

Hon. Donna McQuality, President
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IN THE SUPREME COURT STATE OF ARIZONA

IN THE MATTER OF) Supreme Court No. R-22-0009
PETITION TO ADOPT)
RULE 124 OF THE RULES)
OF THE SUPREME COURT OF)
ARIZONA) COMMENT

The Arizona Association of Superior Court Clerks (the Clerks Association) submits the following Comment to the Petition to Adopt Rule 124 of the Rules of the Supreme Court of Arizona filed by the Administrative Office of the Courts (AOC). The Clerks Association is made up of the elected Clerks of the Superior Courts for each of Arizona’s fifteen (15) counties. Each county has a Superior Court Clerk elected to a four year term. The role of the Clerk is to maintain court case files; certify documents; collect fees; issue summonses, subpoenas, and marriage licenses; and perform other duties required by law. The Clerk is the custodian of record for all documents filed in matters before the Superior Court.

The Clerks Association strongly supports the AOC’s goal of the facilitation of the expansion of electronic filing in the Superior Court, and understands that the proposed rule is intended to implement the changes to A.R.S. § 12-109 made by Senate Bill 1265, effective on September 21, 2021.¹ However, after a review of the legislative history of SB 1265, as well

¹ Senate Bill 1265 was approved by the Governor on March 26, 2021, and in that Bill it is Subsection B of A.R.S. § 12-109 that provides the Court with the ability to allow documents that require a sworn written declaration, verification, certificate, statement, oath or affidavit to be signed with an electronic signature. But subsequent to that, on June 30, 2021, the Governor approved House Bill 2893, which provided additional changes to A.R.S. § 12-109, and as a result made what was Subsection B now

as the provisions of A.R.S. § 18-106, which is specifically referenced in the Senate Fact Sheet for SB 1265, it appears that the AOC's proposed mechanisms for an electronic signature are far different than the Legislature likely intended.

In its Petition, the AOC utilizes a definition of "electronic signature" – typed signatures utilizing "/s/" on the signature line with the person's typed name immediately following the "/s/," or appearing immediately under the signature line. Such is different than the statutory definition of the term in A.R.S. § 18-106, which provides that the electronic signature is to be unique to the person using it, capable of reliable verification and linked to the record in a manner so that if the record is changed the electronic document is invalidated.

The Clerks Association acknowledges that various Rules of Procedure, including Rule 11(a)(2), *Arizona Rules of Civil Procedure*, Rule 1.6(c)(5), *Arizona Rules of Criminal Procedure*, and Rule 26(a)(2), *Arizona Rules of Family Law Procedure*, as well as multiple Supreme Court Administrative Orders permit the use of a typed signature on the electronic filings of pleadings, and does not dispute their validity or efficacy of use when submitting a pleading with the Clerk via a secure, electronic portal, i.e., eFile Portals maintained and operated by the AOC or Clerks' Offices.

However, the Clerks Association cannot ignore the fact that A.R.S. § 12-109(C) as currently written is not limited to the submission of pleadings via a secure electronic portal, and actually makes no reference to the manner in which the document is submitted, via an electronic portal or an in-person, paper copy submission. Further, A.R.S. § 12-109(C) goes far beyond the submission of court pleadings, but includes documents, other than court pleadings, that require a sworn written declaration, certification, statement, oath or affidavit,

of which an “/s/” typed signature may very well be legally insufficient under other laws, including, but not limited to, the laws of electronic notarization and remote online notarization, as well as current law governing electronic wills. The laws governing electronic and remote electronic notarization as well as electronic wills require that the electronic signature be unique to the person using it, capable of verification, under the sole control of the person using it and linked to the electronic document to which it relates so that if the document is changed the electronic signature is invalidated. *See* A.R.S. § § 41-351, 41-376, A.R.S. § 14-2518.²

Since the enactment of changes to A.R.S. § 12-109, Clerks Offices have experienced significant problems with parties, both *pro per* and *pro se* litigants as well as licensed attorneys, who seek to use typed signatures on paper filings. Filers appear to believe typed signatures are authorized as “electronic signatures” for pleadings and other documents that are to be submitted to the Court, but not electronically filed, either by the choice of the filing party or the type of document being filed is specifically prohibited from being submitted electronically and must be filed in paper format. Such filings containing typed signatures are routinely rejected for documents filed in paper, as mechanisms are not in place to verify the signature.

The Clerks Association notes that the intention of proposed Rule 124 appears to allow for an “/s/” signature only on documents that are submitted through a secure, electronic portal, but the Clerks Association fears that proposed Rule 124 will only reinforce the likely incorrect notion that SB 1265 authorizes the use of typed signatures on documents filed in paper, and specifically those that require a sworn written declaration, verification, certificate, statement, oath, or affidavit.³

² Arizona has also adopted the Uniform Electronic Transactions Act, and it defines electronic signature similarly to how such is defined by A.R.S. § § 18-106, 41-351, 41-376 and 14-2518.

³ It is the understanding of the Clerks Association that it is the intent of the AOC and Clerks to develop an eFile platform for use in Probate cases, and proposed Rule 124, and the use of an “/s/” type

The Petition and SB 1265 both seek to accomplish the expansion of eFile, which the Clerks Association strongly supports, not only as a measure of convenience to litigants, but in that it furthers access to justice, while also benefiting Clerks' Offices seeking to maintain an electronic court record. But the inconsistencies between the Legislature's definition of an "electronic signature" and that contemplated by proposed Rule 124 should be addressed in deeper discussion with stakeholders, such as Clerks' Offices, judicial officers, as well as practitioners, prior to enacting such a Rule.

The Clerks Association therefore recommends that at this time R-22-0009 be either withdrawn or denied without prejudice. The Clerks Association respectfully recommends that the Court form a working group with a diverse membership, inclusive of interested stakeholders, including practitioners, judicial officers, court administrators and representatives of Clerks' Offices, to holistically address the conflict between the differing statutory and rule definitions of the term "electronic signature."⁴

DATED this 27th day of April, 2022.

/s/ Donna McQuality
Hon. Donna McQuality, President
Arizona Association of Superior Court Clerks

This Comment has been filed via electronic filing in accordance with deadlines set forth in the Supreme Court's January 27, 2022 Order.

signature may not be sufficient for many Probate filings due to the inability to verify the identity of the person making the declaration, verification, certification, statement, oath or affidavit, as that party is likely not going to be the filing party.

⁴ Representatives of the Clerks Association would be more than willing to participate in any stakeholder workgroup that may be assembled to address the use of electronic signatures, as it is an issue that is of growing concern and will require a more critical understanding with future technological advancements.

A copy of this Comment has been mailed to the Petitioner at the following:

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