Probation Violation
(Amend Cal. Rules of Court, rule 8.304)

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	Commenter	Position	Comment	Committee Response
			The boxes, however, can also be a source of the problem. In our experience, and as noted in the proposal itself ("it is not uncommon for both self-represented defendants and attorneys to check the wrong box or boxes, [or] check no boxes"). If a defendant or defense counsel uses the form and only checks the certificate of probable cause box, and the certificate of probable cause is denied, some clerks may deem the notice of appeal inoperative instead of construing it as operative as to non-certificate issues. This proposed rule change solves that problem by directing court clerks to treat such an appeal as operative as to non-certificate issues.	No further response required.
			The appellate projects spend a lot of time trying to remedy these defective notices of appeal either by telling the defendant or defense counsel to file an amended notice of appeal checking a non-certificate box if the 60-day deadline has not run yet, or by filing motions to amend/construe notices of appeal as being taken from grounds not requiring a certificate, which often involves an additional step of obtaining a declaration from the defendant or defense counsel of what was intended. (See, e.g., *People v. McEwan* (2007) 147 Cal.App.4th 173, 177-179. [denying such a motion because "Defendant's application to this court could have included proof of his intent to appeal on non-certificate grounds based on matters outside the	The committee notes the commenters' position that the proposal will save resources of both courts and the appellate projects.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	Committee Response
			record" – e.g., a declaration – "but it failed to do so"].) This rule change, therefore, will accomplish the stated goal of relieving trial court clerks of the responsibility of determining whether a notice of appeal following a guilty or nolo contendere plea is operative if no certificate was requested or if a request for a certificate was denied, and it will relieve appellate courts of the burden of entertaining motions to deem notices of appeal operative as to non-certificate issues where the defendant has not obtained a certificate. **2. Would the proposed rule changes have an impact on preparation of the record on appeal? If so, please describe.** The record on appeal is no different for any operative appeal from a judgment of conviction. The composition of the normal record on appeal is defined in rule 8.320. The proposal that would clarify the process for determining whether an appeal is operable would not affect the preparation of the record. The essential portions of the record on appeal following a guilty plea or admitted probation violation would be the same as one in which a certificate of probable cause was issued. Even though a "sentencing only" appeal does not challenge the plea, the record still requires the reporter's transcript of the plea and other portions of record to determine whether the trial	The committee appreciates this response to its request for specific comments.

	Commenter	Position	Comment	Committee Response
			court carried out the terms of the plea. When a plea bargain is not implemented according to its terms, due process principles are implicated. (*People v. Villalobos* (2012) 54 Cal.4th 177, 182; accord, *People v. Mancheno* (1982) 32 Cal.3d 855, 860.) A due process claim based on a failure to implement the plea bargain may be forfeited where the trial court provides the advice pursuant to Penal Code section 1192.5 so that the defendant is aware that he may withdraw his plea if the sentencing court does not accept the plea terms. However, where the lay defendant may not be aware that the terms of the agreement have been breached, his failure to object or withdraw his plea does not constitute forfeiture of the due process claim. (See *People v. Newton* (1974) 42 Cal.App.3d 292, 298.) **Additional considerations** **1. How could the grounds be more clearly stated in layman's terms to exercise their right to appeal?** The grounds for appeal stated in proposed rule 8.304(b)(2)(B) could be simplified for the layperson by using the language of the CR-120 notice of appeal form: "(B) The sentence or other matters occurring after the plea that do not affect the validity of the plea."	The committee modified this provision to remove the phrase “as a substantive matter” (see response to California Lawyers Association, above). References to “admission” were added so that the provision expressly applies to both pleas and admissions of probation violation. The committee considered further modifications but believes the proposed language of rule 8.304(b)(2)(B), as

	Commenter	Position	Comment	Committee Response
			Conclusion Thank you for reviewing our comments. The projects look forward to an amended rule that addresses current problems in initiating an appeal.	modified following circulation for public comment, is sufficiently clear and correct. [Does subcommittee agree?] No response required.
3.	Adrian Contreras Attorney	NI	I practice criminal law and have a concern with this proposed rule change. The proposed amendment seeks to enumerate the entire universe of orders that require a certificate of probable cause and those that don't. However, I can already see that it does not account for motions to vacate a conviction under Penal Code section 1473.7, subdivision (a)(1). Subdivision (f) of that statute expressly states it is an appeal order under Penal Code section 1237, subdivision (b). I could see a situation where either a defendant or defense attorney wants to file an appeal on a PC 1473.7 order and the superior court clerk disagree about whether a notice of appeal is needed. Perhaps the proposed rule change could have a "catch-all" provision saying a certificate of probable cause is not needed if some other statute expressly states it is not needed, like in PC 1473.7, subdivision (f). Plus, that would avoid having to amend the rule every time the Legislature in the future expands the class of orders that do not need a certificate of probable cause.	The committee appreciates the commenter's feedback. Under the rule, the two categories of appeals that do not require a certificate of probable cause are unchanged substantively by the proposed amendments. The committee is unaware of any confusion regarding statutes that expressly authorize an appeal under section 1237(b), and declines to add a third category to the rule. The committee will, however, retain the suggestion for consideration in the future if any issues arise. [To Rules Subcommittee: Do you agree with this response or prefer to add a catch-all provision to account for statutes that provide for an appeal under section 1237(b), e.g., Penal Code section 1473.7(f)? See possible language in memo.]

