JUDICIAL COUNCIL
OF CALIFORNIA

APPELLATE ADVISORY
COMMITTEE

www.courts.ca.gov/aac.htm
aac@jud.ca.gov

APPELLATE ADVISORY COMMITTEE
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:	Monday, January 30, 2017
Time:	1:00 PM
Public Call-in Number:	1-877-820-7831, Passcode: 5846649

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))

A. Call to Order and Roll Call

B. Chair's Report

C. Approval of Minutes

Approve minutes of the November 7, 2016 Appellate Advisory Committee meeting.

II. PUBLIC COMMENT (CAL. RULES OF COURT, RULE 10.75(K)(2))

Written Comment

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 or mailed or delivered to Judicial Council of California, attention: Heather Anderson. Only written comments received by Friday, January 27 will be provided to advisory body members.

III. DISCUSSION AND POSSIBLE ACTION ITEMS (ITEMS A–L)

Item A

Legislative Update

Item B

Rules to Implement Senate Bill 1065 (Action Required)
Consider public comments on proposed rules to implement the requirements of Senate Bill 1065.

Item C

Appealability of Orders Following Voluntary Dismissal (Action Required)
Consider whether to propose amendments to the statute on appealability to permit appeals from orders following a voluntary dismissal.

Item D

Record on Appeal in Juvenile Cases (Action Required)
Consider whether to propose rule or statutory amendments regarding the record in cases where the appellant is not a party who would ordinarily have access to the juvenile case file.

Item E

Input to the Family and Juvenile Law Advisory Committee on Rule 5.590 (Action Required)
Consider and provide input on the course of action proposed by the Family and Juvenile Law Advisory Committee and its staff in response to a proposal to amend rule 5.590

Item F

Update from the Privacy Subcommittee

Item G

Rule Regarding Settled Statements (Action Required)
Consider whether to recommend circulation of proposed amendments to the rule regarding settled statements or a form to address difficulties in the timely preparation of these statements.

Item H

Format of Electronic Reporter's Transcripts (Action Required)
Consider proposed amendments to rule 8.144 to include additional provisions regarding the format of electronic reporter's transcripts.

Item I

Verification of Writ Petitions (Action Required)
Consider whether to recommend circulation of proposed amendments to the rules regarding writ petitions to consistently reflect statutory requirements for verification of petitions.

Item J

Record Designation in Limited Civil Appeals (Action Required)
Consider whether to recommend circulation of proposed revisions to the form for designating the record in limited civil appeals to address concerns about frequent defaults by appellant.

Item K

Service of Briefs in Misdemeanor Appeals (Action Required)
Consider whether to recommend circulation of proposed amendments to the rule on service of briefs in misdemeanor appeals to make it more consistent with the rule relating to briefs in felony appeals.

Item L

Payment for Partially Prepared Transcripts (Action Required)
Consider whether to recommend circulation of proposed amendments to clarify the payment for partially prepared transcripts in misdemeanor appeals.

IV. ADJOURNMENT

Adjourn

TAB IA

Appellate Advisory Committee

As of January 25, 2017

Hon. Louis R. Mauro, Chair
Associate Justice of the Court of Appeal
Third Appellate District

Ms. Laura Arnold
Deputy Public Defender
Law Offices of the Public Defender
County of Riverside
Murrieta

Hon. Kathleen M. Banke
Associate Justice of the Court of Appeal
First Appellate District
Division One

Mr. Kevin K. Green
Senior Counsel
Hagens, Berman, Sobel, Shapiro, LLP
San Diego

Mr. Jonathan D. Grossman
Appellate Attorney
6th District Appellate Program
Santa Clara

Hon. Adrienne M. Grover
Associate Justice of the Court of Appeal
Sixth Appellate District

Hon. Richard D. Huffman
Associate Justice of the Court of Appeal
Fourth Appellate District
Division One

Hon. Kent M. Kellegrew
Judge of the Superior Court of California,
County of Ventura

Mr. Daniel M. Kolkey
Gibson, Dunn & Crutcher LLP
San Francisco

Hon. Leondra R. Kruger
Associate Justice of the Supreme Court

Mr. Joseph A. Lane
Clerk/Executive Officer
Court of Appeal
Second Appellate District

Mr. Jeffrey Laurence
Senior Assistant Attorney General
California Department of Justice
Office of the Attorney General
San Francisco

Ms. Mary K. McComb
State Public Defender
Sacramento

Ms. Sheran L. Morton
Court Executive Officer
Superior Court of California,
County of Fresno

Mr. Jorge Navarrete
Court Administrator and Clerk of the Supreme Court

Appellate Advisory Committee

As of January 25, 2017

Mr. Dallas Sacher
Executive Director
Sixth District Appellate Program
Santa Clara

Hon. Stephen D. Schuett
Judge of the Superior Court of California,
County of Kern

Hon. M. Bruce Smith
Associate Justice of the Court of Appeal
Fifth Appellate District

Ms. Kimberly A. Stewart
Appellate Court Managing Attorney
Court of Appeal
Fourth Appellate District

Ms. Mary-Christine Sungaila
Partner
Haynes and Boone, LLP
Costa Mesa

Hon. Thomas Lyle Willhite, Jr.
Associate Justice of the Court of Appeal
Second Appellate District
Division Four

TCPJAC LIAISON

Hon. Elizabeth W. Johnson
Judge of the Superior Court of California,
County of Trinity

JUDICIAL COUNCIL CJER LIAISON

Ms. Adetunji Olude
Attorney
Center for Judicial Education and Research
Judicial Council of California

OGA LIAISON

Mr. Daniel Pone
Senior Attorney
Governmental Affairs
Judicial Council of California

JUDICIAL COUNCIL LEAD COMMITTEE STAFF

Ms. Heather Anderson
Supervising Attorney
Legal Services
Judicial Council of California

Appellate Advisory Committee
2016-2017 Subcommittee Assignments

Rules Subcommittee
Mr. Daniel Kolkey, Chair
Hon. M. Bruce Smith
Mr. Kevin Green
Mr. Jonathan Grossman
Hon. Leondra Kruger
Mr. Joseph Lane
Mr. Jeffrey Laurence
Ms. Mary McComb
Ms. Sheran Morton
Ms. Kimberly Stewart
Ms. Mary-Christine Sungaila
Hon. Thomas L. Willhite, Jr.

Appellate Division Subcommittee
Hon. Kent Kellegrew, Chair
Ms. Laura Arnold
Mr. Jonathan Grossman
Hon. Matthew P. Guasco (TCPJAC designee)
Hon. Elizabeth W. Johnson (TCPJAC liaison)
Ms. Sheran Morton
Hon. Jeffrey J. Prevost (TCPJAC designee)
Hon. Stephen Schuett
Ms. Jane Van Vloten(CEAC designee)

Joint Appellate Technology Subcommittee
Hon. Louis Mauro, Chair (ITAC and AAC)
Mr. Kevin Green (AAC)
Mr. Joseph Lane (AAC)
Mr. Jorge Navarrete (AAC)
Hon. Peter Siggins (ITAC)
Ms. Kimberly Stewart (AAC)
Mr. Don Willenburg (ITAC)

Legislative Subcommittee
Hon. Kathleen M. Banke, Chair
Hon. Adrienne Grover
Hon. Richard Huffman
Hon. Kent Kellegrew
Hon. Louis Mauro
Ms. Mary McComb
Mr. Jorge Navarrete

Ad Hoc Subcommittee on Privacy Issues in Appellate Court Opinions
Hon. Kathleen M. Banke, Chair
Mr. Kevin Green
Hon. Adrienne Grover
Mr. Daniel Kolkey
Mr. Jeffrey Laurence
Ms. Kimberly Stewart
Hon. Thomas L. Willhite, Jr.

TAB IB

TAB IC

JUDICIAL COUNCIL
OF CALIFORNIA

APPELLATE ADVISORY
COMMITTEE

www.courts.ca.gov/aac.htm
aac@jud.ca.gov

APPELLATE ADVISORY COMMITTEE

MINUTES OF OPEN MEETING

November 7, 2016
12:00 Noon

Advisory Body Members Present:	Justice Louis Mauro, chair, Ms. Laura Arnold, Mr. Kevin Green, Mr. Jonathan D. Grossman, Justice Adrienne Grover, Mr. Daniel Kolkey, Justice Leondra Kruger, Mr. Joseph Lane, Mr. Jeffrey Laurence, Ms. Mary McComb, Ms. Sheran Morton, Mr. Jorge Navarrete, Judge Stephen Schuett, Justice Bruce Smith, and Ms. Mary-Christine Sungaila
Advisory Body Members Absent:	Justice Kathleen Banke, Justice Richard Huffman, Judge Kent Kellegrew, Ms. Kimberly Stewart, and Justice Thomas Willhite, Jr.
Others Present:	Hon. Elizabeth Johnson, TCPJAC Liaison; Mr. Saul Bercovitch, State Bar of California; Ms. Adetunji Olude, Center for Judicial Education and Research Liaison; Mr Pone, Governmental Affairs; Ms. Christy Simons, Legal Services, and Heather Anderson, Committee Counsel

OPEN MEETING

Call to Order and Roll Call
The chair called the meeting to order at 12:00 noon, and roll call was taken.

Approval of Minutes
The advisory body reviewed and approved the minutes of the October 4, Appellate Advisory Committee meeting.

DISCUSSION AND ACTION ITEMS (ITEMS A–D)

Item A

Rules to implement Senate Bill 1065 (Action Required)
Consider whether to recommend circulation for public comment of proposed rules to implement the requirements of Senate Bill 1065.

Action:

The committee reviewed the proposal and made two modifications: (1) increasing the proposed time for the appellant to file an opening brief from 7 to 10 days; and (2) eliminating the

requirement to file hyperlinked briefs. With these changes, the committee recommended that this proposal be circulated for public comment.

Item B

Rules to implement section 271 of Senate Bill 836 (Action Required)
Consider whether to recommend adoption of proposed rules to implement the requirements of section 271 of Senate Bill 836.

Action:

The committee recommended adoption of these amendments as a technical amendments, without circulation for public comment.

Item C

Rules to implement Assembly Bill 2298 (Action Required)
Consider whether to recommend adoption of proposed rules to implement the requirements of Assembly Bill 2298.

Action:

The committee discussed this legislation and the draft rules. The committee concluded that the procedure contemplated by the legislation was not really an appeal and therefore any rules to implement this procedure did not belong in the Appellate Rules. The committee concluded that the Criminal Law Advisory Committee, the Civil and Small Claims Advisory Committee, and Juvenile Law Advisory Committee should be approached about forming an ad hoc working group to consider how best to implement this legislation.

Item D

Review of potential items for inclusion on proposed committee annual agenda (Action Required)
Consider what items to recommend for inclusion in the committee's proposed annual agenda for 2016-2017.

Action:

The committee reviewed the draft of the proposed annual agenda and approved it for submission to the Judicial Council's Rules and Projects Committee.

ADJOURNMENT

There being no further business, the meeting was adjourned.

Approved by the advisory body on enter date.

TAB IIIA

TAB IIIB

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
January 23, 2017

To
Appellate Advisory Committee

From
Heather Anderson, Supervising Attorney, Legal Services

Subject
Public Comments on Proposed Rules to Implement

Action Requested
Please read before January 30 committee meeting

Deadline
January 30, 2017

Contact
Heather Anderson
415-865-7691
heather.anderson@jud.ca.gov

Introduction

As you may recall, late last year, the Appellate Advisory Committee recommended circulating for public comment a set of proposed new rules of court intended to implement recent legislation that requires the Court of Appeal to issue its decision in cases involving the review of certain orders denying motions to compel arbitration no later than 100 days after the notice of appeal is filed. The Judicial Council's Rules and Projects Committee approved that recommendation and the proposed rules were circulated for public comment between December 5, 2016 and January 11, 2017. A copy of the invitation to comment is available at: http://www.courts.ca.gov/documents/SP16-13.pdf.

This memo discusses the public comments received on the proposal and the rules subcommittee's recommendations regarding responding to these comments.

Public Comments

Nine individuals or organizations submitted comments on this proposal. Three commentators agreed with the proposal, four agreed with the proposal if modified, and two did not indicate a position on the proposal overall but provided comments. A tenth person submitted input to the

comment box, but the input was not about this proposal. The full text of the comments received on the proposal and the rule subcommittee's suggested committee responses are set out in the attached comment chart. The main substantive comments and rule subcommittee's proposed responses are also discussed below, but there are other comments and responses that are discussed only in the comment chart, so **please review the draft comment chart carefully**.

Notice of Appeal Period

As you may recall, with a few exceptions, the proposed rules were generally modeled on existing rules 8.700 – 8.702 which implement statutory requirements for expedited review in certain cases under the California Environmental Quality Act (CEQA). These exceptions included setting a longer notice of appeal period and a shorter period for the filing of the appellant's opening brief than under the CEQA rules. The CEQA rules require that the notice of appeal be filed within 5 days after notice of entry of the judgment is served and then give the appellant 25 days from the filing of the notice of appeal to file an opening brief. As circulated, these proposed new rules would instead require the notice of appeal to be filed within 20 days after notice of entry of the order is served and would give the appellant 10 days after the notice of appeal is filed to serve and file an opening brief. Under this proposal, the appellant would be expected to utilize some of the proposed 20-day notice of appeal period to prepare its opening brief. When it developed the proposed rules for circulation, the committee decided that this approach was preferable because it would provide greater flexibility in scheduling the remaining briefing while still allowing time for the court's deliberations during the statutorily–mandated 100-day period for the appeal.

In the invitation to comment, the committee specifically sought comments on which approach is preferable – the proposed approach of having a longer notice of appeal period and shorter period for filing the appellant's opening brief or the alternative approach of having a 5-day notice of appeal period and longer period for filing the appellant's opening brief. Five commentators provided specific input on this question:

- Two commentators – the California Assisted Living Association (CALA) and the Superior Court of Los Angeles County – expressed a preference for the 5-day notice of appeal period:
  - CALA expressed concern about making the briefing periods for appellants and respondents similar and that appellants might want to file the notice of appeal early for purposes of obtaining a stay
  - The Superior Court of Los Angeles County expressed a desire for the rules to be similar to those for the expedited CEQA review
- On commentator – the Court of Appeal, Fifth Appellate District, suggested shortening the notice of appeal period to 10 or 15 days in order to shorten the overall period for completing these cases.
- Two commentators – Mr. Craton and the Orange County Bar Association – expressed a preference for the proposal as circulated, with the longer notice of appeal period:

- Mr. Craton noted the jurisdictional nature of the deadline for filing the notice of appeal and expressed concern about the likelihood of inadvertent defaults when the notice of appeal period is very short
- The Orange County Bar simply expressed that the proposed approach is preferable.

Although, in terms of numbers, the weight of the comments favors lengthening the notice of appeal period, the rules subcommittee does not recommend making this change for the reasons stated in the suggested response to the comments of CALA and the Court of Appeal, Fifth Appellate District in the attached comment chart:

- Shortening the notice of appeal period and lengthening the briefing time will not actually increase the overall length of time available for the appellant to prepare its opening brief;
- While shortening the notice of appeal period and lengthening the briefing time is likely to reduce the number of cases in which the reporter's transcript is not yet available when the appellant's opening brief is due (necessitating filing a later, final brief that includes citations to the transcript), it is not likely to eliminate this issue altogether because the deadlines will remain very tight;
- As noted by Mr Craton, because the notice of appeal period is jurisdictional, making the notice of appeal period shorter will increase the likelihood that some appellants will miss this deadline and inadvertently lose their right to appeal altogether.
- Under Code of Civil Procedure section 1008, the deadline for filing a motion for reconsideration is "within 10 days after service upon the party of written notice of entry of the order," so a 5-day or even 10-day notice of appeal period will create potential conflicts with the deadline for filing a motion for reconsideration in the trial court.
- Increasing the time for filing the opening brief will necessitate reducing the already short time that either the parties have for briefing or the Court of Appeal has to consider the matter and issue its decision in these cases.

CALA does raise a legitimate concern about appellants who may wish to file a notice of appeal quickly for purposes of obtaining a stay. Under the proposal, such an appellant would have a substantially shorter time to file the opening brief. However, such an appellant could still seek a stay in the trial court even if the notice of appeal was not yet filed.

Extensions of the Notice of Appeal Period

Proposed rule 8.712(c) in the proposal that was circulated for public comment mirrored provisions in rule 8.108 that provide extensions on the time for filing the notice of appeal when cross appeals or certain post-trial motions are filed in the trial court. Five commentators provided input on this provision:

- Three commentators expressed concern or suggested eliminating all or part of this provision:

  - The Consumer Attorneys of California recommended eliminating this provision entirely. They indicated that motions for new trials and motions to vacate judgments are not applicable to orders denying motions to compel arbitration.
  - One of the Presiding Justices of the Second District Court of Appeal expressed concern that these extensions of the time for filing the notice of appeal ae inconsistent with the intent of the legislation that these appeals be disposed of within 100 days.
  - The Court of Appeal, Fourth Appellate District, Division One, like the Consumer Attorneys of California, indicated that the use of a motion for new trial or to vacate judgment is very uncommon following the denial or dismissal of a motion to compel arbitration. The Court also expressed concern the lack of guidance about how the courts are to handle conflicts, noted in the Advisory Committee Comment to the rule, between the deadlines for the filing of the notice of appeal and these post-trial motions.
- Two commentators – the Orange County Bar Association and the Los Angeles Superior Court – in response to a specific inquiry in the invitation to comment, expressed support for including a provision that addresses the time for filing a cross-appeal.

In response to these comments, the rules subcommittee recommends revising the proposed rules to delete the provisions regarding motions for new trial and motions to vacate judgments. Staff did a Westlaw search for any cases involving denials for motions to compel arbitration where either a motion for a new trial or a motion to vacate was filed. Staff found no such cases. It seems that these provisions should therefore be deleted as inapplicable.

In contrast, there is case law indicating that motions for reconsideration can be made following an order on a petition to compel arbitration. (See *Blake v. Ecker* (2001) 93 CA4th 728, 739, 113 CR2d 422, 430 (disapproved on other grounds in *Le Francois v. Goel* (2005) 35 C4th 1094, 1107, 29 CR3d 249, 260, fn. 5 and Knight et al, Cal. Prac. Guide Alt. Disp. Res. Ch. 5-G, sec. 5:335.6.). The legislation enacting new Code of Civil Procedure section 1494.4 did not eliminate the right to seek reconsideration of these rulings. The rules subcommittee therefore concluded that it would be best for the proposed rules to follow the model of rule 8.108 in clarifying the impact on the time for filing a notice of appeal in the event that such a motion is filed in the trial court. Since the legislation is focused on limiting the time spent on the appellate process, not the trial court process, the rules subcommittee does not think that including such a provision is inconsistent with the intent of the legislation.

The provision regarding motions for reconsideration mirrors the language of rule 8.108(e) in extending the time to file a notice of appeal only if a party serves and files a *valid* motion to reconsider. During the discussion of this provision, a subcommittee member asked for some additional information about the meaning of a "valid" motion in this context and what would happen if the time to file the notice on appeal under had expired when the motion was determined not to be valid. Section 3.94 of the Rutter Group's *California Practice Guide: Civil*

Appeals & Writs (2016), discusses this issue. It explains that to be considered valid, the motion must have complied with the procedural requirements of Code of Civil Procedure section 1008, including that the motion was timely filed and is accompanied by supporting declarations. Validity in this context does not include whether the motion is determined to have substantive merit. Thus, if the motion complies with the procedural requirements, its filing will extend the time to file the notice of appeal.

The rules subcommittee also recommends deleting the proposed advisory committee comment accompanying this rule, which, as circulated for public comment, provided:

> It is very important to note that the deadline for filing a notice of appeal may be earlier than the deadline for filing a motion for a new trial, a motion for reconsideration, or a motion to vacate the judgment.

It appears that this comment was a hold-over from an earlier draft of the rules in which a 5-day notice of appeal period was proposed. That notice of appeal period would have overlapped with the time for filing a motion for reconsideration. As noted above, however, the proposed 20-day notice of appeal period does not overlap with this time period. Given that this comment is not accurate with respect to motions for reconsideration and that the rules subcommittee is recommending the deletion of the rule provisions relating to motions for new trial or to vacate a judgment, rules subcommittee recommends deleting this advisory committee comment in its entirety.

Based on the comments, there does not seem to be an objection to retaining the provision that gives guidance about the time to file a cross-appeal. Therefore, rules subcommittee recommends retaining it in the rule.

Transcript Reimbursement Fund Applications

The invitation to comment specifically noted that proposed rules did not include a provision similar to rule 8.703(d)(2)(B) regarding applications for reimbursement of transcript costs from the Transcript Reimbursement Fund because of concerns relating to delay in the preparation of the record and because appellant in these cases are unlikely to qualify for such reimbursement. The committee specifically sought comments on this approach. Two commentators provided input on this issue:

- The Los Angeles Superior Court suggested that the rule should address Transcript Reimbursement Fund applications. They noted that a party electing a reporter's transcript is ordinarily permitted to apply for reimbursement from the Fund and suggested that, unless specifically prohibited from using this fund, consistency with the existing rules on reporter's transcripts would be best.

- The Orange County Bar Association expressed a preference for inclusion of the proposed rule on lending of the record.

The rules subcommittee view is that the Los Angeles Superior Court has raised a legitimate point about access to the Transcript Reimbursement Fund. Staff noted that the proposed rule includes a cross reference to the provision in rule 8.130 that encompasses potential substitution of an application to the Fund for reporter's transcript deposit. This will not necessarily encourage use of such applications, but it will cover such a situation if it occurs. The subcommittee concluded that this cross-reference should be retained. The subcommittee also recommends keeping the lending of the record provision that was included in the proposal circulated for public comment, as it provides a helpful alternative method of providing the record in these situations.

Subcommittee Task

Staff has prepared a revised draft of the proposed rules. This draft reflects rules subcommittee's recommendations regarding modifications to the proposal in response to the public comments, which are shown in yellow highlighting. The committee's task with respect to this proposal is to:

- Discuss the comments received on the proposal;
- Discuss and approve or modify the rules subcommittee's recommendations for responding to the comments, as reflected in the draft comment chart and revised draft rules; and
- Decide whether to recommend that the Judicial Council adopt the proposal.

Attachments

1. Revised draft of the proposed rules
2. Draft comment chart

ITC SP16-13

Appellate Procedure: Expedited Review of Certain Orders Denying Motions to Compel Arbitration (adopt Cal. Rules of Court, rules 8.710 – 8.717)

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

	Commentator	Position	Comment	Suggested Committee Response
1.	California Assisted Living Association by Heather S. Harrison Vice President of Public Policy Sacramento, CA	AM	On behalf of the California Assisted Living Association (CALA), I am submitting these comments regarding Proposal SP16-13, proposed amendments to the California Rules of Court 8.104 and 8.710 through 8.717. CALA addresses its comments to the question of whether it is preferable to have a longer notice of appeal period and a shorter time for filing the appellant's opening brief or the alternative of having only five days to file a notice of appeal and a longer period for filing the appellant's opening brief. CALA concludes that it is preferable to have a shorter notice of appeal period to allow for an adequate period to prepare and file appellant's opening brief and to ensure both appellant and appellee have similar time period for preparing briefs without penalizing the appellant for filing a notice of appeal right away. A party will generally need less time to decide whether to appeal an adverse ruling and more time to prepare the appellate brief. Typically, a party whose petition to compel arbitration has been denied will not need a full twenty days to decide whether to appeal the court's decision. And once that decision is made, preparing and filing the notice of appeal itself is not time consuming. Accordingly, reducing the time to file the notice of appeal to five days is unlikely to pose a hardship. Preparing an appellate brief in ten days, however, may be quite burdensome.	The committee appreciates this input. The committee has considered this and other comments regarding the notice of appeal period. Ultimately, the committee decided not to revise the proposal to shorten the proposed notice of appeal period. Under these proposed rules, the appellant would have a total of 30 days to both determine whether to file an appeal and to prepare and file an opening brief. This gives the appellant a slightly longer time to prepare its opening brief than the 25-day period provided for the respondent to prepare its brief. The proposal circulated for public comment divided this total 30-day period by providing 20 days before the notice of appeal must be filed and 10 days after the notice of appeal is filed until the appellant's opening brief is due. Shortening the notice of appeal period and lengthening the briefing time as suggested by the commentator will simply change how this period is divided, it not the increase the overall length of time available for the appellant to prepare its opening brief. As noted by another commentator, because the notice of appeal period is jurisdictional, making the notice of appeal period shorter will increase the likelihood that some appellants will miss this deadline and inadvertently lose their right to appeal altogether. In addition, a 5-day or even 10-day notice of appeal period will create potential conflicts with the deadline for filing a

	Commentator	Position	Comment	Suggested Committee Response
			On balance, therefore, more time should be allotted to preparation of the appellate brief than filing the notice of appeal. Fairness also weighs in favor of increasing the briefing period. Both appellants and appellees should have similar time to prepare their briefs. Although an appellant could delay filing a notice of appeal until the end of the twenty-day notice-of-appeal deadline to allow more time to draft the opening brief, an appellant may want to file the notice of appeal quickly. For example, an appellant may want to appeal immediately and ask the appellate court to stay trial court proceedings pending appeal. Under the proposed rules, an appellant who files a notice of appeal early would be penalized with fewer days to prepare the appellate brief. In this scenario, an appellant must choose between (1) accessing appellate court remedies as soon as possible and (2) having adequate time to prepare the appellate brief. Appellants should not be forced to make such a choice. CALA asks the Council to modify the proposed rule to reallocate the days for filing the notice of appeal and the appellant's brief so that both appellant and appellee have similar and adequate time to prepare their briefs without penalizing the appellant for seeking appellate court remedies quickly.	motion for reconsideration in the trial court. Finally, increasing the time for filing the opening brief will reduce the already short time that the Court of Appeal has to issue its decision in these cases. The longer notice of appeal period does mean that an appellant would have to sacrifice briefing time if he or she wants to file the notice of appeal early for purposes of obtaining a stay of any trial court proceedings. However, the appellant could still seek a stay of any trial court proceedings even if the notice on appeal had not yet been filed.

