JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date
November 17, 2015

To
Members of the Joint Appellate Technology Subcommittee

From
Katherine Sher, Attorney, Legal Services

Subject
Possible changes to be considered for inclusion in the Phase 2 Rules Modernization proposal

Action Requested
Please read before November 20th subcommittee conference call

Deadline
November 20th, 2015

Contact
Katherine Sher
415-865-8031
katherine.sher@jud.ca.gov

Introduction

As discussed in the October 6th JATS conference call, one of the projects JATS will work on this year is Phase 2 of the Rules Modernization Project as to the appellate rules. In 2015, as part of Phase 1 of the Rules Modernization Project JATS developed proposals for technical, non-substantive changes to the appellate rules to facilitate electronic filing, electronic service and modern business practices. In 2016, this work will continue, in Phase 2, with the development of proposals for more substantive changes needed to ensure that the rules are consistent with modern practices.

At its November 20th conference call, JATS will be discussing what rule and form changes to include in Phase 2 of the Rules Modernization project. This memo provides a list of the various appellate rules and forms changes that have been proposed that could be included in Phase 2. The list is broken into those which are more substantive changes and those which are technical changes that were not included in the Phase 1 proposal. Within the list of technical changes, there are separate lists of proposed rule changes and proposed changes to forms.

It may not be possible, due to workload constraints, for all of the listed proposals to be included in a Phase 2 Rules Modernization proposal for this coming year. If JATS decides to prioritize some items and not others for inclusion in this year's proposal, other items may be considered as part of further Rules Modernization proposals in future years.

Possible Items for Inclusion in Rules Modernization Project

Substantive Changes

The items listed in this section are substantive changes. For some items, there has been enough previous discussion to allow a detailed description of what has been proposed (although of course the specifics are open to consideration). For other items (numbers 2, 4, 5, 6 and 7), the proposal as listed is simply a description of the area to be addressed. If JATS decides to include these in the Rules Modernization proposal for the coming year, the details of how to address the issue will need to be worked out.

1. Changes were proposed in phase 1, but not carried out, to rules 8.122, 8.336 and 8.838, that to allow use of an electronic record on appeal. These were deferred from phase 1 after a comment noted possible prejudice to self-represented, indigent or incarcerated appellants. , The intent was to make these changes as part of Phase 2, while also putting in place protections (similar to those in rules for those parties who may not be able to work with an electronic record. This issue also arises in rule 8.416, regarding appeals from terminations of parental rights and possibly elsewhere in the rules.

2. What type of bookmarking/indexing/electronic tabbing should be required for electronic records, and should electronically filed documents be required to be put in "volumes"? Language regarding volumes is in rules 8.63 (extensions given in cases with long records – as measured by number of volumes of clerk's and reporter's transcripts); 8.112 (documents filed with petition for writ of supersedeas to be put into volumes); 8.144 (form of record); 8.486 (documents filed with writ petitions); 8.824 (documents filed with petition for writ of supersedeas in appellate division); 8.838 (record in civil appeals to appellate division) and 8.932 (writs in appellate division).

3. Changing the rules to give the appellate courts discretion to order e-filing and e-service where not allowed now under rule 8.73 (for a self-represented party; where the party would be required to pay a fee to an electronic filing service provider to file or serve the documents and the party objects to paying this fee in its opposition to the motion for electronic filing or service, or for a trial court). This is a simple change to

make but raises the significant issue of the scope of discretion of the appellate court to order electronic filing and service.

4. Creation of standards for the digital format of transcripts, as allowed under Code of Civil Procedure section 271(b): "Except as modified by standards adopted by the Judicial Council, the computer-readable transcript shall be on disks in standard ASCII code, unless otherwise agreed by the reporter and the court, party, or other person requesting the transcript." Justice Bruiniers has suggested that JATS look at this, and further suggests that searchable PDF might work better than ASCII.

5. Creation of rules to govern e-filing and e-service (like rules 8.70 to 8.79 in the appellate courts), and access to electronic court records (like new rules 8.80 to 8.85 in the appellate courts) in the appellate divisions of Superior Courts.

6. How to handle sealed and confidential records where the records are electronic (rules 8.45 to 8.47, and 8.482, for conservatorship appeals).

7. Death penalty appeals. Existing rules (rules 8.613, and 8.616 to 8.622) have requirements for preparation of the clerk's transcript and the reporter's transcript, including requirements for the original and certain numbers of copies to be prepared, and a requirement for a computer-readable version of the reporter's transcript (8.613). These rules could be updated to better facilitate use of electronic reporter's transcripts and records. On reporter's transcripts, statutory change is necessary before some changes can be made, as CCP 271 requires the original of a reporter's transcript to be paper.

8. Amend Rule 10.1028 (d)(2) to allow retention of a true and correct electronic copy of the reporter's transcript rather than of the original, which must be a paper copy under CCP Section 271 (a).

Technical Changes

Rules

1. In Rule 8.104 (c), regarding what constitutes entry of judgment, adding language to say that orders signed electronically have same effect as orders with an original signature. This is a purely technical change; under Government Code section 68150 (g) documents signed electronically by judicial officers hold the same validity and legal force as documents signed on paper. However, in some cases appellate courts have interpreted "signed" to require a signature on paper.

2. Rules 8.452 and 8.456, having to do with the substantive writ petition filed after a notice of petition under rules 8.450 or 8.454, requires the reviewing court, if it either

stays or prohibits proceedings set to occur within 7 days or requires action within 7 days, to give telephonic notice to the trial court. This could be changed to allow electronic notice. The same issue is presented in rule 8.489 as to writ petitions generally.

3. "Return" of records – references to this throughout the appellate rules. In Phase 1, most of the rules where this occurs were left unchanged. It may be that change is unnecessary, if it is clear that an electronically transmitted record need not be returned, but it is an issue to consider. There is a related issue regarding rule 8.153, which governs lending of the record from one party to another.

Forms

1. Change to proofs of service on the Notice of Appeal form and other appellate forms to allow for electronic proof of service.

2. Change to Notice of Appeal form and other appellate forms so that they no longer state that providing the email address of the attorney (or party without attorney) is optional.

3. Change to form MC 275 (Petition for Writ of Habeas Corpus) to modify instructions to reflect possibility of e-filing (where instructions dictate the number of copies to be filed).

Subcommittee Task

The subcommittee's task at the November 20th meeting is to determine which of these proposals should be included in the Phase 2 Appellate Rules Modernization Project for this coming year, which can be deferred for consideration in future Rules Modernization proposals, and which should not be pursued at all.

As time permits, the subcommittee may also wish to discuss what, specifically, should be done in those areas where the item notes the need to address a subject without stating the specifics of the changes to be made.