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	Commenter	Position	Comment	Committee Response
4.	Robert Gant Owner North Hollywood	A	No specific comment.	The committee notes the commenter's support for the proposal.
5.	Orange County Bar Association By Larisa M. Dinsmoor President	N	The proposed amendment to California Rules of Court, Rule 8.304 would negatively impact litigants and deny them due process. Under Penal Code section 1237.5, litigants who decide to appeal a plea of guilty or an admission of a probation violation must file both a notice of appeal and a certificate of probable cause. Under the current law, if a litigant fails to file a certificate of probable cause, the clerk is required to notify the litigant and send a copy of the marked appeal to the district appellate project. With the proposed amendments, the clerk would no longer notify the litigant or the appellate project. If the certificate of probable cause is missing, any appellate issues from the plea or admission could not be addressed by the appellate court. This proposed amendment would harm a number of individuals who are seeking appellate review on pleas or admissions. First, many people who file for appeal after a plea or admission are doing so pro per and likely do not have the legal acumen to know that they must file the certificate of probable cause. In addition, some lawyers do not understand the certificate of probable cause process and could	The committee notes the commenter's opposition to the proposal. [Note to Rules Subcommittee: what response to this comment?]

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	Commenter	Position	Comment	Committee Response
			unintentionally harm defendants seeking an appeal under these circumstances. This proposed amendment will cause litigants to lose the ability to have certain appellate issues considered by reviewing courts. Moreover, litigants will not even know that they made a mistake and will not have the ability to correct the mistake.	
6.	Superior Court of California, County of Los Angeles By Bryan Borys	A	In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following: Does the proposal appropriately address the stated purpose? Yes. Clarification of the current rule is welcome. Would the proposed changes have an impact on preparation of the record on appeal? If so, please describe. The impact is likely to be more timely preparation of the record for appeals that fall within this category, as the court will not have to wait for the ruling on the certification of probable cause, or for appeals court review, to prepare the notice. The advisory committee also seeks comments from courts on the following cost and implementation matters: Would the proposal provide cost savings? If so, please quantify. The proposal will provide cost savings associated with elimination of the notice	The committee notes the commenter's support for the proposal. No response required. The committee appreciates these comments on the impact of the proposed rule change. The committee appreciates this information on cost and implementation matters.

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	Commenter	Position	Comment	Committee Response
			requirement. Note, however, that in instances in which the appeal goes forward, the trial court prepares the record, and then the Court of Appeal subsequently determines that the appeal is invalid, the trial court will have wasted time and money in preparing the record. This is not a reason to reject the proposal; the clarity provided by the proposal is necessary. But there may be no net cost savings from this proposal. What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems. Minor programming and training costs.	No further response required.
7.	Superior Court of California, County of San Diego By Mike Roddy Executive Officer	A	• Does the proposal appropriately address the stated purpose? **Yes.** • Would the proposed changes have an impact on preparation of the record on appeal? If so, please describe. **No. The appeals clerks already follow this proposed practice.** • Would the proposal provide cost savings? If so, please quantify. **No.**	The committee notes the commenter's support for the proposal and appreciates the feedback on its request for specific comments. No further response required. No further response required.

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(Amend Cal. Rules of Court, rule 8.304)

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	Commenter	Position	Comment	Committee Response
			• What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? **The information would need to be incorporated into written procedures.**	No further response required.
			• Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **Yes.**	No further response required.
			• How well would this proposal work in courts of different sizes? **There should be no disparate impact between courts of different sizes.**	No further response required.

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JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR21-__

Title
Appellate Procedure: Appeal After Plea of Guilty or Nolo Contendere or Admission of Probation Violation

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 8.304

Proposed by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Action Requested
Review and submit comments by May 27, 2021

Proposed Effective Date
January 1, 2022

Contact
Christy Simons, 415-865-7694
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Executive Summary and Origin

The Appellate Advisory Committee proposes amending the rule that governs initiating an appeal in a felony case after a plea of guilty or nolo contendere or after an admission of a probation violation. In these cases, a certificate of probable cause is required if the defendant seeks to appeal an issue that challenges the validity of the plea or admission. Currently, the rule requires the trial court clerk to mark a notice of appeal "Inoperative" if the defendant did not file the statement requesting a certificate of probable cause or the trial court denied a certificate. However, because an appeal can be based on grounds that do not require a certificate, the clerk must review the notice of appeal and decide whether it should be filed notwithstanding the lack of a certificate. The amendments would reorganize the rule, simplify procedures, and eliminate the onus on the clerk to make a legal decision. The proposal is based on a suggestion from a member of another advisory committee.