ITC SP16-13

Appellate Procedure: Expedited Review of Certain Orders Denying Motions to Compel Arbitration (adopt Cal. Rules of Court, rules 8.710 – 8.717)

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

	Commentator	Position	Comment	Suggested Committee Response
			CALA further notes that the reference to "rule 3.2237" in proposed Rule 8.712(c)(1) appears to be in error.	The committee appreciates the commentator pointing out this error. Based on other comments, the committee has revised the proposal to delete this provision in its entirety.
2.	Consumer Attorneys of California by Saveena K. Takhar Associate Staff Counsel Sacramento, CA	NI	I write on behalf of the Consumer Attorneys of California (CAOC) to comment on Appellate Procedure: Expedited Review of Certain Orders Denying Motions to Compel Arbitration. CAOC generally supports the proposed rules, but has technical concerns with some of the proposed terminology and procedure outlined below. **Background** Consumer Attorneys of California co-sponsored by SB 1065 (Monning), along with the California Advocates for Nursing Home Reform and the Congress of California Seniors. SB 1065, signed by Governor Brown, will ensure speedy access to justice for victims of elder abuse who have proven to the court they are elderly and dying and have been granted a trial court preference by providing that when there is an appeal from an order dismissing or denying a petition to compel arbitration, the court of appeal must issue its decision within 100 days after the notice of appeal is filed. <u>8.712(b) – Time to appeal</u> CAOC is concerned about the references to a judgment in both subsections (b)(1) and (b)(2). An order denying arbitration would not result in a judgment of any kind. The references in 8.712	Under the definitions used in the Appellate Rules, the term "judgment" includes any judgment or order that may be appealed. However, since this chapter is limited to appeals from orders dismissing or denying petitions to

	Commentator	Position	Comment	Suggested Committee Response
			(b)(1) and (2) should instead refer to an order, not a judgment, because the applicable document at this phase of the case is an appealable order. 8.712(c) – Extending the time to appeal CAOC recommends that 8.712(c) be deleted in its entirety. Subsection (c)(1) creates a procedure for filing a motion for a new trial. This is not relevant or necessary because motions for new trials are not filed after an order compelling arbitration. Subsection (c)(2) discusses motions to vacate judgment, as stated above, no judgment results from an order to compel arbitration. Subsection (c)(3) regarding motions for reconsideration is at odds with the statute as well. Defendants have the right of immediate appellate review, so subsection (c)(3) is not necessary. 8.713 & 8.715 – Record on appeal & briefing One other possible problem CAOC would like to highlight is the interplay between designating the record on appeal in 8.713 and the briefing schedule in 8.715, which requires the appellant to file the opening brief on the same day the court reporter may file the transcript. The solution would be to instead change the designation of record rule, 8.713, to require appellant to file a certified copy of the reporters' transcript along with the Notice of Appeal, which would also eliminate the need for 8.715(c)(2).	compel arbitration, the committee has revised the proposed rule to refer to orders. The committee appreciates this input. Based on this and other comments, the committee has revised the proposal to eliminate paragraphs, (1) and (2), relating to motions for new trials and motions to vacate, from subdivision (c). This would leave paragraph (3), relating to motions for reconsideration, and paragraph (4), relating to cross-appeals. Case law indicates that parties may move for reconsideration of an order denying a motion to compel arbitration. See *Blake v. Ecker* (2001) 93 CA4th 728, 739, 113 CR2d 422, 430 (disapproved on other grounds in *Le Francois v. Goel* (2005) 35 C4th 1094, 1107, 29 CR3d 249, 260, fn. 5. The committee's view is that the rules should reflect the availability of this procedure in the trial court. The committee appreciates this suggestion, but requiring appellants to obtain and file a certified transcript with their notice of appeal would be an important substantive change in the proposal that would need to be circulated for public comment before it could be recommended for adoption by the Judicial Council. The committee will therefore consider whether to propose such a rule at a later date.

ITC SP16-13

Appellate Procedure: Expedited Review of Certain Orders Denying Motions to Compel Arbitration (adopt Cal. Rules of Court, rules 8.710 – 8.717)

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

	Commentator	Position	Comment	Suggested Committee Response
3.	Court of Appeal, Second Appellate District by Thomas Kallay, Managing Attorney	A	**Comment One** We propose that the underscored provision should be added to subdivision (a)(2) of proposed rule 8.712. **Rule 8.712. Notice of appeal** **(a) Contents of notice of appeal** (1) (2) Copies of the order being appealed and the order granting preference under Code Civ. Proc., § 36 must be attached to the notice of appeal.	The committee agrees with this suggestion and has modified the proposal as suggested by the commentator.
			Comment Two One of the Presiding Justices of this district is of the opinion that extending the time to file the notice of appeal for various post-order events under subdivision (c) of rule 8.712, as well as allowing parties to stipulate for extensions under subdivision (d) of rule 8.715, impermissibly extends beyond 100 days the time to dispose of the appeals that are subject to these proposed rules. This Presiding Justice is of the view that the intent of the legislature is clear that these appeals must be disposed within 100 days and that it is contrary to the demonstrated intent of the legislature to fashion provisions that will permit delays in disposition exceeding 100 days. This problem is acute, in this Presiding Justice's view, in that post-order proceedings may be drawn out and extended by the vagaries of trial court schedules.	The committee appreciates this input. With respect to subdivision (c) in proposed rule 8.712, based on other comments, the committee has revised the proposal to eliminate paragraphs, (1) and (2), relating to motions for new trials and motions to vacate, from subdivision (c). This would leave paragraph (3), relating to motions for reconsideration, and paragraph (4), relating to cross-appeals. Under the law in effect prior to the enactment of Code of Civil procedure section 1294.4, parties may move for reconsideration of an order denying a motion to compel arbitration. See *Blake v. Ecker* (2001) 93 CA4th 728, 739, 113 CR2d 422, 430 (disapproved on other grounds in *Le Francois v. Goel* (2005) 35 C4th 1094, 1107, 29 CR3d 249, 260, fn. 5. The legislation did not eliminate this option. The committee's view is that the

	Commentator	Position	Comment	Suggested Committee Response
				proposed rules should follow the model of rule 8.108 in terms of clarifying how the filing of a motion for reconsideration would impact the time to appeal. The committee does not believe that clarifying this is inconsistent with the intent of the legislation, which is to limit the duration of the appellate proceedings in order to protect the interests of the injured elder person. The proposed language of (c)(3) does not extend the 100-day period specified by Code of Civil Procedure section 1294.4(a) since that period begins upon the filing of the notice of appeal. With respect to subdivision (d) of proposed rule 8.715, the committee does not believe that this is inconsistent with the underlying intent of the legislation. Such a stipulated extension cannot occur without the agreement of the attorney for the injured elder person. This insures that the elder person's interests will be protected.
4.	Court of Appeal, Fourth Appellate District, Division One by Hon. Judith McConnell San Diego, CA	NI	**I. RULE 8.710.** Rule 8.710(a) sets forth the scope of application of the new chapter 12 to Title 8, Division 1 of the rules and provides: "The rules in this chapter govern appeals to review a superior court order dismissing or denying a petition to compel arbitration under Code of Civil Procedure section 1294.4." Since Code of Civil Procedure section 1294.4 does not include specific provisions addressing	The committee agrees in concept with the commentator's suggestion and has modified both the title of the chapter and rule 8.710(a) so that they no longer refer to petitions to compel arbitration under section 1294.4.

	Commentator	Position	Comment	Suggested Committee Response
			petitions to compel arbitration, we suggest a slight re-wording of this rule to specify that the rules in chapter 12 apply to appeals from a superior court order "dismissing or denying a petition to compel arbitration *in an action subject to* Code of Civil Procedure section 1294.4." (Italics added.) **RULE 8.711** Rule 8.711 sets out the rules for the filing and service of documents in a proceeding specified in Code of Civil Procedure section 1294.4. Paragraph (a) is entitled "Service" and specifies that except as otherwise ordered or required by law, the parties must use a method of service "reasonably calculated to ensure delivery of the document to the parties not later than the close of the business day after the document is filed or lodged with the court." Paragraph (b), which is entitled "Electronic filing and service," incorporates additional requirements for electronic service of documents. Finally, proposed rule 8.715(a) also specifies that unless otherwise ordered by the court, the parties must file all briefs electronically. We suggest that these proposed rules be reorganized so that the requirements for service be set forth in the same paragraph or, at a minimum, that the heading of paragraph (a) be revised to "Method of service." Similarly, we believe that the requirements for electronic filing	The committee agrees with this suggestion and has revised the proposal to consolidate the provisions discussing service and to delete proposed 8.715(a).

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	Commentator	Position	Comment	Suggested Committee Response
			are adequately set forth in proposed rule 8.711(b), such that proposed rule 8.715(a) may be deleted as superfluous.	
			As to proposed rule 8.711(b)(1), dealing with electronic service, we note there is a typographical error in line 2, with the words "documents" and "electronically" missing a space between them.	The committee appreciates the commentator pointing out this typographical error. The committee has modified the proposal to correct this error.
			This paragraph also specifies that self-represented parties are not required to use electronic filing unless the court of appeal orders otherwise. Given the strict time constraints applicable to proceedings subject to these rules, we recommend that the Committee revise this rule to require a self-represented party to use electronic filing unless otherwise ordered by the court.	The committee considered this suggestion but decided that it is preferable to retain the provision allowing the Court of Appeal to order a self-represented parties to file electronically, rather than making electronic filing the default for these parties. The proposed rule's authorization for the Court of Appeal to order self-represented litigants to file electronically already expands the courts' authority in these cases. Under rule 8.71, the general rule relating to electronic filing, self-represented litigants cannot be ordered to file electronically. The requirement for an order is designed to ensure that the Court makes a determination that electronic filing is feasible for the self-represented litigant, rather than putting a burden on the self-represented litigant to seek to be excused from electronic filing.
			RULE 8.712 Rule 8.712 addresses the requirements for the content and timing of the filing of the notice of appeal. Paragraph (b) provides that the notice of	The committee appreciates this input. The committee appreciates this input. Based on this and other comments, the committee has revised the proposal to eliminate paragraphs, (1) and

	Commentator	Position	Comment	Suggested Committee Response
			appeal must be filed within 20 days of the service by either the superior court or a party (whichever occurs first) of a notice of entry of judgment or a file-endorsed copy of the judgment. Paragraph (c) of that rule provides that the time for filing the notice of appeal is extended where the superior court denies a motion for new trial, a motion to vacate judgment or motion for reconsideration. The Committee comment to the proposed rule provides "It is very important to note that the deadline for filing a notice of appeal may be earlier than the deadline for filing a motion for new trial, a motion for reconsideration, or a motion to vacate the judgment." However, neither the comment nor rule 8.712 provide any guidance or explanation as to whether the rule is intended to (1) bar a notice of appeal that is not filed within the time specified by paragraph (b) even if one of the specified motions is filed after the deadline in (b) has passed, (2) preclude a party from filing any of the specified motions after a notice of appeal is filed in compliance with paragraph (b), or (3) achieve some other result. We urge the Committee to clarify the intent of the rule in this regard and note the following for its consideration: (a) anecdotally, it appears that the use of a motion for new trial or to vacate judgment is very uncommon following the denial or dismissal of a motion to compel arbitration; and (b) extending the time for filing of the notice of appeal to accommodate traditional post-trial	(2), relating to motions for new trials and motions to vacate, from subdivision (c). This would leave paragraph (3), relating to motions for reconsideration, and paragraph (4), relating to cross-appeals. Case law indicates that parties may move for reconsideration of an order denying a motion to compel arbitration. See *Blake v. Ecker* (2001) 93 CA4th 728, 739, 113 CR2d 422, 430 (disapproved on other grounds in *Le Francois v. Goel* (2005) 35 C4th 1094, 1107, 29 CR3d 249, 260, fn. 5. The committee's view is that the rules should reflect that this procedure is available in the trial court and should, like rule 8.108, address how the filing of such a motion would impact the time to appeal. Since, under Code of Civil Procedure section 1008, the deadline for filing a motion for reconsideration is "within 10 days after service upon the party of written notice of entry of the order," the proposed advisory committee comment was incorrect that this deadline would expire before the proposed 20-day notice of appeal period. This advisory committee has also been deleted.

	Commentator	Position	Comment	Suggested Committee Response
			motions to challenge ajudgment or order will significantly prolong the time for resolution of cases the Legislature intended to expedite by enacting Code of Civil Procedure section 1294.4. The Committee has also asked for specific comment on whether rule 8.712(c)(4), which addresses the time for the filing of a cross-appeal, is necessary. Given the strict time constraints of Code of Civil Procedure section 1294.4, we believe that it is. **RULE 8.713** Rule 8.713 sets forth the applicable requirements for the record on appeal. Paragraph (b)(2) deals with reporter's transcripts and specifies that the reporter has 10 days from notice of the transcript request to prepare and certify the transcript. As civil proceedings in many courts now involve the use of private court reporting services rather than reporters employed by the superior courts, we suggest that the Committee provide further specification in this rule that an extension of time to file and certify a reporter's transcript in a proceeding subject to these rules will only be granted on a showing of exceptional good cause. **RULE 8.715** Rule 8.715 addresses the requirements for briefing in proceedings subject to Code of Civil Procedure section 1294.4. As noted above, we believe that proposed rule 8.714(a) can be eliminated as superfluous in light of the	The committee considered this suggestion but concluded that it additional language regarding extensions of time not necessary. Under rule 8.60, only the Court of Appeal is authorized to extend the deadline for completing a reporter's transcript, so the court will be able to determine if any such extension is appropriate in these cases. As noted above, the committee has revised the proposal to eliminate 8.714(a), as suggested by the commentator.

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			requirements of rule 8.71 l(b)(l). In addition, we are concerned that the language of rule 8.714(c)(l), specifying that briefs must comply "as nearly as possible" with traditional requirements for briefs set forth in rule 8.204, is too ambiguous to provide any guidance to parties or the courts as to what is required. We urge the Committee to adopt a more traditional standard (e.g., substantial compliance) for determining the adequacy of briefs. In conclusion, thank you for the opportunity to comment on the proposed rule changes.	With respect to the language of rule 8.71(b)(1), this is modeled on existing rule 8.702(f)(3)(A), which addresses briefs in expedited CEQA appeals. The committee's view is that these rules should use consistent language for equivalent provisions. Therefore, the committee will consider whether to recommend amending both these provisions at a later date.
5.	Court of Appeal, Fifth Appellate District by Charlene Ynson Court Administrator/Clerk Fresno, CA	AM	Instead of 8.712 (a)(1), there should be a special form for this type of appeal stating the deadlines (in addition the trial court should be required to state the deadlines at the hearing, while providing the special form). 8.712(b)- instead of 20 days in (b) it should be 10 or 15 days for the serving of the NOA. (if our time doesn't start until the NOA is served, then the concern would be not so much about our clock, but about the clock in general since these are cases requiring expedited treatment) 8.713(b)(4) because we are recommending changing the times in 8.715 the word "final" can be eliminated on the third line (before opening brief)	The committee appreciates this suggestion, but proposing a new notice of appeal form would be an important substantive change in the proposal that would need to be circulated for public comment before it could be recommended for adoption by the Judicial Council. The committee will therefore consider whether to develop such a form at a later date. The committee appreciates this input. The committee has considered this and other comments regarding the notice of appeal period. Ultimately, the committee decided not to revise the proposal to shorten the proposed notice of appeal period. The proposed 20-day notice on appeal period is already 40 days (or two-thirds) shorter than the 60-day period generally applicable in civil appeals to the Court of Appeal. As noted by another commentator,

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			8.714 change 5 days to 2 days because we need every day we can get and with electronic filing it shouldn't be hard to serve within 2 days; however, if we change the numbers in 8.715 as discussed below, then that would give respondent and appellant equal time after the NOA is filed to file their briefs. 8.715 (b)(1) change the 10 days to 15 days, (b)(2) change 25 days to 20 days, (b)(3) change 15 days to 5 days. (The reason for respondent to have 5 days more than appellant is because appellant can start working on their brief as soon as they file the NOA, or even earlier because they probably know they are going to file it during the time in 8.712 (b) "Time to appeal"). 8.715 (c)-because we are giving appellant 5 more days to file their opening brief either eliminate (c)(2) altogether or reduce 10 days to 5 days.	because the notice of appeal period is jurisdictional, making the notice of appeal period even shorter will increase the likelihood that some appellants will miss this deadline and inadvertently lose their right to appeal altogether. In addition, a 10-day notice of appeal period will create potential conflicts with the deadline for filing a motion for reconsideration in the trial court. Finally, the committee does not believe that increasing the time for filing the opening brief by 5 or 10 days will eliminate the potential for the appellant having to file its opening brief before the transcript is available.
			One last question: Is it practical for the court to order self-represented parties to file electronically when that conflicts with other rules of court? Do we maybe want to clearly state that in this particular instance or case, the self-represented party is ordered to file electronically? (8.711(a-c)) CLARIFICATION TO EARLIER COMMENTS FROM 5TH DCA: I would like to clarify the below questions submitted earlier today - these comments are in	The committee believes that it is appropriate in this limited group of appeals in which the Legislature has set an extraordinarily short timeframe to give the Court of Appeal the authority to order self-represented litigants to electronically file documents. The committee has revised the proposed language to make it clearer that this authority is limited to these particular appeals.

	Commentator	Position	Comment	Suggested Committee Response
			response to the comments from the 4th Appellate District where the suggestion was made to "revise this rule to require a self-represented party to use electronic filing unless otherwise ordered by the court." One last question: Is it practical for the court to order self-represented parties to file electronically when that conflicts with other rules of court? Do we maybe want to clearly state that in this particular instance or case, the self-represented party is ordered to file electronically? (8.711(a)) Our question is really, Can we require self-represented parties to use e-filing unless otherwise ordered by the court? and if so, shouldn't we clearly state in the rule that this requirement only applies to these particular cases?	
6.	Curt R. Craton CRATON, SWITZER & TOKAR LLP Long Beach, CA	A	The proposed approach of having a longer notice of appeal period and shorter period for filing the appellant's opening brief is preferable to the alternative approach of having a 5-day notice of appeal period and longer period for filing the appellant's opening brief for the following reasons: The deadline to file a notice of appeal is jurisdictional whereas the period for filing the appellant's opening brief is not. If the press of business in an attorney's law practice causes him or her to miss the deadline to file a notice of appeal, the client's rights are prejudiced. By contrast, if the deadline to file a brief is missed, the court of appeal	The committee appreciates this input. The committee has considered this and other comments regarding the notice of appeal period. Ultimately, the committee decided not to revise the proposal to shorten the proposed notice of appeal period. Please see the response to the comments of the California Assisted Living Association.

	Commentator	Position	Comment	Suggested Committee Response
			generally grants an extension or the attorney can seek relief from the default. The latter is less prejudicial to the client. Court Rules ought to account for (to the extent reasonably practicable) the realities of practicing law. On any given day, a typical lawyer places and returns calls with clients, engages in frequent communications with opposing counsel, and must meet constant administrative deadlines in more than one case that the attorney oversees. Many of these deadlines are beyond the attorney's control because they are set by statute, court rule, or a court order in a pending case. A jurisdictional deadline of only 5 days to file a notice of appeal invites the practical probability of missing the filing deadline. For example, the period of time between the Wednesday before the Thanksgiving holiday and the following Monday is only 4 days. Thus a 5-day deadline to file a notice of appeal in that situation would effectively be reduced to only 1 court day. That problem could be mitigated by making the rule 5 court days. But the point remains: intervening events in the life of an attorney such as a death in the family or even a brief hospital stay due to illness or injury could cause a short deadline to be missed. By contrast, an unforeseeable intervening event such as just described would be grounds for relief from a short deadline to file an opening brief. The consequential effect of missing a jurisdictional deadline is a probable malpractice claim by the	

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			aggrieved client against the attorney. By contrast, the ability of an attorney to obtain relief from a missed briefing deadline mitigates the likelihood of a malpractice claim. Accordingly, a short notice of appeal deadline will likely increase court congestion arising from malpractice cases, which easily can be avoided by implementing the proposed longer notice of appeal period with the shorting briefing period. Thank you for considering my comments. Please let me know if I should present my comments in a more formal manner. The instructions that my local bar association sent to me did not indicate the form or manner in which comments should be submitted. It appeared that a mere email to you was all that was required.	
7.	Marci Harness East Palo Alto, CA		Comments not related to proposal.	No response required.
8.	Orange County Bar Association by Michael L. Baroni President New Port Beach, CA	A	**The Judicial Council requested comments on four points.** The first question was: **"Whether the proposed amendment to the advisory committee comment to rule 8.104 is sufficient to provide rule users with adequate notice about the nature of the exceptions to the normal time for filing a notice of appeal or whether further information should be incorporated into the text of the rule."** We believe the proposed amendment to the advisory committee comment to Rule 8.104 is sufficient to provide adequate notice and that more	The committee appreciates this input.

	Commentator	Position	Comment	Suggested Committee Response
			information would make the Rule confusing. The second question was: **"Which is preferable – the proposed approach of having a longer notice of appeal period and shorter period for filing the appellant's opening brief (which will allow longer periods for the respondent's and reply briefs) or the alternative approach of having a 5-day notice of appeal period and longer period for filing the appellant's opening brief (but which will require shorter periods for the respondent's and reply briefs in order to comply with the 100-day period for adjudicating appeals)."** The proposed approach is preferable. The third questions was: **"Whether it is necessary for the rules to include a provision such as proposed in 8.712(c)(4) addressing the effect of cross-appeals on the time to file a notice of appeal."** Rule 8.712(c)(4) appears acceptable as proposed. The last question was: **"Whether the proposed rules should include a provision similar to rule 8.703(d)(2)(B) regarding applications for reimbursement of transcript costs from the Transcript Reimbursement Fund."** We believe the Judicial Council should follow Rule 8.153 with respect to any lending of the record.	The committee appreciates this input. The committee has considered this and other comments regarding the notice of appeal period. Ultimately, the committee decided not to revise the proposal to shorten the proposed notice of appeal period. Please see the response to the comments of the California Assisted Living Association. The committee appreciates this input. Based this and on other comments, the committee retained the proposed paragraph (c)(4) relating to cross-appeals. The committee appreciates this input. Based on this and other comments, the committee has retained the proposed provision regarding lending the record, but also included a cross-reference to a provision in rule 8.130 allowing a Transcript Reimbursement Fund application to serve as a substitute for the reporter's transcript deposit.
9.	Peter G. Rose	AM	The statute at issue is narrow and it is unlikely my	The committee appreciates this suggestion.

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	Managing Attorney Court of Appeal, First Appellate District		court will be asked to decide many appeals under its terms. But accelerated appeals are becoming more common and I anticipate the rules drafted to implement this statute will be used as a template for future statutes with wider applicability. Therefore I think it is important to respond to this proposal. My comments on this topic are informed by my court's recent experience deciding an accelerated appeal in a CEQA case under California Rules of Court, rules 8.700 through 8.705. As Managing Attorney for my court, I was able to see how those rules impacted each stage of the decision-making process. That experience leads me to conclude the 100-day period from notice of appeal to decision is too short. As I read the proposed rules, an appellate court will only have about 40 days to read the briefs, conduct the necessary research, write an opinion, hear oral argument, and file an opinion. That is not enough time. I understand the 100-day standard is statutorily mandated and there is nothing the Judicial Council can do to change it. But there is something else the Judicial Council can do. The size of appellate briefs is dictated by the Rules of Court and the proposed rules for this statute allow parties to file full-sized 14,000 word briefs. I believe the size of briefs for this and all other accelerated appeals should limited. The most recent statistics published by the Judicial Council's Office of Court Research show the median period between the filing of a notice of appeal and the filing of an	However, proposing shorter briefs would be an important substantive change in the proposal that would need to be circulated for public comment before it could be recommended for adoption by the Judicial Council. The committee will therefore consider whether to propose such a change at a later date.