Background

Rule 8.304 of the California Rules of Court governs filing an appeal in a felony case. Subdivision (b) addresses notices of appeal filed after a plea of guilty or nolo contendere or an admission of a probation violation. The defendant filing the appeal must request a certificate of probable cause for any challenge to the validity of the plea. If the superior court does not issue a certificate, either because the defendant did not request one or the court denied the request, the rule sets forth the procedure for clerks to follow: "If the defendant does not file the statement required [to request a certificate of probable cause] or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal 'Inoperative,' notify the

defendant, and send a copy of the marked notice of appeal to the district appellate project." (Rule 8.304(b)(3).)

However, in the next paragraph, the rule also provides that a defendant need not request a certificate of probable cause if the notice of appeal states that the appeal is based on the denial of a motion to suppress evidence under Penal Code section 1538.5 or grounds arising after the plea, such as sentencing issues, that do not challenge the validity of the plea. (Rule 8.304(b)(4).)

As a result, a superior court clerk in receipt of a notice of appeal that is not accompanied by a request for a certificate of probable cause or the certificate itself must decide whether to mark it "Inoperative" or file it and allow the appeal to proceed. While the notice of appeal forms often contain check boxes that allow the defendant to specify that the appeal is from denial of a motion to suppress evidence or sentencing only and is not designed to attack the plea, it is not uncommon for both self-represented defendants and attorneys to check the wrong box or boxes, check no boxes, or otherwise submit a notice of appeal that does not alert the clerk that no certificate of probable cause is required. Incorrect decisions to mark a notice of appeal inoperative result in delay and additional work for litigants, appellate projects, and the courts.

The Proposal

This proposal would clarify the rule and eliminate a procedure that inappropriately requires clerks to make legal decisions. It would save time and reduce work for the courts, and avoid delay in felony appeals following a plea or admission of probation violation.

Currently, rule 8.304(b)(1) indicates that, "except as provided in (4)," a notice of appeal must be filed with a certificate of probable cause or the statement requesting a certificate. Under subdivision (b)(2), if a certificate is requested, the court must issue it or deny the request within 20 days. Subdivision (b)(3) requires the clerk to mark a notice of appeal filed without a certificate or a request for a certificate "Inoperative." Subdivision (b)(4) provides that a defendant "need not comply with (1)" if the notice of appeal states grounds that do not require a certificate. Thus, the rule suggests that a notice of appeal filed without a certificate or a request for one is improper and the clerk is expected to reject the filing and take other steps unless exceptions apply. To more accurately reflect the law and clarify that the distinction to be drawn is whether the grounds for the appeal require a certificate, not whether a certificate is requested or attached to the notice of appeal, the proposed amendments would group paragraphs (1) and (2) of subdivision (b) together as provisions addressing appeals that require a certificate of probable cause.

New subdivision (b)(2) would address appeals for which no certificate of probable cause is required, that is, appeals that either challenge the denial of a Penal Code section 1538.5 motion to suppress evidence or are based on grounds such as sentencing or other post-plea matters that do not challenge the validity of the plea.

New subdivision (b)(3) would address appeals for which no certificate of probable cause was requested or granted. Rather than requiring clerks to mark the notice of appeal inoperative, notify

the defendant, and send a copy of the marked notice of appeal to the district appellate project unless the notice of appeal states that the appeal is based on grounds that do not require a certificate of probable cause, the rule would simply provide that if a notice of appeal is filed without the statement requesting a certificate of probable cause or the trial court denies the request, the appeal is limited to issues that do not require a certificate of probable cause.

The proposal also includes a conforming change to subdivision (c) regarding notification of the appeal. Subdivision (c)(1) requires the superior court clerk to promptly send notification of the filing of a notice of appeal to certain individuals including the attorneys of record, any unrepresented defendant, the reviewing court clerk, and each court reporter. The rule further provides that if the defendant also files a statement requesting a certificate of probable cause, the clerk must not send the notification unless the superior court files a certificate. This provision would no longer be necessary because the proposed amendments provide that appeals in which a certificate is requested but denied may proceed but will be limited to issues that do not require a certificate of probable cause.

Finally, the advisory committee comment to subdivision (b) has been rewritten to reflect the changes to the rule and to include references to Supreme Court cases analyzing circumstances in which no certificate of probable cause for the appeal is required.

Alternatives Considered

The committee considered taking no action, but determined that the proposed changes would provide a substantial benefit to litigants and the superior courts by simplifying procedures and avoiding delay caused by the incorrect rejection of notices of appeal presented for filing.

The committee also considered a more limited option of amending only the provision requiring the clerk to mark the notice of appeal inoperative. That option would still have required action by the clerk to indicate that the appeal would be limited to issues that do not require a certificate of probable cause. The committee rejected this option in favor of clarifying the rule and eliminating the need for the clerk to review and evaluate the sufficiency of the notice of appeal and take action based on that evaluation.

Fiscal and Operational Impacts

Implementation requirements include providing training for superior court staff and publicizing the change in procedure to the criminal defense bar and the appellate projects. There should be minimal implementation costs, if any. The operational impacts would include time savings for superior court clerks processing notices of appeal filed in these cases.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Would the proposed changes have an impact on preparation of the record on appeal? If so, please describe.

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 8.304, at pages 5–9