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			opinion in a civil case is 509 days. The 100-day period mandated by new Code of Civil Procedure, section 1294.4, subdivision (a) is less than one-fifth of that amount. While a commensurate reduction in the size of the appellate briefs would be justified, it might be too drastic for some members of the bar. A more conservative approach, and one that I urge the Judicial Council to adopt, would be to limit the briefs in this type of appeal to 7,000 words. Limiting the size of briefs is consistent with legislative intent. When the Legislature adopted Code of Civil Procedure section 1294.4, it stated specifically it intended to enact "a limited expedited appeal process". Shortened briefs are also a practical necessity. It would be difficult for a court to perform all the steps necessary to prepare and file a decision within the time allotted if the parties are allowed to file full-sized 14,000 word briefs. If the size of the briefs is limited, courts will at least have a chance to meet the statutorily mandated 100-day standard.	
10.	Superior Court Los Angeles by Sandra Pigati-Pizano Management Analyst Management Research Unit Los Angeles, CA	AM	*Whether the proposed amendment to the advisory committee comment to rule 8.14 is sufficient to provide rule users with adequate notice about the nature of the exceptions to the normal time for filing a notice of appeal or whether further information should be incorporated into the text of the rule.* The proposed amendment is sufficient and consistent with similar rules re 8.702 filing.	The committee appreciates this input.

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			Which is preferable – the proposed approach of having a longer notice of appeal period and shorter period for filing the appellant's opening brief or the alternative approach of having a 5-day notice of appeal period and longer period for filing the appellant's opening brief. From the appeals unit perspective, the latter is preferred. A 5-day notice of appeal period is consistent with (expedited) rule 8.702 in CEQA cases.	The committee appreciates this input. The committee has considered this and other comments regarding the notice of appeal period. Ultimately, the committee decided not to revise the proposal to shorten the proposed notice of appeal period. Please see the response to the comments of the California Assisted Living Association.
			Whether it is necessary for the rules to include a provision such as proposed in 8.71(c)(4) addressing the effect of cross-appeals on the time to file a notice of appeal. Yes, a provision re cross-appeals should be included, similar to 8.702(c)(4).	The committee appreciates this input. Based this and on other comments, the committee retained the proposed paragraph (c)(4) relating to cross-appeals.
			Whether it is necessary for the rules to include a provision similar to rule 8.703(d)(2)(B) regarding applications for reimbursement of transcript costs from the Transcript Reimbursement Fund. The correct rule is 8.702(d)(2)(B). For consistency in the rules there should be included a provision similar to rule 8.702(d)(2)(B) regarding application for reimbursement from the Transcript Reimbursement Fund (TRF). Although the committee elected to exclude a similar provision because of concerns relating to delay in the preparation of the record, and because the 'appellant in these cases in unlikely to qualify for such reimbursement,' and as an alternative included a provision regarding lending of the record. We	The committee appreciates this input. Based on this and other comments, the committee has retained the proposed provision regarding lending the record, but also included a cross-reference to a provision in rule 8.130 allowing a Transcript Reimbursement Fund application to serve as a substitute for the reporter's transcript deposit.

	Commentator	Position	Comment	Suggested Committee Response
			would argue that a party electing a reporter's transcript as required for the oral record is ordinarily permitted to apply for reimbursement from the TRF. Unless specifically prohibited from using this fund, consistency in rules is always best for all parties. *What would the implementation requirements be for the courts?* Staff training – 1 hour for review, discussion, identification Creation and testing of docket codes in CMS – 24 hours *Would 3 months from JC approval of this proposal until its effective date provide sufficient time for implementation?* Yes.	

California Rules of Court, rules 8.104 would be amended and rules 8.710 – 8.717 are adopted, effective July 1, 2017 to read:

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 2. Civil Appeals

Article 1. Taking the Appeal

Rule 8.104. Time to appeal

(a) Normal time

(1) Unless a statute~~,~~ or rules 8.108, ~~or rule~~ 8.702, or 8.712 provide~~s~~ otherwise, a notice of appeal must be filed on or before the earliest of:

(A) – (C) * * *

(b) – (e) * * *

Advisory Committee Comment

Subdivision (a). This subdivision establishes the standard time for filing a notice of appeal and identifies rules that establish very limited exceptions to this standard time period for cases involving certain post judgment motions and cross-appeals (rule 8.108), certain expedited appeals under the California Environmental Quality Act (rule 8.702), and ~~review~~ appeals under Code of Civil Procedure section 1294.4 of an order dismissing or denying a petition to compel arbitration ~~under Code of Civil Procedure section 1294.4~~ (Rule 8.712).

Under subdivision (a)(1)(A), a notice of entry of judgment (or a copy of the judgment) must show the date on which the clerk served the document. The proof of service establishes the date that the 60-day period under subdivision (a)(1)(A) begins to run.

Subdivision (a)(1)(B) requires that a notice of entry of judgment (or a copy of the judgment) served by or on a party be accompanied by proof of service. The proof of service establishes the date that the 60-day period under subdivision (a)(1)(B) begins to run. Although the general rule on service (rule 8.25(a)) requires proof of service for all documents served by parties, the requirement is reiterated here because of the serious consequence of a failure to file a timely notice of appeal (see subd. (e)).

Subdivision (b). * * *

Chapter 12. ~~Review of~~ Appeal Under Code of Civil Procedure Section 1294.4 From An Order Dismissing Or Denying A Petition To Compel Arbitration ~~Under Code of Civil Procedure Section 1294.4~~

Rule 8.710. Application

(a) Application of the rules in this chapter

The rules in this chapter govern appeals under Code of Civil Procedure section 1294.4 ~~to review~~ from a superior court order dismissing or denying a petition to compel arbitration ~~under Code of Civil Procedure section 1294.4~~.

(b) Application of general rules for civil appeals

Except as otherwise provided by the rules in this chapter, rules 8.100–8.278, relating to civil appeals, apply to appeals under this chapter.

Rule 8.711. Filing and service

(a) Method of Service

Except ~~when the court orders otherwise under (b) or~~ as otherwise provided by law~~,~~ :

(1) All documents must be served electronically on parties who have consented to electronic service or who are otherwise required by law or court order to accept electronic service. All parties represented by counsel are deemed to have consented to electronic service. All self-represented parties may so consent.

(2) All documents that the rules in this chapter require be served on the parties that are not served electronically must be served by personal delivery, ~~electronic service,~~ express mail, or other means consistent with Code of Civil Procedure sections 1010, 1011, 1012, and 1013 and reasonably calculated to ensure delivery of the document to the parties not later than the close of the business day after the document is filed or lodged with the court.

(b) Electronic filing ~~and service~~

~~(1)~~ In accordance with rule 8.71, all parties except self-represented parties are required to file all documents electronically except as otherwise provided by these rules, the local rules of the reviewing court, or court order. Notwithstanding rule 8.71(b), in appeals governed by this chapter, a court may order a self-represented party to file documents electronically.

~~(2) All documents must be served electronically on parties who have consented to electronic service or who are otherwise required by law or court order to accept electronic service. All parties represented by counsel are deemed to have consented to electronic service. All self-represented parties may so consent.~~

(c) Exemption from extension of time

The extension of time provided in Code of Civil Procedure section 1010.6 for service completed by electronic means does not apply to any service in actions governed by these rules.

Rule 8.712. Notice of appeal

(a) Contents of notice of appeal

(1) The notice of appeal must state that the superior court order being appealed is governed by the rules in this chapter.

(2) ~~A copy~~ Copies of the order being appealed and the order granting preference under Code Civ. Proc., § 36 must be attached to the notice of appeal.

(b) Time to appeal

The notice of appeal must be served and filed on or before the earlier of:

(1) Twenty days after the superior court clerk serves on the party filing the notice of appeal a document entitled "Notice of Entry" of ~~judgment~~ the order dismissing or denying a petition to compel arbitration or a filed-endorsed copy of the ~~judgment~~ order, showing the date either was served; or

(2) Twenty days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of ~~judgment~~ the order dismissing or denying a petition to compel arbitration or a filed-endorsed copy of the ~~judgment~~ order, accompanied by proof of service.

(c) Extending the time to appeal

~~(1) *Motion for new trial*~~

~~If any party serves and files a valid notice of intention to move for a new trial or, under rule 3.2237, a valid motion for a new trial and that motion is denied, the time to appeal from the judgment is extended for all parties until the earlier of:~~

~~(A) Five court days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order; or~~

~~(B) Five court days after denial of the motion by operation of law.~~

~~(2) *Motion to vacate judgment*~~

~~If, within the time prescribed by subdivision (b) to appeal from the judgment, any party serves and files a valid notice of intention to move or a valid motion to vacate the judgment and that motion is denied, the time to appeal from the judgment is extended for all parties until five court days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order.~~

(1) *Motion to reconsider appealable order*

If any party serves and files a valid motion ~~to reconsider an appealable the order~~ under Code of Civil Procedure section 1008, subdivision (a), to reconsider the order dismissing or denying a petition to compel arbitration, the time to appeal from that order is extended for all parties until five court days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order.

(2) *Cross-appeal*

If an appellant timely appeals from ~~a judgment or appealable~~ the order dismissing or denying a petition to compel arbitration, the time for any other party to appeal from the same ~~judgment or~~ order is extended until five court days after the superior court clerk serves notification of the first appeal.

~~**Advisory Committee Comment**~~

~~It is very important to note that the deadline for filing a notice of appeal may be earlier than the deadline for filing a motion for a new trial, a motion for reconsideration, or a motion to vacate the judgment.~~

Rule 8.713. Record on appeal

(a) Record of written documents

The record of the written documents from the superior court proceedings must be in the form of a joint appendix or separate appellant's and respondent's appendixes under rule 8.124.

(b) Record of the oral proceedings

(1) The appellant must serve and file with its notice of appeal a notice designating the record under rule 8.121 specifying whether the appellant elects to proceed with or without a record of the oral proceedings in the trial court. If the appellant elects to proceed with a record of the oral proceedings in the trial court, the notice must designate a reporter's transcript.

(2) Within 10 days after the superior court notifies the court reporter to prepare the transcript under rule 8.130(d)(2), the reporter must prepare and certify an original of the transcript and file the original and required number of copies in superior court.

(3) If the appellant does not present its notice of designation as required under (1) or if any designating party does not submit the required deposit for the reporter's transcript under rule 8.130(b)(1) or a permissible substitute under rule 8.130(b)(3) with its notice of designation or otherwise fails to timely do another act required to procure the record, the superior court clerk must serve the defaulting party with a notice indicating that the party must do the required act within two court days of service of the clerk's notice or the reviewing court may impose one of the following sanctions:

(A) If the defaulting party is the appellant, the court may dismiss the appeal; or

(B) If the defaulting party is the respondent, the court may proceed with the appeal on the record designated by the appellant.

(4) Within 10 days after the record is filed in the reviewing court, a party that has not purchased its own copy of the record may request the appellant, in writing, to lend it the appellant's copy of the record at the time that appellant serves its final opening brief under rule 8.715(c)(2). The borrowing party must return the copy of the record when it serves its brief or the time to file its brief has expired. The cost of sending the copy of the record to and from the borrowing party shall be treated as a cost on appeal under rule 8.891(d)(1)(B).

Rule 8.714. Superior court clerk duties

Within five court days following the filing of a notice of appeal under this rule, the superior court clerk must:

(1) Serve the following on each party:

(A) Notification of the filing of the notice of appeal; and

(B) A copy of the register of actions, if any.

(2) Transmit the following to the reviewing court clerk:

(A) A copy of the notice of appeal, with the ~~copy~~ copies of the order being appealed and the order granting preference under Code Civ. Proc., § 36 attached; and

(B) A copy of the appellant's notice designating the record;

Rule 8.715. Briefing

~~**(a) Electronic filing**~~

~~Unless otherwise ordered by the reviewing court, all briefs must be electronically filed.~~

(a) Time to serve and file briefs

Unless otherwise ordered by the reviewing court:

(1) An appellant must serve and file its opening brief within 10 days after the notice of appeal is served and filed.

(2) A respondent must serve and file its brief within 25 days after the appellant files its opening brief.

(3) An appellant must serve and file its reply brief, if any, within 15 days after the respondent files its brief.

(b) Contents and form of briefs

(1) The briefs must comply as nearly as possible with rule 8.204.

(2) If a designated reporter's transcript has not been filed at least 5 days before the date by which a brief must be filed, an initial version of the brief may be served and filed in which references to a matter in the reporter's transcript are not supported by a citation to the volume and page number of the reporter's transcript where the matter appears. Within 10 days after the reporter's transcript is filed, a revised version of the brief must be served and filed in which all references to a matter in the reporter's transcript must be supported by a citation to the volume and page number of the reporter's transcript where the matter appears. No other changes to the initial version of the brief are permitted.

(d) Stipulated extensions of time to file briefs

If the parties stipulate to extend the time to file a brief under rule 8.212(b), they are deemed to have agreed that such an extension will promote the interests of justice, that the time for resolving the action may be extended beyond 100 days by the number of days by which the parties stipulated to extend the time for filing the brief, and that to that extent, they have waived any objection to noncompliance with the deadlines for completing review stated in Code of Civil Procedure section 1294.4 for the duration of the stipulated extension.

(e) Failure to file brief

If a party fails to timely file an appellant's opening brief or a respondent's brief, the reviewing court clerk must serve the party with a notice indicating that if the required brief is not filed within two court days of service of the clerk's notice, the court may impose one of the following sanctions:

(1) If the brief is an appellant's opening brief, the court may dismiss the appeal;

(2) If the brief is a respondent's brief, the court may decide the appeal on the record, the opening brief, and any oral argument by the appellant; or

(3) Any other sanction that the court finds appropriate.

Rule 8.716. Oral argument

The reviewing court clerk must send a notice of the time and place of oral argument to all parties at least 10 days before the argument date. The presiding justice may shorten the notice period for good cause; in that event, the clerk must immediately notify the parties by telephone or other expeditious method.

Rule 8.717. Extensions of time

The Court of Appeal may grant an extension of the time in appeals governed by this chapter only if good cause is shown and the extension will promote the interests of justice.

TAB IIIC

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
January 24, 2017

To
Members of the Appellate Advisory Committee

From
Heather Anderson, Supervising Attorney
Seung Lee, Attorney
Legal Services, Judicial Council

Subject
Proposed Amendment to Code of Civil Procedure section 904.1, Authorizing Appeals from Orders Entered After Action Is Voluntarily Dismissed Without Prejudice

Action Requested
Please read before January 30 committee meeting

Deadline
January 30, 2017

Contact
Seung Lee
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Introduction

Item 8 on the committee's annual agenda this committee year is to consider whether to recommend amendments to the statute on appealability to permit appeals from orders following a voluntary dismissal (this is a priority 2 project with a proposed January 1, 2019 completion date). The Legislative Subcommittee will be considering this issue on Thursday, January 26. The subcommittee's recommendations will be reported to the committee at its meeting on January 30.

To assist the subcommittee in its consideration, staff prepared the summary below of the suggestion that was received and the results of research regarding the appealability of various orders that may be made following a voluntary dismissal.

Background

Code of Civil Procedure section 904.1 identifies what rulings in unlimited civil cases are appealable. Essentially, this section codifies the common law "one final judgment rule" and then goes on to identify exceptions to this rule. Section 904.1 provides, in relevant part:

> (a) . . . An appeal, other than in a limited civil case, may be taken from any of the following:
>
> (1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11) . . .
>
> (2) From an order made after a judgment made appealable by paragraph (1). . .
>
> (11) From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000).
>
> (12) From an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000). . .
>
> (b) Sanction orders or judgments of five thousand dollars ($5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ. [1]

The committee received the attached suggestion for amending this code section from an attorney - Mr. Schlecter. In his explanation for his suggestion, Mr. Schlecter states that after a case has been voluntarily dismissed without prejudice, courts can still issue orders awarding attorney fees, discovery sanctions, or other remedies and that such orders can sometimes impose "hefty fee awards and sanctions." Mr. Schlecter contends that there is a problem because, under section 904.1, "there is no statutory right to appeal from such post-dismissal orders." Because there is no "judgment" when an action is voluntarily dismissed without prejudice, any subsequent order after a dismissal is not appealable as "an order made after a judgment." Accordingly, he proposes to make such orders appealable by amending section 904.1 to add the following new provision to subsection (a):

> (14) From an order after a voluntary dismissal without prejudice.

Mr. Schlecter contends that without such an amendment, appellate review of such orders made after voluntary dismissal can only be obtained through writ relief, which is discretionary.

[1] You can access the full text of this section at: http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=904.1.&lawCode=CCP

Discussion

To assist the subcommittee in considering Mr. Schlecter's suggestion, staff researched the law regarding the appealability of orders made following a voluntarily dismissal without prejudice. The universe of orders that a trial court can make following voluntary dismissal is narrow; generally, when an action has been voluntarily dismissed under Code of Civil Procedure section 581, a "trial court is without jurisdiction to act further in the action [citations] except for the limited purpose of awarding costs and statutory attorney's fees." (*Associated Convalesecent Enterprises v. Carl Marks & C., Inc.* (1973) 33 Cal.App.3d 116, 120). A trial court also retains authority to vacate the dismissal under section 473. (*Basinger v. Rogers & Wells* (1990) 220 Cal.App.3d 16, 21-22). We focused our research on the appealability of these types of orders, as well as orders for sanctions because Mr. Schlecter specifically mentioned this type of order in his letter. Examining even this narrow set of orders required dipping into the general law on what constitutes a final judgment for purposes of appealability, however. It probably goes without mentioning that the general case law on appealability is vast and complicated. This memo does not attempt a comprehensive discussion of that law, it is only intended to show that that there are questions about the basic premise that orders made following voluntary dismissal without prejudice are not appealable which underlies Mr. Schlecter's suggestion.

Attorney's Fees

Mr. Schlecter's letter does not cite to any case in which a court held that a party was unable to appeal an order awarding attorney's fees on the basis that the order was not an order after judgment under section 904.1(a)(2) and we did not find a case so holding. Instead, what we found was cases that apply the general collateral judgment theory of appealability to orders imposing attorney's fees. See, for example, *People v. McKale* (1979) 25 Cal.3d 626, fn 5 "An order denying attorney fees is independently an appealable order as a final determination on a collateral matter severable from the general subject of the litigation. (See Code Civ. Proc., § 43; *Associated Convalescent Enterprises v. Carl Marks & Co., Inc.* (1973) 33 Cal.App.3d 116, 120 [108 Cal.Rptr. 782].)" This collateral judgment theory of appealability has specifically been applied to attorney's fees orders made following a voluntary dismissal. See, for example, *California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal. App. 4th 562, 565 n. 1 (entertaining appeal from order granting plaintiff's motion for attorney's fees following the voluntary dismissal of the underlying action) and *Associated Convalescent Enterprises v. Carl Marks & Co., Inc.* (1973) 33 Cal. App. 3d 116, 120 (in appeal from the denial of attorney's fees after action was voluntarily dismissed without prejudice, the court noted that "any order made with respect thereto is appealable as a final determination on a collateral matter, severable from the general subject of the litigation").

There may still be a concern about whether an order denying a request for attorney's fees is appealable, however. This is because there is a split in authority about whether, to fall within the collateral judgment theory of appealability, the order at issue must direct the payment of money

or performance of an act (See Cal. Prac. Guide Civ. App. & Writs Ch. 2-B, sections 2.78-2.80). The current majority view appears to be that an appealable "collateral" judgment or order must direct the payment of money or performance of an act. (See Bauguess v. Paine (1978) 22 C3d 626, 634, fn. 3 and In re A.L. (2014) 224 CA4th 354, 363.) The minority view is that the order need not direct payment in order to be appealable. Under this minority view, a direct appeal was allowed from a collateral order denying a motion for backpay and for attorney fees under CCP § 1021.5 because "no further judicial action was required to give effect to that determination." *Henneberque v. City of Culver City* (1985) 172 CA3d 837, 841-842, fn. 3. One unpublished opinion we found that considered the appealability of an order granting a motion to strike/tax costs and attorney fees, *Gunn v. Superior Court* No. G046989 (2013) 2013 WL 452853, concluding that "the appealability of the order . . . is not at all clear[,]"opted to "resolve any doubts about appellate jurisdiction" by treating the appeal as a petition for writ of mandate.

Costs

Mr. Schlecter's letter cites one case, *Mon Chong Loong Trading Corp. v. Superior Court*, 218 Cal. App. 4th 87 (2013), in which the appellate court analyzed the question of appealability of the order imposing costs following voluntary dismissal on the basis that the order was not an order after judgment under section 904.1(a)(2). In that case, the respondent specifically challenged the appealability of the order on this basis. The appellate court concluded that the order was not appealable as an order after final judgment, but granted review by treating the appeal as a petition for writ of mandate.

There are also cases, however, that, as with orders imposing attorneys fee, analyze the appealability of orders imposing costs under the collateral judgment theory. (See, for example, *Serrano v. Stefan Merli Plastering Co., Inc*. (2008) 162 Cal.App.4th 1014 [Court orders which required plaintiffs in personal injury action to pay fees charged by court reporter company for copies of deposition transcripts were appealable under the collateral order doctrine; orders finally determined the issue of plaintiffs' liability for payment, orders did not decide the parties' rights with respect to the relief demanded in the complaint, orders would neither influence nor be influenced by subsequent proceedings in the action with respect to the relief demanded in the complaint, and orders directed the payment of money.].) As with attorney's fees, under the collateral judgment theory, there might a question about appealability when the order at issue is one that denies or taxes costs (see discussion *Gunn v. Superior Court, supra).*

There may also be different conclusions about appealability depending on the authority under which costs are imposed. For example, there are cases that examine the appealability of an order for costs on appeal when the Court of Appeal has reversed the trial court judgment. During the time before the trial court takes up the underlying matter again, there is no trial court judgment to be the basis for arguing that the order for costs is appealable under section 904.1(a)(2). Courts have held, in this circumstance, the Court of Appeal's order constitutes the judgment that makes

the cost order appealable. (See *Markart v. Zeimer* (1925) 74 Cal.App.152["final judgment" includes a judgment or determination by an appellate court; hence, the order is one after final judgment and is appealable] and *Krikorian Premiere Theatres, LLC v. Westminster Cen., LLC* (2011) 193 Cal.App.4th 1075, 1083 [trial court order taxing costs on appeal is appealable as order after judgment, once previous judgment has been reversed on appeal but before new judgment has been entered on remand, because relevant final judgment is judgment of Court of Appeal].)

Sanctions

As the excerpt from this statute quoted above indicates, section 904.1(a)(12) already specifically provides for appellate review of orders imposing large monetary sanctions – those that exceed $5000. Subsection (b) also specifically provides that orders for smaller sanctions may be appealed as part of the judgment or are subject to writ review.

Under these provisions, there does not seem to be any issue about the appealability of orders for large monetary sanctions that needs to be addressed, but there might be a question about orders for smaller sanction amounts. In this regard, the legislative history of these statutory provisions is helpful in considering Mr. Schlecter's suggestion. Sanctions, like attorney's fees, are considered final orders on a collateral matter, and thus were historically separately appealable. *See, e.g., In re Marriage of Gumabao*, 150 Cal. App. 3d 572, 574 n.2 (1984). However, section 904.1 was amended in 1989, with the support of the Judicial Council, to add language specifically restricting this right to appeal to sanction orders of more than $750. *See, e.g., Rao v. Campo*, 233 Cal. App. 3d 1557, 1563 (1991) ("the amendment was proposed by the Judicial Council for the purpose of reducing and limiting the class of judgments and orders imposing monetary sanctions which could be immediately and independently appealed before entry of final judgment in the main action"). In 1993, section 904.1 was again amended, this time to increase the $750 threshold to $5000, thereby further limiting the appealability of sanctions orders.

Although this history indicates that section 904.1(a)(12) was intended to limit the appealability of smaller sanction orders, there are cases that have concluded that in the specific scenario when there has been a voluntary dismissal with prejudice, and thus there will be no other final judgments, these smaller sanctions may also be immediately appealed. (*Eichenbaum v. Alon*, (2003) 106 Cal. App. 4th 967, 974). An immediate appeal has also been allowed under the collateral judgment theory where the remaining issues in the case did not involve the parties involved in the sanction order (*Diepenbrock v. Brown* (2012) 208 Cal.App.4th 743 [Although ordinarily an order or judgment imposing sanctions in an amount of $5,000 or less is not appealable until entry of a final judgment in the action (Code Civ. Proc., § 904.1, subd. (b)), the present judgment is appealable as a final judgment on a collateral matter because it finally

resolves all issues between appellants and Derek and Graham, who are not parties to the underlying litigation.])

As with orders denying attorney's fees or costs, under the collateral judgment theory, there might a question about appealability when the order at issue is one that denies sanctions. But see *Muller v. Fresno Community Hosp. & Medical Center* (2009) 172 Cal.App.4th 887 (trial court's order denying patient's motion for sanctions for alleged discovery abuses in medical negligence action was appealable as a collateral order after trial court granted new trial for patient, since sanctions would have no relevance to proceedings that would take place upon the remand, the issue of sanctions was too independent of the cause itself to require that appellate consideration be deferred until the whole case was adjudicated, it was uncertain whether a judgment following new trial could properly incorporate the order denying sanctions, it was uncertain that there would even be a new trial, and denial of sanctions was a matter too important to be denied review.)

Orders Vacating Dismissal

In his letter, Mr. Schlecter cites *H.D. Arnaiz, Ltd. v. Cty. of San Joaquin* (2002) 96 Cal. App. 4th 1357, a case in which the court concluded that "an order granting a motion to vacate a voluntary dismissal is not an appealable order[,]" but reviewed the order by treating the appeal as a petition for a writ of mandate. This is another area, however, where there is apparently a split of authority (See Eisenberg, *California Practice Guide: Civil Appeals & Writs* (The Rutter Group 2016) ¶ 2:168.5.) Unlike the *H.D. Arnaiz* case, *Basinger v. Rogers & Wells* (1990) 220 CA3d 16, 21 treats these orders as appealable. See also *Mesa Shopping Center-East, LLC v. Hill* (2014) 232 Cal.App.4th 890, which addressed the appealability of an order denying of motion to vacate voluntary dismissal and denial of motion for attorney's fees. The court in that case decided that either these orders were an appealable final judgment or, in the alternative, that the appeal would be treated as a petition for writ of mandate.

Committee Task

The committee's task is to consider the recommendation of the legislative subcommittee and decide whether to propose circulation of legislative proposal to amend Code of Civil Procedure section 904.1 to address the appealability of orders after a voluntary dismissal without prejudice .

From: Blair Schlecter, Esq.

To: Heather Anderson, Supervising Attorney, Judicial Council of California

Date: April 20, 2015

Proposal to Amend *Code of Civil Procedure* Section 904.1 to Permit Appeals From Orders Following Dismissals Without Prejudice

The Problem:

Parties sometimes dismiss their case without prejudice. However, that is not necessarily the final action in a case. Following such dismissals, courts can still issue orders awarding attorney fees, discovery sanctions, or other remedies. Such orders sometimes impose hefty fee awards and sanctions.

The problem is that there is no statutory right to appeal from such post-dismissal orders. Because the case was voluntarily dismissed without prejudice, there is no "judgment" that would typically trigger the time to appeal. *Code of Civil Procedure* § 904.1(a)(1); see also *Mon Chong Loong Trading Corp. v. Superior Court* (2013) 218 Cal.App.4th 87, 92 ("Here, however, there has been no judgment, only a dismissal, and the entry of dismissal by the clerk is a 'ministerial, not a judicial, act, and no appeal lies therefrom.'")

Therefore, the case is in a sort of appellate "limbo."

The California Court of Appeal has often construed an appeal from such orders as a petition for writ of mandate (an appeal that has no statutory deadline), and proceeded to consider the merits. However, there is considerable confusion about what to do in these situations. *H.D. Arnaiz, Ltd. v. Cnty. of San Joaquin* (2002) 96 Cal.App.4th 1357, 1364-1368 (finding that an order on a motion to vacate a voluntary dismissal is not appealable but construing appeal as a writ of mandate to permit review of order); *Mon Chong Loong Trading Corp. v. Superior Court*, *supra*, 218 Cal.App.4th at 92 (post-dismissal order taxing costs); compare to *Mesa Shopping Ctr.-E., LLC v. Hill* (2014) 232 Cal.App.4th 890, 899 (finding that post-dismissal orders are appealable but finding that"[t]he law is confusing."); *Eichenbaum v. Alon* (2003) 106 Cal.App.4th 967, 974 (treating appeal from order imposing sanctions after voluntary dismissal with prejudice as an

appeal or alternatively, an extraordinary writ). However, an appellate court's discretion "to treat a purported appeal from a nonappealable order as a petition for writ of mandate . . . should be exercised only in unusual circumstances." *H.D. Arnaiz, Ltd*., at 1367-136.

Therefore, there is authority suggesting that there is normally no appellate review of post-dismissal orders. (See e.g., *Associated Convalescent Enterprises v. Carl Marks & Co., Inc.* (1973) 33 Cal.App.3d 116, 120.)

This issue has also been the subject of discussion by several recent unpublished opinions. *Gunn v. Superior Cou*rt, No. G046989 (2013) 2013 WL 452853, at *3-4; *Ayala v. Gutierrez*, No. B243006 (2013) 2013 WL 4718694, at *1.

Based on the above, there is a gap in the law about how to handle appeals from post-dismissal orders. Additionally, assuming an appeal from such an order is treated as a writ, the Court of Appeal's power is discretionary. This in essence means that the right to appeal is discretionary. Therefore, there is a high likelihood that courts will treat the appealability of such orders differently.

The Solution:

Amend *Code of Civil Procedure* § 904.1(a) to permit appeals from post-dismissal orders. Specifically, add § 904.1(a)(14) to permit appeals "from an order after a voluntary dismissal without prejudice."

TAB IIID

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
January 22, 2017

To
Members of the Appellate Advisory Committee

From
Heather Anderson, Supervising Attorney, Legal Services

Subject
Record in juvenile appeals

Action Requested
Please read before January 30 committee meeting

Deadline
January 30, 2017

Contact
Heather Anderson
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heather.anderson@jud.ca.gov

Introduction

Item 11 on the committee's annual agenda this committee year is to consider whether to develop a rule regarding the record on appeal in juvenile cases where the appellant is not a party who would ordinarily have access to the juvenile court case file (this is a priority 2 project with a proposed January 1, 2018 completion date). The rules subcommittee reviewed possible amendments to rules 8.405, 8.407 and 8.409 designed to address the concerns that were raised. Ultimately, the subcommittee concluded that the concerns could not fully be addressed through rules of court. The subcommittee therefore recommends that the committee consider, and seek the input of the Family and Juvenile Law Advisory Committee on, a proposal to amend Welfare and Institutions Code section 827. Attached for the committee's review is a draft invitation to comment on such a potential legislative amendment.

Background

Welfare and Institutions Code section 827

The confidentiality of juvenile case files is established by statute. Subdivision (a)(1) of Welfare and Institutions Code section 827 identifies those who may inspect a juvenile court case file.[1] In addition to authorizing inspection by many public officials and entities involved in various aspects of the child welfare system, this code section also specifically authorizes inspection by:

> (A) Court personnel.
>
> (C) The minor who is the subject of the proceeding.
>
> (D) The minor's parents or guardian.
>
> (E) The attorneys for the parties, judges, referees, other hearing officers, probation officers, and law enforcement officers who are actively participating in criminal or juvenile proceedings involving the minor. . . .
>
> (P) Any other person who may be designated by court order of the judge of the juvenile court upon filing a petition.

Subdivision (a)(5) of section 827 identifies those individuals listed in (a)(1) who may also receive copies of the case file.[2] The individuals listed above in (A), (C), (D), and (E) are among those who are authorized to receive such copies.

Rule 5.552 and form JV-570

The Judicial Council has adopted rules in title 5, Division 3 of the California Rules of Court, the Juvenile Rules,[3] that incorporate and implement the requirements of Welfare and Institutions Code section 827. California Rules of Court, rule 5.552, *Confidentiality of records (§§ 827, 828)*,[4] defines "juvenile case file" as including, among other things:

> (1) All documents filed in a juvenile court case;
>
> (2) Reports to the court by probation officers, social workers of child welfare services programs, and CASA volunteers; . . .

---

[1] You can access the full text of this section at: http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=827.&lawCode=WIC)

[2] Subdivision (a)(5) was added to section 827 effective January 1, 2008 by Stats.2007, c. 468 (S.B.39), § 3. There is caselaw from before this provision was added to the statute that held that the right to inspect the case file did not include the right to copy the records.

[3] See rule 5.500.

[4] You can access this rule at: http://www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_552

> (5) Transcripts, records, or reports relating to matters prepared or released by the court, probation department, or child welfare services program;

Like Welfare and Institutions Code section 827, rule 5.552 also identifies those who may have access such files. Subdivision (b)(1) of this rule provides that, in addition to various public officials and entities, the following individuals "may inspect, receive, and copy the juvenile case file without an order of the juvenile court:"

> (A) Court personnel; . . .
>
> (C) The child who is the subject of the proceeding;
>
> (D) The child's parents;
>
> (E) The child's guardians;
>
> (F) The attorneys for the parties, including any trial court or appellate attorney representing a party in the juvenile proceeding or related appellate proceeding;

Rule 5.552 also establishes a procedure for those not otherwise entitled to access the juvenile court file under section 827 to request the juvenile court's permission to access the file. Subdivision (c) of rule 5.552 provides that:

> With the exception of those persons permitted to inspect juvenile court records without court authorization under sections 827 and 828, every person or agency seeking to inspect or obtain juvenile court records must petition the court for authorization using *Petition for Disclosure of Juvenile Court Records* (form JV-570).

Form JV-570, [5] which was renamed *Request for Disclosure of Juvenile Case File*, includes spaces for the petitioner to identify the records he or she is seeking and to indicate the reason for the request. The "reasons" section of the form includes spaces that the petitioner can use to identify any pending civil, criminal, juvenile, or "other" pending court case.

Appellate rules

The rules in Title 8, the Appellate Rules, include separate provisions that address confidentiality of records in juvenile cases under that title. Rule 8.401(b),[6] which is part of Division 1, Chapter 5 *Juvenile Appeals and Writs*, provides that, with some limited exceptions:

> [T]he record on appeal and documents filed by the parties in proceedings under this chapter may be inspected only by the reviewing court and appellate project personnel, the parties or their attorneys, and other persons the court may designate.

[5] You can access this form at: http://www.courts.ca.gov/documents/jv570.pdf

[6] You can access this rule at: http://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_401

As in criminal cases, in juvenile cases the appellant does not designate the record on appeal. Instead record preparation automatically is triggered by the filing of the notice of appeal and the contents of the record is specified by rule. Under rule 8.407,[7] the clerk's transcript must include most of the documents filed in the juvenile court, including:

> (4) Any report or other document submitted to the court. . .
>
> (12) Any written motion or notice of motion by any party, with supporting and opposing memoranda and attachments.

The content of the reporter's transcript varies depending on the type of judgment or order being appealed.

Both rule 8.409 and rule 8.416 require, among other things, that within 20 days after the notice of appeal is filed in a juvenile case, the superior court clerk and the court reporter must prepare and certify the clerk's and reporter's transcripts.[8] These rules then require that the superior court clerk send the record:

> (1) When the transcripts are certified as correct, the court clerk must immediately send:
>
> (A) The original transcripts to the reviewing court, noting the sending date on each original; and
>
> (B) One copy of each transcript to the appellate counsel for the following, if they have appellate counsel:
>
> (i) The appellant;
>
> (ii) The respondent;
>
> (iii) The child's Indian tribe if the tribe has intervened; and
>
> (iv) The child.
>
> (2) If appellate counsel has not yet been retained or appointed for the appellant or the respondent, or if a recommendation has been made to the Court of Appeal for appointment of counsel for the child under rule 8.403(b)(2) and that recommendation is either pending with or has been approved by the Court of Appeal but counsel has not yet been appointed, when the transcripts are certified as correct, the clerk must send that counsel's copy of the transcripts to the district appellate project.

[7] You can access this rule at: http://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_407

[8] You can access this rule at: http://www.courts.ca.gov/cms/rules/index.cfm?title=eight&linkid=rule8_409

Thus, under these rules, the superior court is required to prepare a record on appeal that includes items that are part of a confidential juvenile case file and to send copies of that record to the Court of Appeal and to the attorneys for those who are parties to the appeal.

Issue and suggestion

Committee member Joseph Lane has indicated that the Second District Court of Appeal is experiencing delay in juvenile appeals in which the appellant is an individual who has been participating in the juvenile proceedings, but is not among those entitled to access the juvenile court file under section 827. This may happen, for example, when the appellant is a person who filed a petition seeking de facto parent status and is appealing the denial of that petition or a person who filed a petition under Welfare and Institutions Code section 388 to change, modify, or set aside a juvenile court order on grounds of change of circumstance or new evidence and is appealing the denial of that petition.[9] In these circumstances, the Los Angeles Superior Court requires that the appellant complete and file a *Request for Disclosure of Juvenile Case File* (form JV-570) before the court will begin preparing the record on appeal. Appellants in these circumstances, who may not be represented by an attorney, often do not file form JV-570. Without the record, the appeal cannot move forward.

To address this, Mr. Lane has suggested that the committee consider proposing a rule providing that if such an appellant does not file form JV- 570 within x days of the filing of the notice of appeal, the appeal can be dismissed.

Current court practices

When the committee began considering this suggestion last year, one of the first questions that arose was whether the problems being experienced in the Second District were also being experienced in other districts. Committee member Mr. Sacher gathered informal information from the appellate projects in most of the other districts. He found that practices with respect to preparation of the record on appeal in the types of juvenile cases identified by Mr. Lane vary across Court of Appeal Districts. The information he received indicated that in the Second and Sixth Districts, appellants are being required to file from JV-570 before a record will be prepared but that in the First, Third, and Fourth Districts, appellants are not being required to file form JV-570. Mr. Sacher's information indicated that in the Third District, the record is sent to the district appellate project and not to the appellant. In order to obtain access to the record, the appellant must file a motion in the Court of Appeal. Usually, the appeal is dismissed for non-prosecution since the appellant has not qualified for the appointment of counsel and has not submitted a motion.

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[9] As examples of appeals in these circumstances, see In re Michael R (2006) 67 Cal.App.4th 150 and In re David F.(2016) 2016 WL 193633.

To gather additional information about trial court practices in this area, late last year, messages were sent out to listserves for juvenile court judges and for trial court administrators inquiring about whether courts require the filing of JV-570 in these circumstances or have a different procedure. Responses were received from seven superior courts; these responses are set out in the attached table. Four courts indicated that they either require the filing of JV-570 or indicated that they had not encountered such situations, but would require a JV-570 if such a circumstance presented itself. Three courts indicated that they do not require the filing of a JV-570. One court indicated that it prepares the record on appeal if directed to do so by the Court of Appeal and sends the record to the district appellate project. One court indicated that when such a situation arose recently, a judge of the superior court made determinations about what documents in the juvenile court file the appellant was entitled to receive. One court indicated it did not have a procedure for addressing this type of situation. Note that most of these courts have local rules that address access to the juvenile court case files; links to these local rules are included in the attached table. None of these local rules specifically address access in the context of preparation of a record on appeal.

These responses confirm the results of Mr. Sacher's earlier inquiry in terms of there being varying practices among the courts. They do not, however, shed much additional light on why the practices vary or how best to address the problems that have arisen in the Second District.

Discussion

Application of Welfare and Institutions Code Section 827

The differing practices in the trial and appellate courts with respect to preparing the record on appeal in these cases may reflect, at least in part, a lack of clarity about whether Welfare and Institutions Code section 827 actually applies to a situation in which the record on appeal is being prepared, and thus whether the requirement for filing a petition in the juvenile court seeking access to the juvenile case file is a prerequisite to the superior court's preparation of the record on appeal. Staff found no statute, published case, or other authority directly addressing this issue.

Section 827 does not directly address the record on appeal in juvenile cases or the preparation of this record. In contrast, Family Code section 7805, which addresses confidentiality in proceedings to free children from parental custody and control – proceedings that are similar in nature to juvenile dependency proceedings in which parental rights are terminated – specifically addresses confidentiality of records in appellate proceedings. Subdivision (b) of this statute provides:

> In a proceeding before the court of appeal or Supreme Court to review a judgment or order entered in a proceeding under this part, the court record and briefs filed by the parties may be inspected only by the following persons:
>
> (1) Court personnel.
>
> (2) A party to the proceeding.
>
> (3) The attorneys for the parties.
>
> (4) Any other person designated by the presiding judge of the court before which the matter is pending.

This provision has been in Family Code section 7805 and its predecessor, Civil Code section 233.5, for more than 35 years. This statutory language was, in fact, the model for the adoption in 1981of the language in rule 8.401(b), quoted above, which limits access to the record on appeal in juvenile cases.[10] Welfare and Institutions Code section 827 has also been in effect for more than 35 years. During that time, section 827 has been amended on numerous occasions, but no language specifically addressing access to appellate court records in juvenile cases has been added to section 827. This, combined with the Judicial Council's conclusion, evidenced by the adoption of 8.401(b), that a rule specifically addressing access to the record on appeal in juvenile cases was necessary to protect the confidentiality of these records, suggests that section 827 does not govern access to the record on appeal.

This does not necessarily answer the question of whether section 827 applies when the record on appeal is in the process of being prepared, however. At the record preparation stage of the proceedings, the records at issue might still be considered part of a juvenile court case file, and thus subject to section 827's access limitations. The practice in Los Angeles and several other courts of requiring the appellant to file a JV-570 if he or she not included on section 827's list appears consistent with this view.

Note, however, that the preparation of the record on appeal is generally governed by the Appellate Rules. As indicated above, rule 8.407 and 8.409 address the contents and preparation of the record in juvenile appeals. These rules do not include any provision indicating that some appellants are required to file a JV-570 before the record on appeal will be prepared and/or sent to them. In an unpublished opinion issued by the Second District Court of Appeal earlier this week, the court discussed the Los Angeles Superior Court's practice of similarly requiring the filing of a JV-570 by a prospective adoptive parent who filed a notice of intent to file a writ petition under Welfare and Institutions Code section 366.28 to review an order designating

[10] April 16, 1981 memo to members of the Judicial Council's Superior Court Committee from the Administrative Office of the courts re: Proposal Regarding Procedure in Juvenile Court Appeals.

specific placement of a dependent child after termination of parental rights.[11] The Court of Appeal in that case, in ordering the superior court to prepare the record without the filing of the JV-570, focused on the fact that the California Rules of Court do not require a prospective adoptive parent to file a JV-570 request prior to filing a notice of intent to file a writ petition.

Application of provisions authorizing access by an attorney for a party

The courts' differing practices with respect to preparing the record on appeal in these cases may also reflect, at least in part, a lack of clarity about whether an appellant who is not among the specific individuals named in section 827 should be considered a party in the proceeding for purposes of the provisions in section 827 and the rules that authorize access to juvenile records by attorneys for the parties.

Section 827 and rules 5.552, 8.401, and 8.409 all provide that attorneys for the parties are entitled to copy or receive records in juvenile cases without petitioning the court. Neither section 827 nor these rules include a definition of the term "party" for purposes of access to records in juvenile cases. The rule establishing definitions of terms used in the Juvenile Rules similarly does not include a definition of the term "party."[12] Absent a specific definition of "party," the definition of "party" in rule 1.6, which defines terms used throughout the California Rules of Court unless the context or subject matter otherwise requires, would apply in interpreting rule 5.552:

> "Party" is a person appearing in an action. Parties include both self-represented persons and persons represented by an attorney of record. "Party," "plaintiff," "People of the State of California," "applicant," "petitioner," "defendant," "respondent," "other parent," or any other designation of a party includes the party's attorney of record.

As with the Juvenile Rules, the Appellate Rules do not include a separate definition of the term "party." However, rule 8.10 specifically provides that "[u]nless the context or subject matter requires otherwise, the definitions and use of terms in rule 1.6 apply to these rules."

Rule 1.6's definition of this term – "'Party' is a person appearing in an action" – would seem to cover any person who files a petition or an appeal in a juvenile proceeding. If an appellant other than the individual's listed in section 827 is considered a "party" for purposes of these provisions, then such a party's appellant's attorney should be entitled to access the juvenile record under section 827 and these rule provisions without filing a JV-570. The procedure

[11] *Mark M, v. The Superior Court of Los Angeles* (January 11, 2017) B279631, 2017 WL 108038

[12] See rule 5.502, *Definitions and Use of Terms*, at http://www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_502

followed in Riverside Superior Court, in which the record on appeal is sent to the district's appellate project, seems consistent with this view.

There is some basis for making a contrary argument, however. Prior to 1990, section 827 provided that juvenile records:

> may be inspected only by court personnel, the minor who is the subject of the proceeding, his parents or guardian, the attorneys for such parties, and such other persons as may be designated by court order of the judge of the juvenile court upon filing a petition therefor (emphasis added)

This language suggests that the original intent of this provision was to allow attorneys for the minor or the minor's parents or guardians to inspect juvenile records. Effective January 1, 1991, this language was changed to read:

> may be inspected only by court personnel, the district attorney, the minor who is the subject of the proceeding, his or her parents or guardian, the attorneys for the parties, and such other persons as may be designated by court order of the judge of the juvenile court upon filing a petition therefor.[13]

Staff did not find anything in the history of this legislation suggesting that the change from "such parties" to "the parties" was meant to be a substantive change.

Furthermore, interpreting "party" as including any person who appeals a ruling in a juvenile case and as entitling that person's counsel to receive a copy of the record on appeal could potentially undermine the confidentiality of juvenile records. Rule 8.407 does not establish different requirements for the contents of clerk's transcript depending on who is the appellant or what judgment or order is being appealed. As noted above, under rule 8.407 the clerk's transcript in all juvenile cases includes, among other things, "[a]ny report or other document submitted to the court." This would mean that an attorney for an appellant would have access to all such reports, even when such reports are not relevant to the judgment or order being appealed.

Finally, if the term party these provisions in these provisions were interpreted to apply to any person appearing in the action, these provisions would only entitle such parties attorneys, but not the parties themselves, to access the record. Thus these provisions would not address what procedure should be followed when there is a self-represented appellant. As suggested by the information gathered by Mr. Sacher, the appellants in the types of cases at issue, who are not the child or the child's parent or guardian, may not be entitled to appointment of appellate counsel and thus are likely to be self-represented.

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[13] Statutes of 1990, chapter 246 (A.B. 2638)

Options considered by the rules subcommittee
The rules subcommittee considered several possible options for amending the California Rules of Court to try to address the concerns raised by Mr. Lane.

OPTION 1 –Require the Appellant to File *Request for Disclosure of Juvenile Case File* (form JV-570)
This option would implement the suggestion submitted by Mr. Lane by establishing appellants' underlying obligation to file the *Request for Disclosure of Juvenile Case File* (form JV-570) in these cases and authorizing the Court of Appeal, after notice and an opportunity to correct, to dismiss the appeal if the request is not filed.

The advantages of option 1 considered by the subcommittee include:

- It would clarify the procedures for preparing the record on appeal in these cases;
- It would protect the confidentiality of records in juvenile case files;

The disadvantages of option 1 considered by the subcommittee include:

- It would apply section 827 to the appellate record preparation process when it is not clear that this statute is applicable.
- It would add considerable time to the record-preparation process in these appeals where reaching resolution quickly is a high priority;
- Even if the procedures are clarified, it may be difficult for self-represented litigants to navigate the obligation to file a JV-570, resulting in these cases being dismissed for procedural default rather than being decided on the merits; and
- For those trial courts that are not currently requiring the filing of a JV-570 in these cases, it would add new obligations.

OPTION 2 –Require the Court of Appeal to Determine What to Include in the Record on Appeal and Who Should Receive the Record
This option would incorporate elements of the procedures described by the Riverside Superior Court and in the Third District Court of Appeal. Under this procedure an initial version of the record on appeal would be sent to the Court of Appeal for its review and that court would determine the appropriate contents of the final record and to whom it could be distributed.

The advantages of option 2 considered by the subcommittee include:

- It would clarify the procedures for preparing the record on appeal in these cases;
- It would protect the confidentiality of records in juvenile case files; and
- Since the rules would place the obligation on the Court of Appeal to determine what should be included in the record on appeal without requiring the appellant to file either a JV-570 or a

motion in the Court of Appeal, this procedure may be less difficult for self-represented litigants to navigate, resulting in fewer of these cases being dismissed for procedural default rather than being decided on the merits.

The disadvantages of option 2 considered by the subcommittee include:

- If section 827 is applicable to the appellate record preparation process, this rule would not be consistent with the requirement in that section that a juvenile court judge make the decision about permitting access to the juvenile record;
- It would likely add time to the record-preparation process in these appeals where reaching resolution quickly is a high priority; and
- For those Court of Appeal District that are not currently determining what should be included in the record on appeal in these cases, it would add new obligations.

OPTION 3 –Specify a Limited Record in These Appeals by Rule
This option is designed to establish a limited record on appeal in those appeals in which the appellant or respondent may be a person who is not entitled to inspect or copy records in a juvenile case file under section 827. Essentially, instead of requiring the juvenile court or the Court of Appeal to balance factors and determine appropriate access on a case-by-case basis, in recommending and adopting this amendment, the subcommittee, committee, and Judicial Council would be weighing these factors and identifying those juvenile records for which the interests of the appellant and respondent in accessing these records for purposes of an appeal outweighs the policy considerations favoring confidentiality of juvenile case files.

The advantages of option 3 considered by the subcommittee include:

- It would clarify the content of the record on appeal in these cases;
- If superior courts and Courts of Appeal end other practices designed to protect confidentiality in these cases, it would reduce the time for record-preparation in these appeals where reaching resolution quickly is a high priority; and
- Since the rules would not place an obligation on self-represented litigants to file JV-570 or a motion in the Court of Appeal, if local courts did not impose such requirements, this procedure may be less difficult for self-represented litigants to navigate, resulting in fewer of these cases being dismissed for procedural default rather than being decided on the merits.

The disadvantages of option 3 considered by the subcommittee include:

- If section 827 is applicable to the appellate record preparation process, this rule would not be consistent with the requirement in that section that a juvenile court judge make the decision about permitting access to the juvenile record;
- It is not clear if this approach would adequately protect the confidentiality of records in juvenile case files because it is not clear if it encompasses all the cases in which the appellant

or respondent may be a person who is not entitled to access juvenile court records under section 827;

- Differing practices for record preparation in these cases might continue to exist in the trial and appellate courts; and
- The question of access to the record by self-represented parties is not addressed.

OPTION 4 – Not Pursuing Amendments to the California Rules of Court
This is essentially the "do nothing" option considered by the subcommittee. No recommendation would be made to amend any California Rules of Court; any effort to address this issue would be left to the local rule-making authority of the Courts of Appeal and superior courts.

The advantages of option 4 considered by the subcommittee include:

- It would not mandate changes or uniform practice by the superior courts or the Courts of Appeal.

The disadvantages of option 4 considered by the subcommittee include:

- It would not clarify record preparation procedures in these cases;
- There would not be uniformity in the protection of the confidentiality of records in juvenile case files;
- The procedures would likely continue to be difficult for self-represented litigants to navigate, resulting in these cases being dismissed for procedural default rather than being decided on the merits; and
- Both superior courts and Courts of Appeal would continue to expend considerable time and records in the record-preparation process in these appeals.

Rules Subcommittee Recommendation

After discussing the options above, the rules subcommittee concluded that an amendment to the Rules of Court would not adequately address the concerns relating to these appeals. This is primarily because it is not clear whether section 827 is applicable to the appellate record preparation process and the potential rules changes would either impose the requirements of this statute or be inconsistent with the requirements of this statute. The subcommittee therefore concluded that the best way to address these concerns would be to propose an amendment to section 827. The subcommittee asked staff to draft, for the full committee's consideration, a possible amendment to section 827 to specifically provide that appellants not otherwise entitled to access the juvenile case file may access those items to which they already had access in the juvenile proceedings that are relevant to the order being appealed. Essentially, this would embody option 3 above in the statute.

Subcommittee members also discussed the fact that, to properly prosecute an appeal, the appellant would also typically need to have access to some portions of the social worker's report. Based on confidentiality concerns, subcommittee did not think it was appropriate for this to be released to the appellant in these cases without a court order. The subcommittee concluded that the statutory amendment should therefore also include a provision allowing the Court of Appeal to authorize access to all or part of another record from the juvenile case file in these circumstances. The thought was that this would authorize handling such requests through existing augmentation procedures.

Attached for the committee's review is a draft invitation to comment reflecting the rules subcommittee recommendation, including the text of possible amendments to section 827. **Please note** that this draft is a staff draft; it was not reviewed by the rules subcommittee. In this draft, a new paragraph (6) would be added to subdivision (a) of section 827. This paragraph would apply only to the following:

- An individual who petitioned the juvenile court for de facto parent status and who files a notice of appeal challenging the denial of that petition;
- An individual not listed in paragraph (1) who files a petition under section 388 and who files a notice of appeal challenging the denial of that petition.

It would then authorize these appellants to access the following records without a court order:

- The petition that resulted in the order being appealed;
- Any response filed to the petition;
- The order appealed being appealed;
- Any court minutes relating to the order being appealed;
- the reporter's transcript in these appeals to the oral proceedings at any hearing that resulted in the order being appealed; and:
- The notice of appeal.

In addition the draft would allow these appellants to access any other record in the juvenile case file on order of the Court of Appeal and would apply the statute's restrictions on sharing of those records to which the appellant is provided access.

To help the committee see these draft amendments in context, staff has included in the draft invitation to comment the full text of section 827, which is very long and complex.

Questions the committee may want to discuss with respect to this draft proposal include:

- Should the determination of what to include in the record on appeal in these cases be made by statute or should it be done on a case-by-case basis? Note that section 827 and rule 5.552 contemplate that this determination will be done on a case-by-case basis considering, among other things, the relationship of the person who is seeking records to the child and/or the proceedings and what records are sought. Under this draft statute the relationship of the person receiving the records to the proceedings and the records sought would be consistent, but the relationship of the person to the child would vary.
- Does the draft encompass all the cases in which the appellant may be a person who is not entitled to access juvenile court records under section 827?
- The draft amendments focus on access to the record by the appellant:
    - Are there other parties who should have access to records without a court order?
    - Are there concerns about access to the record by anyone else who would ordinarily receive a copy of the record on appeal, such as the representative of the child's Indian tribe?
    - Is there a better way to identify who should have access?
- Balancing the interests of the child and other parties to the juvenile court proceedings, the interests of the appellant, and the interests of the public, are the records listed in the draft rules appropriate to release to an appellant in the identified juvenile proceedings?
    - Are the records are necessary and have substantial relevance to the legitimate need of the appellant?
    - Does the need for access to the records outweigh the policy considerations favoring confidentiality of juvenile case files?

Committee Task

The committee's task is to review the attached draft invitation to comment and:
(1) ask staff or committee members for further information/analysis;
(2) recommend to RUPRO that the invitation to comment, as proposed or as further revised by the committee, be approved for circulation; or
(3) reject the proposal.

Please note that staff is seeking the input of the Family and Juvenile Law Advisory Committee on this proposal and will report back to the full committee on this input.

Judicial Council of California

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

LEG17-__

Title
Appellate Procedure: Content of the Record in Certain Juvenile Appeals

Proposed Rules, Forms, Standards, or Statutes
Amend Welfare and Institutions Code Section 827

Proposed by
Appellate Advisory Committee
Hon. Louis Mauro, Chair

Action Requested
Review and submit comments by ____

Proposed Effective Date
January 1, 2019

Contact
Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov

Executive Summary and Origin

This proposal would amend the statute that specifies who may access and copy records in a juvenile case file to clarify that persons who are entitled to appeal certain orders in juvenile proceedings may access and copy the records related to the order they are appealing. This proposal is based on a suggestion from the Executive Officer of one of the Courts of Appeal.

Background

The confidentiality of juvenile case files is established by Welfare and Institutions Code section 827. This confidentiality is intended to protect the privacy rights of the child who is the subject of the juvenile court proceedings. Subdivision (a)(1) of this statue identifies those who may inspect and receive copies of a juvenile court case file.[1] These include the child who is the is the subject of the proceeding, the child's parent or guardian, the attorneys for the parties, the petitioning agency in a dependency action, or the district attorney, a city attorney, or city prosecutor authorized to prosecute criminal or juvenile cases under state law.

Ordinarily, to help resolve these matters as quickly as possible, when an appeal is filed in a juvenile proceeding, the record on appeal is prepared and sent to the Court of Appeal and the parties to the appeal very quickly. The items that must be included in the record are listed in California Rules of Court, rule 8.407 and, as soon as a notice of appeal is filed, the trial court begins preparing the record. This practice seems to be premised on all the parties to the appeal

[1] You can access the full text of this section at: http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=827.&lawCode=WIC)

being entitled under section 827 to inspect and receive copies of the records from the juvenile case file that would be included in the record on appeal.

Currently, however, there are individuals who have been authorized to participate in juvenile proceedings and have the right to appeal certain orders in those proceedings who are not entitled under section 827 to inspect or copy any records in a juvenile case file, including those relating to the order they are appealing. This may happen, for example, when the appellant is a family member or other person who filed a petition seeking de facto parent status and is appealing the denial of that petition or who filed a petition under Welfare and Institutions Code section 388 to change, modify, or set aside a juvenile court order on grounds of change of circumstance or new evidence and is appealing the denial of that petition. In these cases, the juvenile courts and Courts of Appeal are following various procedures to decide, on a case-by-case basis, what records the appellant may receive. This takes time and resources for the appellant, the juvenile court and/or the Court of Appeal. It also results in delays and, particularly when the appellant is self-represented, procedural dismissals of these appeals without consideration of their merit.

The Proposal

The Appellate Advisory Committee is proposing an amendment to section 827 to identify appellants in these juvenile proceedings as entitled to inspect and receive copies of those items from the juvenile court case file that are specifically related to the order that they are appealing. The items that the committee is proposing be accessible to these appellants without a prior court order are those to which they already had access in the juvenile court proceedings in which they were participating. The amendment would provide that an order from the Court of Appeal is required for such appellants to access any other item in the juvenile court record.

The committee believes that this proposed amendment appropriately balances the policy considerations favoring confidentiality of juvenile case files against these appellants' need for access to these records for purposes of effectuating their right to appeal. Since these appellants were already privy to the listed records in the juvenile court proceedings, the proposal would not dilute the confidentiality protections for the child. By eliminating the necessity for special procedures to authorize the appellants' access to the listed records, the proposal would reduce barriers to the appellants' access to justice, delays in these proceedings, and time and expenses for the parties and the courts. The amendment would also clarify the procedure for providing these appellants with access to any additional records from the juvenile case file in these circumstances.

Alternatives Considered

The committee also considered several different options for possible changes to the California Rules of Court to address this issue, including:

- Specifically requiring appellants to file a petition in the juvenile court requesting access to the juvenile case file and allowing the dismissal of the appeal if they fail to do so;

- Requiring the Court of Appeal to determine, on a case-by-case basis, what items from the juvenile case file to include in the record on appeal in these cases and who can access that record on appeal; and
- Setting the contents of the record on appeal in these cases by rule.

The committee ultimately concluded, however, that none of these approaches, by themselves was sufficient to address the issue.

Implementation Requirements, Costs, and Operational Impacts

The committee believes that this proposal will reduce burdens on litigants, trial courts, and the Courts of Appeal associated with preparing the record on appeal 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?
- Does the proposal appropriately identify the appellants who should have access to certain items from the juvenile case file without court order? Are there other appellants or parties who should be included? Is there a better way to identify who should have this access?
- Does the proposal appropriately identify the items from the juvenile case file that should be accessible without court order? Are there other items that should be included?

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

- 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?

Attachments and Links

Proposed amendments to Welfare and Institutions Code Section 827,

Welfare and Institutions Code section 827 would be amended, effective January 1, 2019 to read:

§ 827. Juvenile case file inspection; confidentiality; release; probation reports; destruction of records; liability

(a) (1) Except as provided in Section 828, a case file may be inspected only by the following:

(A) Court personnel.

(B) The district attorney, a city attorney, or city prosecutor authorized to prosecute criminal or juvenile cases under state law.

(C) The minor who is the subject of the proceeding.

(D) The minor's parents or guardian.

(E) The attorneys for the parties, judges, referees, other hearing officers, probation officers, and law enforcement officers who are actively participating in criminal or juvenile proceedings involving the minor.

(F) The county counsel, city attorney, or any other attorney representing the petitioning agency in a dependency action.

(G) The superintendent or designee of the school district where the minor is enrolled or attending school.

(H) Members of the child protective agencies as defined in Section 11165.9 of the Penal Code.

(I) The State Department of Social Services, to carry out its duties pursuant to Division 9 (commencing with Section 10000), and Part 5 (commencing with Section 7900) of Division 12, of the Family Code to oversee and monitor county child welfare agencies, children in foster care or receiving foster care assistance, and out-of-state placements, Section 10850.4, and paragraph (2).

(J) Authorized legal staff or special investigators who are peace officers who are employed by, or who are authorized representatives of, the State Department of Social Services, as necessary to the performance of their duties to inspect, license, and investigate community care facilities, and to ensure that the standards of care and services provided in those facilities are adequate and appropriate and to ascertain compliance with the rules and regulations to which the facilities are subject. The confidential information shall remain confidential except for purposes of inspection, licensing, or investigation pursuant to Chapter 3 (commencing with Section 1500) and Chapter 3.4 (commencing with Section 1596.70) of Division 2 of the Health and Safety Code, or a criminal, civil, or administrative proceeding in relation thereto. The confidential information may be used by the State Department of Social Services in a criminal, civil, or

administrative proceeding. The confidential information shall be available only to the judge or hearing officer and to the parties to the case. Names that are confidential shall be listed in attachments separate to the general pleadings. The confidential information shall be sealed after the conclusion of the criminal, civil, or administrative hearings, and may not subsequently be released except in accordance with this subdivision. If the confidential information does not result in a criminal, civil, or administrative proceeding, it shall be sealed after the State Department of Social Services decides that no further action will be taken in the matter of suspected licensing violations. Except as otherwise provided in this subdivision, confidential information in the possession of the State Department of Social Services may not contain the name of the minor.

(K) Members of children's multidisciplinary teams, persons, or agencies providing treatment or supervision of the minor.

(L) A judge, commissioner, or other hearing officer assigned to a family law case with issues concerning custody or visitation, or both, involving the minor, and the following persons, if actively participating in the family law case: a family court mediator assigned to a case involving the minor pursuant to Article 1 (commencing with Section 3160) of Chapter 11 of Part 2 of Division 8 of the Family Code, a court-appointed evaluator or a person conducting a court-connected child custody evaluation, investigation, or assessment pursuant to Section 3111 or 3118 of the Family Code, and counsel appointed for the minor in the family law case pursuant to Section 3150 of the Family Code. Prior to allowing counsel appointed for the minor in the family law case to inspect the file, the court clerk may require counsel to provide a certified copy of the court order appointing him or her as the minor's counsel.

(M) When acting within the scope of investigative duties of an active case, a statutorily authorized or court-appointed investigator who is conducting an investigation pursuant to Section 7663, 7851, or 9001 of the Family Code, or who is actively participating in a guardianship case involving a minor pursuant to Part 2 (commencing with Section 1500) of Division 4 of the Probate Code and acting within the scope of his or her duties in that case.

(N) A local child support agency for the purpose of establishing paternity and establishing and enforcing child support orders.

(O) Juvenile justice commissions as established under Section 225. The confidentiality provisions of Section 10850 shall apply to a juvenile justice commission and its members.

(P) Any other person who may be designated by court order of the judge of the juvenile court upon filing a petition.

Welfare and Institutions Code section 827 would be amended, effective January 1, 2019 to read:

(2) (A) Notwithstanding any other law and subject to subparagraph (A) of paragraph (3), juvenile case files, except those relating to matters within the jurisdiction of the court pursuant to Section 601 or 602, that pertain to a deceased child who was within the jurisdiction of the juvenile court pursuant to Section 300, shall be released to the public pursuant to an order by the juvenile court after a petition has been filed and interested parties have been afforded an opportunity to file an objection. Any information relating to another child or which could identify another child, except for information about the deceased, shall be redacted from the juvenile case file prior to release, unless a specific order is made by the juvenile court to the contrary. Except as provided in this paragraph, the presiding judge of the juvenile court may issue an order prohibiting or limiting access to the juvenile case file, or any portion thereof, of a deceased child only upon a showing by a preponderance of evidence that release of the juvenile case file or any portion thereof is detrimental to the safety, protection, or physical or emotional well-being of another child who is directly or indirectly connected to the juvenile case that is the subject of the petition.

(B) This paragraph represents a presumption in favor of the release of documents when a child is deceased unless the statutory reasons for confidentiality are shown to exist.

(C) If a child whose records are sought has died, and documents are sought pursuant to this paragraph, no weighing or balancing of the interests of those other than a child is permitted.

(D) A petition filed under this paragraph shall be served on interested parties by the petitioner, if the petitioner is in possession of their identity and address, and on the custodian of records. Upon receiving a petition, the custodian of records shall serve a copy of the request upon all interested parties that have not been served by the petitioner or on the interested parties served by the petitioner if the custodian of records possesses information, such as a more recent address, indicating that the service by the petitioner may have been ineffective.

(E) The custodian of records shall serve the petition within 10 calendar days of receipt. If any interested party, including the custodian of records, objects to the petition, the party shall file and serve the objection on the petitioning party no later than 15 calendar days after service of the petition.

(F) The petitioning party shall have 10 calendar days to file any reply. The juvenile court shall set the matter for hearing no more than 60 calendar days from the date the petition is served on the custodian of records. The court shall render its decision within 30 days of the hearing. The matter shall be decided solely upon the basis of the petition and supporting exhibits and declarations, if any, the objection and any supporting exhibits or declarations, if any, and the reply and any supporting declarations or exhibits thereto, and argument at hearing. The court may solely upon its own motion order the appearance of witnesses. If no objection is filed to the petition, the court shall review the petition and issue its decision within

Welfare and Institutions Code section 827 would be amended, effective January 1, 2019 to read:

10 calendar days of the final day for filing the objection. Any order of the court shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ.

(3) Access to juvenile case files pertaining to matters within the jurisdiction of the juvenile court pursuant to Section 300 shall be limited as follows:

(A) If a juvenile case file, or any portion thereof, is privileged or confidential pursuant to any other state law or federal law or regulation, the requirements of that state law or federal law or regulation prohibiting or limiting release of the juvenile case file or any portions thereof shall prevail. Unless a person is listed in subparagraphs (A) to (O), inclusive, of paragraph (1) and is entitled to access under the other state law or federal law or regulation without a court order, all those seeking access, pursuant to other authorization, to portions of, or information relating to the contents of, juvenile case files protected under another state law or federal law or regulation, shall petition the juvenile court. The juvenile court may only release the portion of, or information relating to the contents of, juvenile case files protected by another state law or federal law or regulation if disclosure is not detrimental to the safety, protection, or physical or emotional well-being of a child who is directly or indirectly connected to the juvenile case that is the subject of the petition. This paragraph shall not be construed to limit the ability of the juvenile court to carry out its duties in conducting juvenile court proceedings.

(B) Prior to the release of the juvenile case file or any portion thereof, the court shall afford due process, including a notice of and an opportunity to file an objection to the release of the record or report to all interested parties.

(4) A juvenile case file, any portion thereof, and information relating to the content of the juvenile case file, may not be disseminated by the receiving agencies to any persons or agencies, other than those persons or agencies authorized to receive documents pursuant to this section. Further, a juvenile case file, any portion thereof, and information relating to the content of the juvenile case file, may not be made as an attachment to any other documents without the prior approval of the presiding judge of the juvenile court, unless it is used in connection with and in the course of a criminal investigation or a proceeding brought to declare a person a dependent child or ward of the juvenile court.

(5) Individuals listed in subparagraphs (A), (B), (C), (D), (E), (F), (H), and (I) of paragraph (1) may also receive copies of the case file. In these circumstances, the requirements of paragraph (4) shall continue to apply to the information received.

(6)(A)The following individuals may inspect and receive copies of the portions of the juvenile case file listed in subparagraph (B):

(i) An individual who petitioned the juvenile court for de facto parent status and who files a notice of appeal challenging the denial of that petition;

Welfare and Institutions Code section 827 would be amended, effective January 1, 2019 to read:

(ii) An individual not listed in paragraph (1) who files a petition under section 388 and who files a notice of appeal challenging the denial of that petition.

(B) (i) The petition that resulted in the order being appealed;

(ii) Any response filed to the petition under (A);

(iii) The order appealed from;

(iv) Any court minutes relating to the order being appealed;

(v) A transcript of the oral proceedings at any hearing that resulted in the order being appealed;:

(vi) The notice of appeal; and

(vii) Any other record or portion thereof in the juvenile case file on order of the Court of Appeal.

(C) The requirements of paragraph (4) shall continue to apply to the information received under this paragraph.

(b) (1) While the Legislature reaffirms its belief that juvenile court records, in general, should be confidential, it is the intent of the Legislature in enacting this subdivision to provide for a limited exception to juvenile court record confidentiality to promote more effective communication among juvenile courts, family courts, law enforcement agencies, and schools to ensure the rehabilitation of juvenile criminal offenders as well as to lessen the potential for drug use, violence, other forms of delinquency, and child abuse.

(2) (A) Notwithstanding subdivision (a), written notice that a minor enrolled in a public school, kindergarten to grade 12, inclusive, has been found by a court of competent jurisdiction to have committed any felony or any misdemeanor involving curfew, gambling, alcohol, drugs, tobacco products, carrying of weapons, a sex offense listed in Section 290 of the Penal Code, assault or battery, larceny, vandalism, or graffiti shall be provided by the court, within seven days, to the superintendent of the school district of attendance. Written notice shall include only the offense found to have been committed by the minor and the disposition of the minor's case. This notice shall be expeditiously transmitted by the district superintendent to the principal at the school of attendance. The principal shall expeditiously disseminate the information to those counselors directly supervising or reporting on the behavior or progress of the minor. In addition, the principal shall disseminate the information to any teacher or administrator directly supervising or reporting on the behavior or progress of the minor whom the principal believes needs the information to work with the pupil in an appropriate fashion, to avoid being needlessly vulnerable or to protect other persons from needless vulnerability.

Welfare and Institutions Code section 827 would be amended, effective January 1, 2019 to read:

(B) Any information received by a teacher, counselor, or administrator under this subdivision shall be received in confidence for the limited purpose of rehabilitating the minor and protecting students and staff, and shall not be further disseminated by the teacher, counselor, or administrator, except insofar as communication with the juvenile, his or her parents or guardians, law enforcement personnel, and the juvenile's probation officer is necessary to effectuate the juvenile's rehabilitation or to protect students and staff.

(C) An intentional violation of the confidentiality provisions of this paragraph is a misdemeanor punishable by a fine not to exceed five hundred dollars ($500).

(3) If a minor is removed from public school as a result of the court's finding described in subdivision (b), the superintendent shall maintain the information in a confidential file and shall defer transmittal of the information received from the court until the minor is returned to public school. If the minor is returned to a school district other than the one from which the minor came, the parole or probation officer having jurisdiction over the minor shall so notify the superintendent of the last district of attendance, who shall transmit the notice received from the court to the superintendent of the new district of attendance.

(c) Each probation report filed with the court concerning a minor whose record is subject to dissemination pursuant to subdivision (b) shall include on the face sheet the school at which the minor is currently enrolled. The county superintendent shall provide the court with a listing of all of the schools within each school district, within the county, along with the name and mailing address of each district superintendent.

(d) (1) Each notice sent by the court pursuant to subdivision (b) shall be stamped with the instruction: “Unlawful Dissemination Of This Information Is A Misdemeanor.” Any information received from the court shall be kept in a separate confidential file at the school of attendance and shall be transferred to the minor's subsequent schools of attendance and maintained until the minor graduates from high school, is released from juvenile court jurisdiction, or reaches the age of 18 years, whichever occurs first. After that time the confidential record shall be destroyed. At any time after the date by which a record required to be destroyed by this section should have been destroyed, the minor or his or her parent or guardian shall have the right to make a written request to the principal of the school that the minor's school records be reviewed to ensure that the record has been destroyed. Upon completion of any requested review and no later than 30 days after the request for the review was received, the principal or his or her designee shall respond in writing to the written request and either shall confirm that the record has been destroyed or, if the record has not been destroyed, shall explain why destruction has not yet occurred.

(2) Except as provided in paragraph (2) of subdivision (b), no liability shall attach to any person who transmits or fails to transmit any notice or information required under subdivision (b).

Welfare and Institutions Code section 827 would be amended, effective January 1, 2019 to read:

(e) For purposes of this section, a "juvenile case file" means a petition filed in any juvenile court proceeding, reports of the probation officer, and all other documents filed in that case or made available to the probation officer in making his or her report, or to the judge, referee, or other hearing officer, and thereafter retained by the probation officer, judge, referee, or other hearing officer.

(f) The persons described in subparagraphs (A), (E), (F), (H), (K), (L), (M), and (N) of paragraph (1) of subdivision (a) include persons serving in a similar capacity for an Indian tribe, reservation, or tribal court when the case file involves a child who is a member of, or who is eligible for membership in, that tribe.

(g) A case file that is covered by, or included in, an order of the court sealing a record pursuant to Section 781 or 786 may not be inspected except as specified by Section 781 or 786.

TAB IIIE

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
January 20, 2017

To
Appellate Advisory Committee

From
Daniel Richardson, Attorney Center for Family Children & the Courts

Subject
Juvenile Law-Advisement of Appellate Rights

Action Requested
Please Review

Deadline
N/A

Contact
Daniel Richardson, Center for Families, Children & the Courts
415-865-7619 phone
Daniel.richardson@jud.ca.gov

Executive Summary

Staff to the Family and Juvenile Law Advisory Committee is seeking the input of the Appellate Advisory on the direction proposed to be taken in response to a proposal to change the rule that addresses advisement of appellate rights in juvenile proceedings. On January 12, 2017, after reviewing a suggestion to remove the requirement of California Rule of Court 5.590(a) that a parent be present at a hearing to be advised of their appellate rights, the Family and Juvenile Law Advisory Committee voted not to remove this requirement. The suggestion came from an appellate attorney on a recent published decision in which the rule was found to unambiguously require the appearance of a parent at the hearing to be advised of their appellate rights. While some committee members agreed with the suggestion, the majority felt that the requirement creates an extra burden on the court that was not justified under the circumstances. The committee chose instead to pursue the option of notifying parents that they will not be advised of their appellate rights if they do not attend the court hearing by placing this language on court forms related to notice. Staff at the Center for Family, Children & the Courts will be exploring in future cycles revisions to forms to include an advisement that if a parent is not present they will

not be advised of their appellate rights, and seeks feedback from the Appellate Advisory Committee on whether this is an agreeable course of action.

Request to Amend Rule 5.590(a)

Staff to the Family and Juvenile Law Advisory Committee and the Appellate Advisory Committee received a suggestion to amend rule 5.590(a), requesting that the requirement that a parent be present in order to receive an advisement of appellate rights be removed. Currently the language only requires that the advisement of appellate rights be given if the parent is present.[1]

A recent case found that based on the language in rule 5.590(a), there is no right to the advisement of appellate rights under rule 5.590(a) unless the parent is present at the hearing. *In re Albert A.* 243 Cal.App.4th 1220, 1237. In response to this decision, staff was contacted by the appellate attorney who represented the appellant on the case. She requested the committee remove the words "if present" from rule 5.590(a), to read as follows:

> **(a) Advisement of right to appeal** If at a contested hearing on an issue of fact or law the court finds that the child is described by Welfare and Institutions Code section 300, 601, or 602 or sustains a supplemental or subsequent petition, the court after making its disposition order other than orders covered in (b) must advise, orally or in writing**,** the child, if of sufficient age, and ~~if present~~ the parent or guardian of: ***

She presented several arguments for why the rule should be amended, including:

- There is no other authority besides rule 5.590(a) for denying notice of appeal rights to parents who are not present at their dependency hearing.
- The language is confusing in the dependency context and has been interpreted inconsistently, citing to different treatment by various treatises.
- More recently adopted rules of court contain the requirement of advisement of appellate rights in dependency cases orally or in writing, including rule 5.590(b) & (c) and rule 5.542(f).
- Public policy should favor advising a party of the right to appeal a decision that affects a fundamental interest. Many parents have limited education and less than average access to legal services, and it is reasonable to switch the burden to the state to explain the proceedings and the party's basic remedies.

[1] Rule 5.590 subsection (b) and (c) require that an advisement of appellate rights be sent in writing for certain hearings. Subsection (b) requires the written advisement when the court sets a section 366.26 hearing, and subsection (c) requires a written advisement of an order transferring a case to tribal court.

- It is risky to put the sole burden for notification on counsel for the parent, when dependency counsel have notoriously unmanageable caseloads and often fewer resources than the court.
- The requirement a parent be present to receive notice of basic appellate rights, effectively punishes parents who are not present, without regard to their culpability for not being present.

The language "if present" as it relates to parents and guardians has been in the rule since its inception and has not since been altered. Rule 5.590, originally adopted in 1973 as rule 251, was initially focused on ensuring children would be advised of their appellate rights. The rule was adopted in response to a request by the Board of Governors that a rule be adopted requiring juvenile court judges and referees to advise minors, and their parents or guardians, of the minors' appeal rights. While the focus of the rule initially was concerned with ensuring minors were advised of their appellate rights, the rule has over time been interpreted as including an advisement of a parent's appellate rights as well.

Much has changed for the families in dependency courts since 1973. There has been a substantial shift towards greater recognition of the fundamental rights of families to due process and the maintenance of familial bonds. When the rule was enacted in 1973, a parent's due process rights in dependency was still in its embryonic stage. Due process rights of parents have evolved since 1973, but the rule as it relates to advisement of appellate rights to parents has remained unaltered.[2]

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[2] The rule was enacted shortly after the US Supreme Court in *Stanley v. Illinois* found that a parent had a due process right to hearing on parental fitness. *Stanley v. Illinois* (1972) 405 U.S. 645. And in 1981, the US Supreme Court ruled that the heightened standard of proof clear and convincing evidence of parental unfitness was required when considering terminating parental rights. *Santosky II v. Kramer*, (1981) 455 U.S. 745. The *Santosky* court found that the balance of private interests strongly favored heightened procedural protections when a court is severing a parent's fundamental right to their custody of their children. *Id.* at p. 760.

In 1982, California adopted the federal law Public Law 96-273, which established a more structured framework for the protection of abused, neglected and abandoned children as dependents of the juvenile court and for services to the family. This included regular review hearings every six months. Pursuant to the new federal law, California mandated active efforts to keep children in their home if possible, to reunify families if removal proved necessary, and to select permanent plans, including adoption, in a timely fashion if families could not be reunified.

Further changes to the dependency scheme were established in 1987 when SB 243 was enacted. Parents were now entitled to court-appointed counsel to represent them through the proceedings if they cannot afford counsel. (Section 317(b)). Appointment of counsel previously had been a matter of juvenile court discretion. *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, p. 248 fn. 4. SB 243 also brought termination of parental rights for dependent children within the dependency process, eliminating the need to file a separate Civil Code section 232 proceeding. In addition, six month review hearings carried with them a presumption that the minor would be returned to parental custody unless the department of social services carried the burden that the minor would be at risk if returned home.

Further, notice of all hearings and rights has been described as key safeguard for parents in the dependency system. *In re Marilyn H.* (1993) 5 Cal.4th 295, 307-308. And new subdivisions were added to 5.590(b) in 2009 that include a

Along with the significant changes in the dependency scheme since 1973 came more expansive appellate rights and appealable issues. Under section 395, all subsequent orders to disposition are directly appealable without limitation. As a result of these broad statutory terms, juvenile dependency law does not abide by the normal prohibition against interlocutory appeals. *In re S.B.* (2009) Cal.4th 529, 532 [citing cases].[3] And as a consequence of section 395, unappealed disposition or postdisposition orders are final and binding and may not be attacked on an appeal from a later appealable order. *Id.*

As interpreted by the court of appeal in *In re Albert*, the right to an advisement of appellate rights rests in the language of the rule itself, and not as a fundamental due process right. *In re Albert, supra.* at p. 1238-39. The court in *In re Albert* failed to find any authority supporting that due process entitled a parent to an advisement of appellate rights if they were not present at the hearing. *Id.* As such, there is currently no error when a parent misses a hearing and is not advised of their appellate rights. As the court of appeal noted, the advisement of a parent's right to appeal from a disposition order has always been predicated on presence at the jurisdictional hearing, despite numerous opportunities for the Judicial Council to provide otherwise. *Id.* In a separate case, the same court found that the failure to advise a parent of their appellate rights as required by rule 5.590(a) was a special circumstance constituting an excuse for failure to timely appeal. *In re A.O.* (2015) 242 Cal.App.4th 145.

Family and Juvenile Law Advisory Committee Action

On January 12, 2017, the Family and Juvenile Law Advisory Committee considered the suggestion of removing the requirement that a parent be present at a hearing to be advised of their appellate rights. The committee voted to not proceed with the suggested rule change. While some committee members agreed with the suggestion, the majority felt that the requirement creates an extra burden on the court that was not justified under the circumstances. The committee chose instead to pursue the option of notifying parents that they will not be advised of their appellate rights if they do not attend the court hearing by placing this language on court forms related to notice.

Conclusion

Staff at CFCC will explore in future cycles possible revisions to forms to include where appropriate, an advisement that if a parent is not present they will not be advised of their appellate rights, in addition to other rule changes and form changes that should present themselves. In addition language has been added to the script for dependency status review

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requirement that an advisement of appellate rights be given in writing if it cannot be done orally when the court is setting a section 366.26 hearing.

[3] Only "findings" are appealable however. *In re L.B.* (2009) 173 Cal.App.4th 562, 565

hearings used by judicial officers, indicating that if a parent is not present at their future hearings, they will not be advised of their appellate rights. Staff at CFCC also seeks to ensure that this is agreeable with the Appellate Advisory Committee.

TAB IIIF

TAB IIIG

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
January 24, 2017

To
Members of the Appellate Advisory Committee

From
Heather Anderson, Supervising Attorney, Legal Services

Subject
Settled statements

Action Requested
Please read before January 30 committee meeting

Deadline
January 30, 2017

Contact
Heather Anderson
415-865-7691
heather.anderson@jud.ca.gov

Introduction

Item 6 on the committee's annual agenda this committee year is to consider whether to recommend amendments to the rule regarding settled statements in unlimited civil cases or a form to address difficulties in the timely preparation of these statements (this is a priority 1 project with a proposed January 1, 2018 completion date). At its January 12 meeting, the rules subcommittee reviewed draft amendments to California Rules of Court, rule 8.137, draft revisions to *Appellant's Notice Designating Record on Appeal (Unlimited Civil)* (form APP-003), and a mock-up of a possible new form APP-014 *Proposed Statement on Appeal (Unlimited Civil Case)* that were designed to implement this suggestions. The rules subcommittee recommends that the committee move forward with circulating this proposal for public comment. Attached for the committee's review is a draft invitation to comment addressing these proposed rule amendments and forms.

Background

Settled statements are one of the methods permitted under the Rules of Court to prepare a record of the trial court proceedings for an appeal. A settled statement is a summary of the trial court proceedings prepared by the appellant and approved by the trial court (this contrasts with an

agreed statement, which is not reviewed by the trial court but is agreed to by the parties). Settled statements are typically used as the record of the oral proceedings in the trial court, replacing a reporter's transcript, but they can also be used to provide a record of the documents filed in the trial court, replacing a clerk's transcript or appendix.

Settled statements in unlimited civil cases

Rule 8.137 addresses the use of settled statements in appeals to the Court of Appeal in unlimited civil cases. This rule reflects a basic presumption that court reporter's transcripts will be available in these unlimited civil cases and a preference for use of these transcripts. Under subdivision (a) of this rule, an appellant must file a motion asking to use a settled statement and must support this motion with a showing that a reporter's transcript is not available to the appellant:

> (a) Motion to use settled statement
>
> (1) An appellant intending to proceed under this rule must serve and file in superior court with its notice designating the record on appeal under rule 8.121 a motion to use a settled statement instead of a reporter's transcript or both reporter's and clerk's transcripts.
>
> (2) The motion must be supported by a showing that:
>
> (A) A substantial cost saving will result and the statement can be settled without significantly burdening opposing parties or the court;
>
> (B) The designated oral proceedings were not reported or cannot be transcribed; or
>
> (C) The appellant is unable to pay for a reporter's transcript and funds are not available from the Transcript Reimbursement Fund (see rule 8.130(c)). A party proceeding in forma pauperis is deemed unable to pay for a transcript.

The rule also provides very little direction regarding how a proposed statement is to be prepared and how it is to be reviewed and approved by the trial court.

Given that court reporters were historically present to record the proceedings in unlimited civil cases and the hurdle of having to file a motion, in the past, settled statements were a little-used option in Court of Appeal proceedings. As noted by committee member Joseph Lane, however, times have changed. Court reporters are no longer present to record the proceedings in many civil cases and therefore more appellants are now trying to use the settled statements procedure. This has proved problematic, as appellants attempt to navigate the motion procedure and prepare

proposed statements and trial court attempt to review and certify proposed statement. These problems are having an increasing impact on both litigants and the Courts of Appeal.

Statements on appeal in limited civil cases

A statement on appeal is the equivalent of a settled statement in a limited civil case appealed to the appellate division of the superior court. Unlike in unlimited civil cases, historically, court reporters were often not present to record the proceedings in limited civil cases. Statements on appeal were therefore commonly used to prepare the record in these cases and continue to be used currently.

Rule 8.837 addresses statements on appeal in limited civil cases. Unlike rule 8.137, this rule, adopted effective January 1, 2009, does not require the appellant to file a motion requesting to use a statement on appeal; the appellant may simply elect in his or her record designation to use a statement on appeal. Rule 8.837 also provides fairly detailed directions to appellants regarding the content of proposed statements on appeal and to trial courts about reviewing and approving (certifying) these statements. At the same time as it adopted this rule, the Judicial Council also approved *Proposed Statement on Appeal (Limited Civil Case)* (form APP-104) which provides a template to appellants for preparing a proposed statement.[1] Rule 8.837 generally requires self-represented appellants to use this form.

Draft Rule Amendments and Form Revisions

Committee member Joseph Lane suggested that rule 8.137 be amended to clarify the procedure for getting a final certified statement to the appropriate clerk for transmission to the Court of Appeal. He also noted, however, that there might be other suggestions regarding improving this procedure. Because trial courts are familiar with the statement on appeal procedure and form APP-104 in limited civil cases, the rules subcommittee is proposing that these be used as models for addressing the problems that have arisen with the preparation of settled statements in Court of Appeal proceedings.

Possible amendments to rule 8.137

The attached draft invitation to comment includes possible amendments to rule 8.137 that would incorporate many provisions from rule 8.837 and make other changes designed to make it easier to use the settled statement procedure in unlimited civil cases. The following are the main changes suggested:

- Adding a new subdivision that describes what a settled statement is (proposed subdivision a). This should help litigants better understand this option;

[11] You can access this form at:http://www.courts.ca.gov/documents/app104.pdf

- Eliminating the requirement to file a motion requesting to use a settled statement if either the proceedings were not recorded by a court reporter or the appellant has received a fee waiver (proposed paragraphs b(1). These circumstances were suggested because it seemed likely that motions to use settled statements would have been granted in these circumstances anyway.This should both help reduce barriers for appellants and reduce burdens on the trial court in cases in which the motion would have been granted;
- In cases in which an appellant moves to use a settled statement even though a court reporter did record the proceedings, allowing the respondent to pay for a reporter's transcript (proposed subdivision b(2)(B)). This provision is not in rule 8.837, it was suggested by the rules subcommittee at its January 12 meeting. In concept, this is designed give respondents the opportunity to avoid the delay and burdens associated with preparation of a settled statement by providing a reporter's transcript when one is available. Please note that the language of this provision was not reviewed by the rules subcommittee; it is a staff draft modeled on rule 8.702d(2)(B), relating to expedited CEQA appeals. One thing that the committee may want to discuss in connection with this provision is how the oral proceedings to be included in the transcript will be designated. Currently, when the appellant does not have to identify the proceedings that will be covered in a settled statement in the same way as they are identified for inclusion in a reporter's transcript.
- Requiring self-represented appellants to use a proposed statement on appeal form, modeled on APP-104, unless the trial court authorizes them not to (proposed subdivision c). This should both help appellants prepare proposed statements and make it easier for the trial court judge to review proposed statements;
- Adding provisions from rule 8.837 regarding the contents of proposed statements (proposed subdivision d). This should also both help appellants prepare proposed statements and make it easier for the trial court judge to review proposed statements. Note that these proposed amendments would include requiring the appellant to specify, in all cases, the grounds for the appeal; currently, rule 8.137 only requires such a specification when the proposed statement describes less than all the testimony.
- Adding provisions from rule 8.837 regarding the trial court's review of proposed statements (proposed subdivision f). This should clarify and simplify the procedure for the trial court and bring consistency to the procedures for statements in limited and unlimited civil cases. Among other things, these proposed amendments would:
    - Eliminate the current requirement that the trial court hold a hearing to "settle" the statement in every case; instead, a hearing would only be held if ordered by the trial court and would not ordinarily be ordered unless there was a factual dispute about a material aspect of the proceeding.

  - Specifically authorize the judge to send a proposed statement back to the appellant for correction without holding a hearing if the statement is missing essential material.
  - Allow the judge to make modifications and corrections to the statement, rather than sending it back to the appellant, if the judge so chooses;
  - If a court reporter did record the proceedings and the trial court adopts a rule authorizing this, allow the trial court judge to order preparation of a reporter's transcript instead of reviewing and correcting the statement. The court would be required to pay for any transcript ordered under this provision.

- Add provisions from rule 8.837 regarding review of modified or corrected statements (proposed subdivision g). This procedure ensures that the parties have an opportunity to review and object to any modified statement before it is certified by the judge.
- Add a requirements that any stipulation of the parties to a statement be served and filed and that the final statement be immediately submitted to the clerk for transmission of the record on appeal (proposed subdivision (h). These requirements are intended to reduce delay in transmission of the final statements on appeal to the Court of Appeal.

Possible revisions to form APP-003

Attached for your review are possible revisions to *Appellant's Notice Designating Record on Appeal (Unlimited Civil)* (form APP-003), shown as handwritten additions and deletions, which would conform this form to the proposed amendments to rule 8.137 discussed above. Specifically, revisions are proposed to section 2.b. on the form reflect the elimination of the requirement to file a motion requesting to use a settled statement if either the proceedings were not recorded by a court reporter or the appellant has received a fee waiver

Possible new form APP-014

Attached for your review is a draft of proposed new form *Proposed Statement on Appeal (Unimited Civil Case)* (form APP-014). This form is modeled on *Proposed Statement on Appeal (Limited Civil Case)* (form APP-104).

Note that APP-104 was developed with limited civil cases in mind. Limited civil cases have a narrower range of case types – for example, they do not include family law cases – and the proceedings are typically shorter and simpler than for unlimited civil cases. For this reason, it is not clear if a form like APP-014 will work in unlimited civil cases, either in its current format or even with additional modifications. The rules subcommittee discussed this and decided to recommend moving forward with circulating proposed form APP-014 in order to obtain input on whether such a form will be helpful in this context.

In reviewing this draft form, the committee may want to consider the following questions:

- Are there additional items that need to be included on the form?
- Should the form include additional space for the summary of any of the items?
- Are there items for which the summary is always likely to be too be long to fit on the form and, therefore that the form should require be done by way of attachment?
- Should the form include the final section asking the appellant to summarize the final judgment or should this be replaced with a requirement to attach a copy of the judgment? Note that the appellate will be required to attach a copy of the judgment to the Civil Case Information Statement that must be filed in the Court of Appeal at approximately the same time as a proposed statement must be filed in the trial court.

Committee Task

Attached for the committee's review is a draft invitation to comment reflecting the rules subcommittee recommendations. **Please note** that the rules subcommittee reviewed an earlier draft of the text of the rule amendments, but it did not review the draft invitation to comment cover memo. Changes from the draft rules reviewed by the subcommittee are shown in yellow highlighting.

The committee's task is to review this draft invitation to comment and:
(1) ask staff or committee members for further information/analysis;
(2) recommend to RUPRO that the invitation to comment, as proposed or as further revised by the committee, be approved for circulation; or
(3) reject the proposal.

Judicial Council of California

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR17-__

Title
Appellate Procedure: Settled Statements in Unlimited Civil Cases

Proposed Rules, Forms, Standards, or Statutes
Amend California Rules of Court, rule 8.137; revise form APP-003, and approve new form APP-014

Proposed by
Appellate Advisory Committee
Hon. Louis Mauro, Chair

Action Requested
Review and submit comments by ____

Proposed Effective Date
January 1, 2018

Contact
Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov

Executive Summary and Origin

To make the settled statements procedure in unlimited civil cases less burdensome, this proposal would amend the rule regarding settled statements to remove the requirement for obtaining a court order to use this procedure in certain circumstances and would create a new form for appellants to use in preparing proposed statements. This proposal is based on a suggestion from the Clerk/Executive Officer of one of the Courts of Appeal.

Background

Settled statements are one of the methods permitted under the Rules of Court to prepare a record of the trial court proceedings for an appeal. A settled statement is a summary of the trial court proceedings prepared by the appellant and approved by the trial court. Rule 8.137 addresses the use of settled statements in appeals to the Court of Appeal in unlimited civil cases. This rule currently reflects a basic presumption that court reporter's transcripts will be available in these unlimited civil cases and a preference for use of these transcripts. Under subdivision (a) of this rule, an appellant must file a motion asking to use a settled statement and must support this motion with a showing that a reporter's transcript is not available to the appellant.

Because court reporters are no longer present to record the proceedings in many civil cases, more appellants are now trying to use the settled statements procedure. This has proved problematic, as appellants, particularly those who are self-represented, have difficulty navigating the motion procedure and preparing proposed statements and it is a burden on trial court that must attempt to

review and certify proposed statements. These problems also impact the Courts of Appeal by delaying or resulting in defaults in these cases.

Statements on appeal, which are essentially the same as settled statements, are also used in appeals to the superior court appellate division. The rules for these appeals do not require the appellant to file a motion in order to get permission to use a statement on appeal. There is also a form that is designed to assist litigants, particularly self-represented litigants in preparing proposed statements that contain the necessary information.

The Proposal

Amendments to Rule 8.137

The Appellate Advisory Committee is proposing amendments to rule 8.137 that are modeled in large part on the rules for statements on appeal in the superior court appellate division. The main substantive changes include:

- Permitting an appellant to use the settled statement procedure without having to file a motion in two circumstances in which it seemed likely that a motion would have been granted anyway: (1) if the trial court proceedings were not recorded by a court reporter or (2) if the appellant has received a fee waiver (proposed subdivision b(1)). This change is intended to reduce burdens for both appellants and courts.
- In cases in which an appellant moves to use a settled statement even though a court reporter did record the proceedings, allowing the respondent to pay for a reporter's transcript (proposed subdivision b(2)(B)). This provision is not in rule 8.837, it is modeled on rule 8.702d(2)(B), relating to expedited CEQA appeals. This provision is designed give respondents the opportunity to avoid the delay and burdens associated with preparation of a settled statement by providing a reporter's transcript when one is available;
- Requiring self-represented appellants to use a proposed statement on appeal form, discussed below, unless the trial court authorizes them not to (proposed subdivision c). This is modeled on rule 8.837 and is intended help appellants prepare proposed statements and help produce proposed statements that are easier for the trial court judge to review;
- Adding provisions from rule 8.837 regarding the contents of proposed statements (proposed subdivision d). This should also both help appellants prepare proposed statements and make it easier for the trial court judge to review proposed statements; and
- Adding provisions from rule 8.837 regarding the trial court's review of proposed statements (proposed subdivision f). This should clarify and simplify the procedure for the trial court and bring consistency to the procedures for statements in limited and unlimited civil cases.
- Adding a provision designed to clarify what should happen when the statement is finalized (proposed subdivision (h)(3)). This is designed to reduce delays in the transmission of the record to the Court of Appeal.

Proposed Form Changes

This proposal also includes proposed revisions to one existing form and a possible new form.

Appellant's Notice Designating Record on Appeal (Unlimited Civil) (form APP-003) would be revised to reflect the elimination of the requirement to file a motion requesting to use a settled statement if either the proceedings were not recorded by a court reporter or the appellant has received a fee waiver

Proposed new form *Proposed Statement on Appeal (Unimited Civil Case)* (form APP-014) is modeled on *Proposed Statement on Appeal (Limited Civil Case)* (form APP-104). It is designed to help appellants prepare their initial proposed statement. It includes spaces and prompts to help appellants identify and include necessary information in their statements. By providing a standardized format and prompting the inclusion of required information, it is also designed to make these proposed statements easier for the trial judge to review.

The committee would particularly appreciate comments about this proposed form. As noted above, the form is modeled largely on a form used in limited civil cases. Limited civil cases have a narrower range of case types – for example, they do not include family law cases – and the proceedings are typically shorter and simpler than for unlimited civil cases. The committee would appreciate input on whether, given these differences, a form like APP-014 is likely to be helpful in unlimited civil cases, either as proposed or with additional modifications. Please see the request of specific comments below.

Alternatives Considered

The committee considered only recommending the clarification to the rule about what happens once a statement has been finalized. The committee concluded, however, that additional changes to the procedure would be helpful in reducing barriers for litigants and burdens on the courts. The committee also considered not recommending proposed new form APP-014, but concluded that it would be best to seek input from commentators on whether such a form would be helpful.

Implementation Requirements, Costs, and Operational Impacts

The committee's intent in making this proposal is to reduce burdens on litigants and trial courts associated with preparing settled statements in unlimited civil cases. The committee would particularly appreciate comments about whether the proposal is likely to achieve this goal.

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 *Proposed Statement on Appeal (Unimited Civil Case)* (form APP-014) be helpful to litigants and/or the trial courts?
- Are there additional items that need to be included on the form?
- Should the form include additional space for the summary of any of the items?
- Are there items for which the summary is always likely to be too be long to fit on the form and, therefore that the form should require be done by way of attachment?
- Should the form include the final section asking the appellant to summarize the final judgment or should this be replaced with a requirement to attach a copy of the judgment? Note that the appellate will be required to attach a copy of the judgment to the Civil Case Information Statement that must be filed in the Court of Appeal at approximately the same time as a proposed statement must be filed in the trial court.

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

- 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?

Attachments and Links

1. Proposed amendments to rule 8.137;
2. Proposed revisions to form APP-003
3. Proposed new form APP-014

California Rules of Court, rule 8.137 would be amended, effective January 1, 2018 to read:

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 2. Civil Appeals

Article 2. Record on Appeal

Rule 8.137. Settled statement

(a) Description

A settled statement is a summary of the superior court proceedings that is approved by the superior court. An appellant may either elect or move to use a settled statement as the record of the oral proceedings in the superior court, instead of a reporter's transcript, and may move to use a settled statement as the record of the written documents from the superior court proceedings, instead of a clerk's transcript or appendix.

~~(a)~~(b) ~~Motion to use settled statement~~ When may be used

(1) An appellant may elect in its notice designating the record on appeal under rule 8.121 to use a settled statement as the record of the oral proceedings in the superior court without filing a motion under (2) if:

(A) The designated oral proceedings in the superior court were not reported by a court reporter; or

(B) The appellant has an order waiving his or her court fees and costs.

~~(1)~~(2) An appellant intending to proceed under this rule for reasons other than those listed in (1) must serve and file in superior court with its notice designating the record on appeal under rule 8.121 a motion to use a settled statement instead of a reporter's transcript or both reporter's and clerk's transcripts.

~~(2)~~(A) The motion must be supported by a showing that:

~~(A)~~(i) A substantial cost saving will result and the statement can be settled without significantly burdening opposing parties or the court;

~~(B)~~(ii) The designated oral proceedings ~~were not reported or~~ cannot be transcribed; or

California Rules of Court, rule 8.137 would be amended, effective January 1, 2018 to read:

~~(C)~~(iii) Although the appellant does not have a fee waiver, he or she is unable to pay for a reporter's transcript and funds are not available from the Transcript Reimbursement Fund (see rule 8.130(c)). ~~A party proceeding in forma pauperis is deemed unable to pay for a transcript.~~

(B) If the designated oral proceedings in the superior court were reported by a court reporter:

(i) Within ten days after service of the appellant's motion to use a settled statement, the respondent may either (1) deposit a certified transcript of all of the proceedings designated by the appellant and any additional proceedings designated by the respondent or (2) serve and file a notice that the respondent is requesting preparation, at the respondent's expense, of a reporter's transcript of all proceedings designated by the appellant and any additional proceedings designated by the respondent. This notice must be accompanied by either the required deposit for the reporter's transcript under rule 8.130(b)(1) or the reporter's written waiver of the deposit under rule 8.130(b)(3)(A).

(ii) If the respondent timely deposits the certified transcript as required under (i), the appellant's motion to use a settled statement will be dismissed. If the respondent timely files the notice and makes the deposit or files the waiver as required under (i), the appellant's motion to use a settled statement will be dismissed and the clerk must promptly send the reporter notice of the designation and of the deposit or substitute and notice to prepare the transcript, as provided under rule 8.130(d)

~~(3)~~(C) If the court denies the motion, the appellant must file a new notice designating the record on appeal under rule 8.121 within 10 days after the superior court clerk sends, or a party serves, the order of denial.

~~(b)~~(c) Time to file~~; contents of~~ proposed statement

(1) Within 30 days after filing its notice designating the record on appeal electing under (b)(1) to use a settled statement or within 30 days after the superior court clerk sends, or a party serves, an order granting a motion to use a settled statement under (b)(2), the appellant must serve and file a proposed statement in superior court. ~~a condensed narrative of the oral proceedings that the appellant believes necessary for the appeal. Subject to the court's approval in settling the statement, the appellant may present some or all of the evidence by question and answer.~~

California Rules of Court, rule 8.137 would be amended, effective January 1, 2018 to read:

(2) Appellants who are not represented by an attorney must file their proposed statement on *Statement on Appeal (Unlimited Civil Case)* (form APP-014). For good cause, the court may permit the filing of a statement that is not on form APP-014.

(d) Contents of proposed statement

The proposed statement must contain

~~(2)~~(1) A statement of the points the appellant is raising on appeal. If the condensed narrative under (3) covers only a portion of the oral proceedings, ~~describes less than all the testimony, the appellant must state the points to be raised on appeal;~~ the appeal is then limited to ~~those~~ the points identified in the statement unless the reviewing court determines that the record permits the full consideration of another point or, on motion, the reviewing court permits otherwise.

(2) A summary of the trial court's rulings and judgment.

(3) A condensed narrative of the oral proceedings that the appellant believes necessary for the appeal.

(A) The condensed narrative must include a concise factual summary of the evidence and the testimony of each witness that is relevant to the points which the appellant states under (1) are being raised on appeal. Subject to the court's approval in settling the statement, the appellant may present some or all of the evidence by question and answer. Any evidence or portion of a proceeding not included will be presumed to support the judgment or order appealed from.

(B) If one of the points which the appellant states under (1) is being raised on appeal is a challenge to the giving, refusal, or modification of a jury instruction, the condensed narrative must include any instructions submitted orally and not in writing and must identify the party that requested the instruction and any modification.

~~(3)~~(4) An appellant intending to use a settled statement instead of both reporter's and clerk's transcripts must accompany the condensed narrative with copies of all items required by rule 8.122(b)(1), showing the dates required by rule 8.122(b)(2), and may be accompanied by copies of any document includable in the clerk's transcript under rule 8.122(b)(3) and (4).

(e) Respondent's proposed amendments

~~(4)~~(1) Within 20 days after the appellant serves the condensed narrative, the respondent may serve and file proposed amendments.

California Rules of Court, rule 8.137 would be amended, effective January 1, 2018 to read:

~~(5)~~(2) The proposed ~~statement and proposed~~ amendments may be accompanied by copies of any document includable in the clerk's transcript under rule 8.122(b)(3) and (4).

~~(c)~~(f) ~~Settlement, preparation, and certification~~Review of appellant's proposed statement

(1) ~~The clerk must set a date for a settlement hearing by the trial judge that is~~ No later than 10 days after the respondent files proposed amendments or the time to do so expires, whichever is earlier, ~~and must give the parties at least five days' notice of the hearing date~~ a party may request a hearing to review and correct the proposed statement. No hearing will be held unless ordered by the trial court judge, and the judge will not ordinarily order a hearing unless there is a factual dispute about a material aspect of the trial court proceedings.

~~(2) At the hearing, the judge must settle the statement and fix the times within which the appellant must prepare, serve, and file it.~~

(2) If the trial court proceedings were reported by a court reporter, the trial court judge determines that it would save court time and resources, and the court has a local rule permitting this, the trial court judge may order that a transcript be prepared as the record of the oral proceedings instead of correcting a proposed statement on appeal. The court will pay for any transcript ordered under this subdivision.

(3) Except as provided in (2), if no hearing is ordered, no later than 10 days after the time for requesting a hearing expires, the trial court judge must review the proposed statement and any proposed amendments filed by the respondent and take one of the following actions:

(A) If the proposed statement does not contain material required under (d), the trial judge may order the appellant to prepare a new proposed statement. The order must identify the additional material that must be included in the statement to comply with (d) and the date by which the new proposed statement must be served and filed. If the appellant does not serve and file a new proposed statement as directed, rule 8.140 applies.

(B) If the trial judge does not issue an order under (A), the trial judge must either:

(i) Make any corrections or modifications to the statement necessary to ensure that it is an accurate summary of the evidence and the testimony of each witness that is relevant to the points which the appellant states under (d)(1) are being raised on appeal; or

California Rules of Court, rule 8.137 would be amended, effective January 1, 2018 to read:

(ii) Identify the necessary corrections and modifications and order the appellant to prepare a statement incorporating these corrections and modifications.

(4) If a hearing is ordered, the court must promptly set the hearing date and provide the parties with at least 5 days' written notice of the hearing date. No later than 10 days after the hearing, the trial court judge must either:

(A) Make any corrections or modifications to the statement necessary to ensure that it is an accurate summary of the evidence and the testimony of each witness that is relevant to the points which the appellant states under (d)(1) are being raised on appeal; or

(B) Identify the necessary corrections and modifications and order the appellant to prepare a statement incorporating these corrections and modifications.

(5) The trial court judge must not eliminate the appellant's specification of grounds of appeal from the proposed statement.

(g) Review of the corrected statement

(1) If the trial court judge makes any corrections or modifications to the proposed statement under (f), the clerk must serve copies of the corrected or modified statement on the parties. If under (f) the trial court judge orders the appellant to prepare a statement incorporating corrections and modifications, the appellant must serve and file the corrected or modified statement within the time ordered by the court. If the appellant does not serve and file a corrected or modified statement as directed, rule 8.140 applies.

(2) Within 10 days after the corrected or modified statement is served on the parties, any party may serve and file proposed modifications or objections to the statement.

(3) ~~If the respondent does not object to the prepared statement within five days after it is filed, it will be deemed properly prepared and the clerk must present it to the judge for certification.~~ Within 10 days after the time for filing proposed modifications or objections under (2) has expired, the judge must review the corrected or modified statement and any proposed modifications or objections to the statement filed by the parties. The procedures (2) or in (f)(3) apply if the judge determines that further corrections or modifications are necessary to ensure that the statement is an accurate summary of the evidence and the testimony of each witness relevant to the points which the appellant states under (d)(1) are being raised on appeal.

California Rules of Court, rule 8.137 would be amended, effective January 1, 2018 to read:

(h) Certification of the statement on appeal

(1) If the trial court judge does not order the preparation of a transcript in lieu of correcting the proposed statement under (f)(2) or order any corrections or modifications to the proposed statement under (f)(3), (f)(4), or (g)(3), the judge must promptly certify the statement.

~~(4)~~(2) The parties~~'~~ may serve and file a stipulation that the statement as originally served under (c) or as ~~prepared~~ corrected or modified under (f)(3), (f)(4), or (g)(3) is correct. Such a stipulation is equivalent to the judge's certification of the statement.

(3) Upon certification of the statement under (1) or receipt of a stipulation under (2), the certified statement must immediately be transmitted to the clerk for filing of the record under rule 8.150.

ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
APPELLANT'S NOTICE DESIGNATING RECORD ON APPEAL (UNLIMITED CIVIL CASE)	**SUPERIOR COURT CASE NUMBER:**
RE: Appeal filed on (*date*):	**COURT OF APPEAL CASE NUMBER (*if known*):**

Notice: Please read form APP-001 before completing this form. This form must be filed in the superior court, not in the Court of Appeal.

1. RECORD OF THE DOCUMENTS FILED IN THE SUPERIOR COURT

I elect to use the following method of providing the Court of Appeal with a record of the documents filed in the superior court *(check a, b, c, d, or e and fill in any required information)*:

a. ☐ A clerk's transcript under rule 8.122. *(You must check (1) or (2) and fill out the clerk's transcript section on page 2 of this form.)*

(1) ☐ I will pay the superior court clerk for this transcript myself when I receive the clerk's estimate of the costs of this transcript. I understand that if I do not pay for this transcript, it will not be prepared and provided to the Court of Appeal.

(2) ☐ I request that the clerk's transcript be provided to me at no cost because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record *(check (a) or (b))*:

(a) ☐ An order granting a waiver of court fees and costs under rule 3.50 et seq.; or

(b) ☐ An application for a waiver of court fees and costs under rule 3.50 et seq. (*Use* Request to Waive Court Fees *(form FW-001) to prepare and file this application.*)

b. ☐ An appendix under rule 8.124.

c. ☐ The original superior court file under rule 8.128. (NOTE: *Local rules in the Court of Appeal, First, Third, Fourth, and Fifth Appellate Districts, permit parties to stipulate to use the original superior court file instead of a clerk's transcript; you may select this option if your appeal is in one of these districts and all the parties have stipulated to use the original superior court file instead of a clerk's transcript in this case. Attach a copy of this stipulation.*)

d. ☐ An agreed statement under rule 8.134. *(You must complete item 2b(2) below and attach to your agreed statement copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in rule 8.134(a).)*

e. ☐ A settled statement under rule 8.137. *(You must complete item 2b(3) below and attach to your proposed statement on appeal copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in rule 8.137(b)(3).)*

2. RECORD OF ORAL PROCEEDINGS IN THE SUPERIOR COURT

I elect to proceed:

a. ☐ WITHOUT a record of the oral proceedings in the superior court. I understand that without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was said during those proceedings in determining whether an error was made in the superior court proceedings.

Form Approved for Optional Use
Judicial Council of California
APP-003 [Rev. January 1, 2017]

Cal. Rules of Court, rules 3.50, 8.121–8.124, 8.128, 8.130, 8.134, 8.137
www.courts.ca.gov

CASE NAME:	SUPERIOR COURT CASE NUMBER:

2. b. ☐ WITH the following record of the oral proceedings in the superior court:

(1) ☐ A reporter's transcript under rule 8.130. *(You must fill out the reporter's transcript section on page 3 of this form.)* I have *(check all that apply)*:

(a) ☐ Deposited the approximate cost of transcribing the designated proceedings with this notice as provided in rule 8.130(b)(1).

(b) ☐ Attached a copy of a Transcript Reimbursement Fund application filed under rule 8.130(c)(1).

(c) ☐ Attached the reporter's written waiver of a deposit for *(check either (i) or (ii))*:

(i) ☐ all of the designated proceedings.

(ii) ☐ part of the designated proceedings.

(d) ☐ Attached a certified transcript under rule 8.130(b)(3)(C).

(2) ☐ An agreed statement. *(Check and complete either (a) or (b) below.)*

(a) ☐ I have attached an agreed statement to this notice.

(b) ☐ All the parties have agreed in writing (stipulated) to try to agree on a statement. *(You must attach a copy of this stipulation to this notice.)* I understand that, within 40 days after I file the notice of appeal, I must file either the agreed statement or a notice indicating the parties were unable to agree on a statement and a new notice designating the record on appeal.

(3) ☐ A settled statement under rule 8.137. *(You must attach the motion required under rule 8.137(a) to this form.)*

(a) ☐ The oral proceedings in the superior court were not reported by a court reporter.

(b) ☐ The oral proceedings in the superior court were reported by a court reporter, but the appellant has an order waiving his or her court fees and is unable to pay for a reporter's transcript

(c) ☒ I am requesting to use a settled statement for reasons other than those listed in (a) or (b)

(You must check (a), (b), or (c) below)

3. RECORD OF AN ADMINISTRATIVE PROCEEDING TO BE TRANSMITTED TO THE REVIEWING COURT

☐ I request that the clerk transmit to the reviewing court under rule 8.123 the record of the following administrative proceeding that was admitted into evidence, refused, or lodged in the superior court *(give the title and date or dates of the administrative proceeding):*

Title of Administrative Proceeding	Date or Dates

4. NOTICE DESIGNATING CLERK'S TRANSCRIPT

(You must complete this section if you checked item 1a. above indicating that you elect to use a clerk's transcript as the record of the documents filed in the superior court.)

a. **Required documents.** The clerk will automatically include the following items in the clerk's transcript, but you must provide the date each document was filed or, if that is not available, the date the document was signed.

Document Title and Description	Date of Filing
(1) Notice of appeal	
(2) Notice designating record on appeal *(this document)*	
(3) Judgment or order appealed from	
(4) Notice of entry of judgment *(if any)*	
(5) Notice of intention to move for new trial or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order *(if any)*	
(6) Ruling on one or more of the items listed in (5)	
(7) Register of actions or docket *(if any)*	

CASE NAME:	SUPERIOR COURT CASE NUMBER:

4. NOTICE DESIGNATING CLERK'S TRANSCRIPT

b. **Additional documents.** *(If you want any documents from the superior court proceeding in addition to the items listed in 4a. above to be included in the clerk's transcript, you must identify those documents here.)*

☐ I request that the clerk include the following documents from the superior court proceeding in the transcript. *(You must identify each document you want included by its title and provide the date it was filed or, if that is not available, the date the document was signed.)*

	Document Title and Description	Date of Filing
(8)		
(9)		
(10)		
(11)		
(12)		

☐ See additional pages.

c. **Exhibits to be included in clerk's transcript**

☐ I request that the clerk include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the superior court *(for each exhibit, give the exhibit number, such as Plaintiff's #1 or Defendant's A, and a brief description of the exhibit. Indicate whether or not the court admitted the exhibit into evidence):*

	Exhibit Number	Description	Admitted (Yes/No)
(1)			
(2)			
(3)			
(4)			
(5)			

☐ See additional pages.

5. NOTICE DESIGNATING REPORTER'S TRANSCRIPT

(You must complete this section if you checked item 2b(1) above indicating that you elect to use a reporter's transcript as the record of the oral proceedings in the superior court. Please remember that you must pay for the cost of preparing the reporter's transcript.)

a. I request that the reporters provide *(check one):*

(1) ☐ My copy of the reporter's transcript in paper format.

(2) ☐ My copy of the reporter's transcript in computer-readable format.

(3) ☐ My copy of the reporter's transcript in paper format and a second copy in computer-readable format.

(Code Civ. Proc., § 271; Cal. Rules of Court, rule 8.130(f)(4).)

CASE NAME:	SUPERIOR COURT CASE NUMBER:

5. b. **Proceedings**

I request that the following proceedings in the superior court be included in the reporter's transcript. *(You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings—for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions—the name of the court reporter who recorded the proceedings, and whether a certified transcript of the designated proceeding was previously prepared.)*

	Date	Department	Full/Partial Day	Description	Reporter's Name	Prev. prepared?
(1)						☐ Yes ☐ No
(2)						☐ Yes ☐ No
(3)						☐ Yes ☐ No
(4)						☐ Yes ☐ No
(5)						☐ Yes ☐ No
(6)						☐ Yes ☐ No
(7)						☐ Yes ☐ No

c. The proceedings designated in 5b ☐ include ☐ do not include all of the testimony in the superior court.

If the designated proceedings DO NOT include all of the testimony, state the points that you intend to raise on appeal *(rule 8.130(a)(2) provides that your appeal will be limited to these points unless, on motion, the reviewing court permits otherwise).*

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

APP-014 Proposed Statement on Appeal (Unlimited Civil Case)

Clerk stamps date here when form is filed.

Instructions

- This form is only for preparing a proposed statement on appeal in an **unlimited civil case.**
- This form can be attached to your *Appellant's Notice Designating Record on Appeal (Unlimited Civil Case)* (form APP-003). If it is not attached to that notice, this form must be filed **no later than 30 days after you file that notice. Or, if you had to file a motion requesting to use a settled statement, within 30 days after you are served with an order granting that motion. If you have chosen to prepare a statement on appeal and do not file this form on time, the court may dismiss your appeal.**
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service from *Information Sheet For Proof of Service* (form APP-009-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*
- Take or mail the original completed form and proof of service on the other parties to the clerk's office for the same court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:

You fill in the Court of Appeal case number (if you know it):

Court of Appeal Case Number:

1 Your Information

a. Name of Appellant *(the party who is filing this appeal):*

Name: _____

b. Appellant's contact information *(skip this if the appellant has a lawyer for this appeal):*

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail: _____

c. Appellant's lawyer *(skip this if the appellant does not have a lawyer for this appeal):*

Name: _____ State Bar number: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail: _____

Fax: _____

Information About Your Appeal

2 On *(fill in the date):* _____, I/my client filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

3 On *(fill in the date):* _____

☐ I filed a notice designating the record on appeal, electing to use a statement on appeal.

☐ The Court sent or the other party served me with an order granting my motion to use a settled statement.

Proposed Statement

4 Reasons for Your Appeal

Please note, in an appeal, the Court of Appeal can only review a case for whether certain kinds of legal errors were made:

- *There was not "substantial evidence" supporting the judgment, order, or other decision you are appealing.*
- *A "prejudicial error" was made during the trial court proceedings.*

The Court of Appeal:

- *Cannot retry your case or take new evidence.*
- *Cannot consider whether witnesses were telling the truth or lying.*
- *Cannot consider whether there was more or stronger evidence supporting your position than there was supporting the trial court's decision.*

(Check all that apply and describe the legal error or errors you believe were made that are the reason for this appeal.)

a. ☐ There was not substantial evidence that supported the judgment, order, or other decision that I indicated in the notice of appeal is being appealed in this case. *(Explain why you think the judgment, order, or other decision was not supported by substantial evidence):* _____

b. ☐ The following error or errors about either the law or court procedure was/were made that caused substantial harm to me. *(Describe each error and how you were harmed by that error.)*

(1) *Describe the error:* _____

Describe how you were harmed by the error: _____

(2) *Describe the error:* _____

Describe how you were harmed by the error: _____

(3) *Describe the error:* _____

Describe how you were/your client was harmed by the error: _____

☐ *Check here if you need more space to describe these or other errors and attach a separate page or pages describing the errors. At the top of each page, write "APP-014, item 4."*

5 The Dispute

a. In the trial court, I was the *(check one):*

☐ plaintiff (the party who filed the complaint in the case).

☐ defendant (the party against whom the complaint was filed).

b. The plaintiff's complaint in this case was about *(briefly describe what was claimed in the complaint filed with the trial court):* _____

c. The defendant's response to this complaint was *(briefly describe how the defendant responded to the complaint filed with the trial court):* _____

☐ *Check here if you need more space to describe the dispute and attach a separate page or pages describing it. At the top of each page, write "APP-014, Item 5."*

6 Summary of Any Motions and the Court's Order on the Motion

a. Were any motions (requests for the trial court to issue an order) made in this case that are relevant to the reasons you gave in 4 for this appeal?

☐ Yes *(fill out b)* ☐ No *(skip to 7)*

b. *In the spaces below, describe any motions (requests for orders) that were made in the trial court that are relevant to the reasons you gave in 4 for this appeal. Write a complete and accurate summary of what was said at any hearings on these motions and indicate how the trial court ruled on these motions.*

(1) *Describe the first motion:* _____

The motion was filed by the ☐ plaintiff. ☐ defendant.

There ☐ was ☐ was not a hearing on this motion.

If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing: _____

The trial court ☐ granted this motion. ☐ did not grant this motion.

☐ Other *(describe any other action the trial court took concerning this motion):* _____

☐ *Check here if you need more space to describe this motion and attach a separate page or pages describing this motion. At the top of each page, write "APP-014, Item 6b(1)."*

(2) *Describe the second motion:* _____

The motion was filed by the ☐ plaintiff. ☐ defendant.

There ☐ was ☐ was not a hearing on this motion.

If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing: _____

The trial court ☐ granted this motion. ☐ did not grant this motion.

☐ Other *(describe any other action the trial court took concerning this motion):* _____

_____

_____

☐ *Check here if you need more space to describe this motion and attach a separate page or pages describing this motion. At the top of each page, write "APP-014, item 6b(2)."*

(3) ☐ Check here if any other motions were filed that are relevant to the reasons you gave in (4) for this appeal and attach a separate page describing each motion, identifying who made the motion and whether there was a hearing on the motion, summarizing what was said at the hearing on the motion, and indicating whether the trial court granted or denied the motion. At the top of each page, write "APP-014, item 6b(3)."

(7) Summary of Testimony and Other Evidence

a. Was there a trial in your case?

☐ No *(skip items b, c, d, and e and go to item (8))*

☐ Yes *(check (1) or (2) and complete items b, c, d, and e)*

(1) ☐ Jury trial

(2) ☐ Trial by judge only

b. Did you testify at the trial?

☐ No

☐ Yes *(Write a complete and accurate summary of the testimony you gave that is relevant to the reasons you gave in (4) for this appeal. Include only what you actually said; do not comment or give your opinion about what was said. Please indicate whether any objections were made concerning your testimony or any exhibits you asked to present and whether these objections were sustained.):*

_____

_____

_____

_____

☐ *Check here if you need more space to summarize your testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "APP-014, Item 7b."*

c. Were there any other witnesses at the trial whose testimony is relevant to the reasons you gave in (4) for this appeal?

☐ No

☐ Yes *(complete items (1), (2), and (3)):*

(1) The witness's name is *(fill in the witness's name):* _____

(2) The witness testified on behalf of the *(check one):* ☐ plaintiff. ☐ defendant.

(3) This witness testified that *(Write a complete and accurate summary of the witness's testimony that is relevant to the reasons you gave in (4) for this appeal. Include only what the witness actually said; do not comment on or give your opinion about what the witness said. Please indicate whether any objections were made concerning this witness's testimony or any exhibits this witness asked to present and whether these objections were sustained.):* _____

☐ *Check here if you need more space to summarize this witness's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "APP-014, Item 7c."*

d. ☐ Check here if any other witnesses gave testimony at the trial that is relevant to the reasons you gave in (4) for this appeal. Attach a separate page or pages identifying each witness and who the witness testified for, summarizing what that witness said in his or her testimony that is relevant to the reasons you gave in (4) for this appeal, and indicating whether any objections were made concerning this witness's testimony or any exhibits the witness asked to present and whether these objections were sustained. At the top of each page, write "APP-014, Item 7d."

e. Summarize the evidence, other than testimony, that was given during the trial that is relevant to the reasons you gave in (4) for this appeal. *(Write a complete and accurate summary of the evidence given by both you and the respondent. Include only the evidence given; do not comment on or give your opinion about this evidence.):*

☐ *Check here if you need more space to describe the evidence and attach a separate page or pages describing the evidence. At the top of each page, write "APP-014, Item 7e."*

(8) The Trial Court's Findings

Did the trial court make findings in the case?

☐ No

☐ Yes *(describe the findings made by the trial court):* _____

☐ *Check here if you need more space to describe the trial court's findings and attach a separate page or pages describing these findings. At the top of each page, write "APP-014, Item 8."*

9 The Trial Court's Final Judgment

The trial court issued the following final judgment in this case *(check all that apply and fill in any required information):*

a. I was required to:

☐ pay the other party damages of *(fill in the amount of the damages):* $ _____

☐ do the following *(describe what you were ordered to do):* _____

_____

_____

_____

b. The other party was required to:

☐ pay me/my client damages of *(fill in the amount of the damages):* $ _____

☐ do the following *(describe what the other party was ordered to do):* _____

_____

_____

c. ☐ Other *(describe):* _____

_____

_____

☐ *Check here if you need more space to describe the trial court's judgment or order and attach a separate page or pages describing this judgment or order. At the top of each page, write "APP-014, Item 9."*

Date: _____

_____ ▶ _____

Type or print your name *Signature of appellant or attorney*

TAB IIIH

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
January 26, 2017

To
Members of the Appellate Advisory Committee's Rules Subcommittee

From
Heather Anderson, Supervising Attorney, Legal Services

Subject
Format for electronic reporter's transcripts

Action Requested
Please read before January 30 committee conference meeting

Deadline
January 30, 2017

Contact
Heather Anderson
415-865-7691
heather.anderson@jud.ca.gov

Introduction

Item 6 on the committee's annual agenda this committee year is to consider whether to recommend or support amendments the statute that currently requires the original reporter's transcript be in paper format (this is a priority 1 project with a proposed January 1, 2018 completion date). As you may recall, the committee worked with representatives of the California Court Reporters Association last year on such legislation. Those representatives have also suggested that, to fully implement such a statutory change, rule 8.144, the rule that addresses the format of reporter's transcripts, should also be amended. At its January 12 meeting, the rules subcommittee reviewed draft of possible amendments to rule 8.144. The rules subcommittee recommends that the committee move forward with circulating this proposal for public comment. Attached for the committee's review is a draft invitation to comment addressing these proposed rule amendments.

Background

Code of Civil Procedure section 271 authorizes courts and parties to receive, on request, copies of reporter's transcripts in "computer-readable form." Subdivision (b) of this statute establishes

default standards for the format of such transcripts, but provides that these defaults apply "[e]xcept as modified by standards adopted by the Judicial Council."

Rule 8.144 addresses the form of the record on appeal, including the format of reporter's transcripts. Currently, this rule contains the following provision regarding the format of computer-readable reporter's transcripts:

> A computer-readable copy of a reporter's transcript must be in a text-searchable format approved by the reviewing court while maintaining original document formatting.

As you may recall, last year the committee worked with representatives of the California Court Reporters Association on draft legislation to amend Code of Civil Procedure section 271 to eliminate the requirement that the original reporter's transcript be in paper format. These draft amendments would also have eliminated the archaic default format provisions in the statute and replaced them with a provision specifying that the format requirements for electronic reporter's transcripts are to be established by rules adopted by the Judicial Council. The committee chair and representatives of the association prepared an initial draft of suggested amendments to rule 8.144 to establish these formatting requirements, a copy of which is Attachment A to this memo.

Draft Rule Amendments

Amendments reviewed and recommended by the rules subcommittee

Attached is a draft invitation to comment that includes a draft of possible amendments to rule 8.144 that were reviewed and recommended for circulation by the rules subcommittee. This draft is intended to incorporate all of the formatting requirements suggested in Attachment A. The rule amendments in the invitation to comment includes modifications to the language of some of the proposed provisions in Attachment A to conform to Judicial Council rule-drafting conventions, such as using "must" rather than "shall" to indicate a mandatory obligation. In addition, the version attached to the invitation to comment reorganizes other parts of rule 8.144 to make them clearer and improve the overall rule structure. As a result, the proposed new provisions relating to electronic transcripts would be placed in a different subdivision than Attachment A. The main amendments in the draft invitation to comment include:

- Current subdivisions (a), (b), and (c), which all establish general formatting requirements for reporter's, as well as clerk's, transcripts, would be consolidated into a single subdivision (a). This should make it easier to find all of the general formatting requirements. To make this longer subdivision easier to follow, each paragraph would be given a heading. This should also preserve the headings now used in subdivisions (b) and (c). In addition, the proposed new requirement that each index begin on a separate page would be placed here, as it appears

to make sense for this requirement to apply to all transcripts, whether in paper or electronic format.

- The current provisions that specifically relate to transcripts that are in paper form would be gathered together in a new subdivision (b). This should make it easier to find these specific formatting requirements.
- New subdivision (c) would address the specific requirements for electronic reporter's transcripts. It would include paragraphs for both general requirements and special requirements for multi-reporter or multi-volume transcripts that are in electronic format. As with proposed subdivisions (a) and (b), this structure should make it easier for rule users to find all of the requirements relating to electronic reporter's transcripts in one place. In addition, this structure would avoid having to reletter any additional subdivisions of the rule.

The only suggested substantive changes from Attachment A is that, for multi-reporter or multi-volume transcripts, clarifying that the primary reporter is responsible for preparing the master index.

When it reviewed the draft rules, the rules subcommittee also recommended removing the provision regarding encryption and password protection of transcripts while they are being stored or transmitted electronically, subject to staff getting additional information about the intent of this provision (this provision is shown stricken and highlighted in yellow in the draft attached to the invitation to comment). The members were not sure if the intent might be only to address storage by and transmission from the court reporter to the court or litigants, in which case, members thought that this was not a topic that needed to be addressed in the Rules of Court. Staff received the following clarification of the intent of this provision from the court reporters' association representative:

> It is intended for the transmittal to the agency/agencies over the internet and storage in the cloud based repository. This protects the reporter from unauthorized viewing of sealed and confidential transcripts. Making it mandatory on all transcripts alleviates the chance of error on critical sealed transcripts. Once it is delivered to the intended user they have the ability to use it just as they would now on paper, transmitting it from supervising attorney to judge or justice, clerk to judge, etc.

This appears to confirm that the intent is to address a topic that the rules subcommittee believed should be addressed outside of the Rules of Court.

Comments on draft reviewed by the rules subcommittee

The draft amendments to rule 8.144 that were sent to the rules subcommittee for its review were also sent to the representative of the court reporters' association that worked with the Committee

chair on the draft in Attachment 1. We received comments of from that representative on the draft this week; Attachment 2 is a copy of these comments. Because these were received after the rules subcommittee meeting, that subcommittee has not had an opportunity to review these comments. To assist the full committee in considering these comments, staff has incorporated possible changes to the draft rule to address most of these comments. These changes are shown in blue highlighting in the invitation to comment. The only comments not addressed in the draft are:

- The first comment appears to be suggesting adding to the existing general requirements for all reporter's transcripts a new requirement to index additional information – sessions, in limine motions, motions out of the presence of the jury. These requirements are included in the proposed new requirements for electronic transcripts (see proposed subdivision (c)(1)(D)). Applying these requirements to transcripts in paper format would be a substantive change unrelated to electronic transcripts. The committee should consider whether this is within the scope of this particular project or should be placed on the list of suggestions for future consideration.
- A few of the comments suggest bolding the headings of paragraphs within the rules. This was not done because it would not be consistent with the format used in the Rules of Court. In that format, only the headings of subdivisions are bolded.

Committee Task

Attached for the committee's review is a draft invitation to comment reflecting the rules subcommittee recommendation that this proposal be circulated for public comment and the staff draft of possible changes to respond to the comments received from the court reporters association representative. **Please note** that the rules subcommittee reviewed the draft of the text of the rule amendments, but it did not review the draft invitation to comment cover memo.

The committee's task is to review this draft invitation to comment and:
(1) ask staff or committee members for further information/analysis;
(2) recommend to RUPRO that the invitation to comment, as proposed or as further revised by the committee, be approved for circulation; or
(3) reject the proposal.

Judicial Council of California

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR17-__

Title
Appellate Procedure: Format for Electronic Reporter's Transcripts

Proposed Rules, Forms, Standards, or Statutes
Amend California Rules of Court, rules 8.380, 8.384, 8.452, 8.456, 8.495, 8.931, and 8.972

Proposed by
Appellate Advisory Committee
Hon. Louis Mauro, Chair

Action Requested
Review and submit comments by ____

Proposed Effective Date
January 1, 2018

Contact
Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov

Executive Summary and Origin

The Appellate Advisory Committee is proposing amendments to the rule regarding the format of the record on appeal to incorporate requirements for reporter's transcripts in electronic format. This proposal is in based on a suggestion from a court reporters association.

Background

Code of Civil Procedure section 271 authorizes courts and parties to receive, on request, copies of reporter's transcripts in "computer-readable form." Subdivision (b) of this statute establishes default standards for the format of such transcripts, but provides that these defaults apply "[e]xcept as modified by standards adopted by the Judicial Council."

Rule 8.144 generally addresses the form of the record on appeal, including the format of reporter's transcripts. Currently, this rule contains only the following provision regarding the format of computer-readable reporter's transcripts:

> A computer-readable copy of a reporter's transcript must be in a text-searchable format approved by the reviewing court while maintaining original document formatting.

There are additional formatting issues and questions that arise when a transcript is in electronic format that it may be helpful for rule 8.144 to address.

The Proposal

The committee is proposing amendments to rule 8.144 to provide additional guidance regarding the format for reporter's transcripts that are delivered in electronic form. To make the overall rule clearer, the committee is also proposing reorganizing some of the existing provisions. The main amendments include:

- Current subdivisions (a), (b), and (c), which all establish general formatting requirements for reporter's and clerk's, transcripts, would be consolidated into a single subdivision (a). This should make it easier to find all of the general formatting requirements. To make this longer subdivision easier to follow, each paragraph would be given a heading. This should also preserve the headings now used in subdivisions (b) and (c). In addition, a proposed new requirement that each index begin on a separate page would be placed here, as it this requirement would be helpful in all transcripts, whether in paper or electronic format.
- The current provisions that specifically relate to transcripts that are in paper form would be gathered together in a new subdivision (b). This should make it easier to find these specific formatting requirements.
- New subdivision (c) would address the specific requirements for electronic reporter's transcripts, which include that the transcript be in full-text searchable PDF or other searchable format approved by the court, include an electronic bookmark to each heading, subheading and component of the transcript, and permit users to copy and paste, keeping the original formatting. This new subdivision would include separate paragraphs for both general requirements and special requirements for multi-reporter or multi-volume transcripts that are in electronic format. As with proposed subdivisions (a) and (b), this structure should make it easier for rule users to find all of the requirements relating to electronic reporter's transcripts in one place.

Other non-substantive changes to the rule are also incorporated in this proposal.

Alternatives Considered

The committee considered not recommending any changes to rule 8.144, but concluded that it would be helpful to provide more guidance on the format of electronic reporter's transcipts.

Implementation Requirements, Costs, and Operational Impacts

No appreciable implementation requirements, costs, or operation impacts are anticipated.

Request for Specific Comments

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

- 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?

Attachments and Links

Proposed amendments to rule 8.144

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 2. Civil Appeals

Article 2. Record on Appeal

Rule 8.144. Form of the record

(a) ~~Paper and~~ Format

(1) *General*

In the clerk's and reporter's transcripts:

(A) All documents filed must have a page size of 8½ by 11 inches. ~~If filed in paper form, the paper must be white or unbleached and of at least 20-pound weight;~~

(B) The text must be reproduced as legibly as printed matter;

(C) The contents must be arranged chronologically;

(D) The pages must be consecutively numbered, except as provided in (e);

(E) The margin must be at least 1¼ inches from the left edge.

~~(2) If filed in paper form, in the clerk's transcript only one side of the paper may be used; in the reporter's transcript both sides may be used, but the margins must then be 1¼ inches on each edge.~~

~~(3)~~(2) *Line numbering*

In the reporter's transcript the lines on each page must be consecutively numbered, and must be double-spaced or one-and-a-half-spaced; double-spaced means three lines to a vertical inch.

~~(4) A computer-readable copy of a reporter's transcript must be in a text-searchable format approved by the reviewing court while maintaining original document formatting.~~

~~(5)~~(3) *Sealed and confidential records*

The clerk's and reporter's transcripts must comply with rules 8.45–8.47 relating to sealed and confidential records.

~~(b)~~(4) *Indexes*

Except as provided in rule 8.45, at the beginning of the first volume of each:

~~(1)~~(A) The clerk's transcript must contain alphabetical and chronological indexes listing each document and the volume, where applicable, and page where it first appears;

~~(2)~~(B) The reporter's transcript must contain alphabetical and chronological indexes listing the volume, where applicable, and page where each witness's direct, cross, and any other examination, begins; and

~~(3)~~(C) The reporter's transcript must contain an index listing the volume, where applicable, and page where any exhibit is marked for identification and where it is admitted or refused. The index must identify each exhibit by number or letter and a brief description of the exhibit.

(D) Each index in (A), (B), and (C) must begin on a separate page.

~~**(c)**~~(5) ~~**Binding and**~~ *Cover*

~~(1) If filed in paper form, clerk's and reporter's transcripts must be bound on the left margin in volumes of no more than 300 sheets.~~

~~(2)~~(A) Each volume's cover must state the title and trial court number of the case, the names of the trial court and each participating trial judge, the names and addresses of appellate counsel for each party, the volume number, and the inclusive page numbers of that volume.

~~(3)~~(B) In addition to the information required by ~~(2)~~(A), the cover of each volume of the reporter's transcript must state the dates of the proceedings reported in that volume.

(b) Additional requirements for record in paper form

In addition to complying with (a), if the record is filed in paper form:

(1) The paper must be white or unbleached and of at least 20-pound weight;

(2) In the clerk's transcript only one side of the paper may be used; in the reporter's transcript both sides may be used, but the margins must then be 1¼ inches on each edge.

(3) Clerk's and reporter's transcripts must be bound on the left margin in volumes of no more than 300 sheets.

(c) Additional requirements for electronic reporter's transcripts

(1) *General*

In addition to complying with (a), a reporter's transcript delivered in electronic form must:

(A) Be generated electronically; it must not be created from a scanned document.

(B) Be in full-text searchable PDF (portable document format) or other searchable format approved by the court.

(C) Be paginated beginning with the first page or cover page as page 1 and be consecutively numbered using only Arabic numerals (e.g., 1, 2, 3) throughout the document, including indices and certificates. The electronic page counter in a PDF file viewer must match the transcript page numbering.

(D) Include an electronic bookmark to each heading, subheading and component of the transcript, including all sessions or hearings (date lines), all witness examinations, the index, and all exhibits. All bookmarks and hyperlinks, when clicked, must retain the user's currently selected zoom settings

(E) Be digitally and electronically signed by the court reporter.

(F) Permit users to copy and paste, keeping the original formatting, but with headers, footers, line and page numbers excluded.

(G) Permit courts to electronically add filed/received stamps.

~~(H) Be encrypted and password protected when stored and transmitted electronically.~~

(2) *Multivolume or multi-reporter transcripts*

In addition to the requirements in (1), multivolume or multi-reporter transcripts delivered in electronic form must comply with the following requirements:

(A) Each individual reporter must include the cover page required by (a)(3), the indexes required by (a)(4), and an electronically signed certificate in their respective portion of the transcript.

(B) The transcript must be merged into a single electronic document, which may consist of multiple volumes.

(C) The primary reporter must prepare a master index for the merged transcript that includes all of the information from the indexes required under (A). This master index must be the first bookmark in the transcript, regardless of where the master index is located within the transcript.

(3) *Additional functionality or enhancements*

Nothing in this rule prohibits courts from accepting additional functionality or enhancements in electronic reporter's transcripts.

(d) * * *

(e) Pagination in multiple reporter cases

(1) In a multiple reporter case, each reporter must estimate the number of pages in each segment reported and inform the designated primary reporter of the estimate. The primary reporter must then assign beginning and ending page numbers for each segment.

(2) If a segment exceeds the assigned number of pages, the reporter must number the additional pages with the ending page number, a hyphen, and a new number, starting with 1 and continuing consecutively.

(3) If a segment has fewer than the assigned number of pages, on the last page of the segment, before the certificate page, the reporter must add a hyphen to the last page number used, followed by the segment's assigned ending page number, and state in parentheses "(next volume and page number is ____)."

(f) * * *

Advisory Committee Comment

Subdivision (a)(3) and (4)~~(b).~~ ~~Subdivision (a)(4) is adopted under Code of Civil Procedure section 271(b), which allows the Judicial Council to adopt format requirements for computer-readable copies of a reporter's transcript.~~ Subdivisions (a)~~(5)~~(3) and ~~(b)~~(4) refer to special requirements concerning sealed and confidential records established by rules 8.45–8.47. Rule 8.45(c)(2) and (3) establish special requirements regarding references to sealed and confidential records in the alphabetical and chronological indexes to clerk's and reporter's transcripts.

Subdivision (c). This subdivision is adopted under Code of Civil Procedure section 271(b), which allows the Judicial Council to adopt format requirements for computer-readable copies of a reporter's transcript.

ATTACHMENT 1

Initial Draft of Amendments Prepared by Committee Chair and Representative of Court Reporters Association

Rule 8.144 [*Add new (f), (g) and (h) and change existing (f) to (i)*]

(f) Reporter's electronic transcripts

(1) A reporter's transcript delivered in electronic form must be generated electronically and shall not be created from a scanned document. The transcript must comply with subsections (a) through (e) of this rule, except for requirements pertaining to paper form.

(2) It must be in full-text searchable PDF (portable document format) or other searchable format approved by the court.

(3) The page numbering must begin with the first page or cover page as page 1 and be consecutively numbered using only Arabic numerals (e.g., 1, 2, 3) throughout the document, including indices and certificates. The electronic page counter in a PDF file viewer must match the transcript page numbering.

(4) Each transcript shall include an electronic bookmark to each heading, subheading and component of the document, including all sessions or hearings (date lines), all witness examinations, the index, and all exhibits.

(5) Certified shorthand reporters shall digitally and electronically sign electronic transcripts. Any tamper-proofing of the transcript must permit courts to electronically add filed/received stamps.

(6) Transcripts for sealed or confidential proceedings must comply with rules 8.45 through 8.47 of the California Rules of Court.

(7) All bookmarks and hyperlinks, when clicked, must retain the user's currently selected zoom settings.

(8) Users shall have the ability to copy and paste, keeping the original formatting, but with headers, footers, line and page numbers excluded.

(9) When stored and transmitted electronically, reporter's electronic transcripts shall be encrypted and password protected.

(g) Multiple reporter and multiple volume reporter's transcripts

The following additional format requirements apply to reporter's electronic transcripts in multiple-reporter cases or multiple volume cases:

(1) All indexes shall be on separate pages (e.g., there shall be a separate index on separate pages for sessions/hearings (date lines), witnesses, and exhibits). There shall also be a master index. The master index shall be the first bookmark regardless of where the master index is located within the transcript. The master index shall contain all sessions/hearings (date lines), witnesses (alphabetical and chronological), and exhibits (marked, received and refused), if such occurred on the record.

(2) The transcript must be merged into a single electronic document, which may consist of multiple volumes, excluding sealed and/or confidential documents. Each individual reporter must include a cover page, index and certificate in their respective portion of the document. Beginning and ending page numbers may be assigned for each segment pursuant to rule 8.144(e).

(h) Additional enhancements

Nothing in this rule prohibits courts from accepting additional functionality or enhancements in reporter's electronic transcripts.

Anderson, Heather

From: Mauro, Louis
Sent: Wednesday, January 25, 2017 12:44 PM
To: Anderson, Heather
Subject: Comments from Doreen Perkins re proposed amendments to Rule 8.144

Comments from Doreen Perkins.

From: Doreen Perkins [mailto:Cortreptr1@aol.com]
Sent: Wednesday, January 25, 2017 11:34 AM
To: Mauro, Louis
Subject: JC's Proposed 8.144

Justice Mauro, sorry it has taken me so long to get back to you regarding the JC's new proposed 8.144. I have compared the two drafts and have some comments to make.

8.144
Page 2 - line 2 - Indexes
(A)-(B) are missing the index for sessions. If you do not want the morning and afternoon sessions bookmarked, in limine motions, misc motions out of the presence of the jury, then it does not need to be there. If wanted, it needs to be added.

Page 2 - line 20 - unclear. Our original gave an example. I had a number of reporters read it and they did not understand it. I believe we could change it to: "Each index required in (A) and (B) must begin on a separate page."

Page 2 - line 22 - Cover
I believe that that should (5), not (3).

Page 3 - line 43 - needs to be Bold
What was left out of this was the beginning explaining these are additional requirements if multi-volume or multi-reporter. This could be read that that is all they have to do is 2(A) through (C). I think it would be clearer to maybe put in parenthesis next to the sub-title (Additional requirements for electronic transcripts) or the original language we had in an earlier draft explaining.

Page 4 - line 3 - delete the word "the" and add the words "an electronically signed"
... and an electronically signed certificate ...

Page 4 - line 3 - needs to be bold

Page 4 - line 15 - Bold

Additional comments:

The current requirement under (e)(3) to add a hyphen and a number followed by parentheses and type "next page number is ____)," is not a capability of current court reporter software. We currently have to actually type that in once the transcript is printed in order to comply. Might I suggest that instead that the reporters be required to just put it on the end of the last page before the certificate page. Maybe be worded as such:
"If a segment has fewer than the assigned number of pages, the reporter must add a hyphen to the last page number used, followed by the segment's assigned ending page number and state in parentheses at the end of the transcript, before the certificate page, "The next volume and page number is ____.)

In Fresno we currently use this language:

(Thereupon Volume 1 consists of pages 1 - 65. There are no pages 66-100. Volume 2 will begin on page 101.)

The above are my suggested changes to make 8.144 clear to the end user, which is the reporter. If you would like to discuss any of these feel free to give me a call or email me. If it is too late and my suggested changes need to be made through the comment period, I understand.

Doreen Perkins

TAB IIII

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
January 25, 2017

To
Members of the Appellate Advisory Committee's Rules Subcommittee

From
Heather Anderson, Supervising Attorney, Legal Services

Subject
Rule requirements for verification of writ petitions

Action Requested
Please read before January 30 committee meeting

Deadline
January 30, 2017

Contact
Heather Anderson
415-865-7691
heather.anderson@jud.ca.gov

Introduction

Item 12 on the committee's annual agenda this committee year is to consider whether to recommend amendments to the rules regarding writ petitions to consistently reflect statutory requirements for verification of petitions (this is a priority 2 project with a proposed January 1, 2018 completion date). At its January 12 meeting, the rules subcommittee reviewed draft amendments to various California Rules of Court that add references to the verification requirement. The rules subcommittee recommends that the committee move forward with circulating this proposal for public comment. Attached for the committee's review is a draft invitation to comment addressing these proposed rule amendments.

Background

The statutes addressing petitions for writs of mandate, certiorari, prohibition, and habeas corpus all require that the petitions seeking these writs must be verified.[1] Some of the California Rules of Court that address these writ petitions also include provisions that specifically require

[1] See Code of Civil Procedure sections 1069, 1086, and 1103 and Penal Code section 1474.

verification, reflecting these statutory requirements. For example, rule 8.486, the general rule relating to petitions for writs of mandate, certiorari, and prohibition in the Supreme Court and Court of Appeal, provides in subdivision (a)(4) that "[t]he petition must be verified."[2] However, there are some rules relating to writ petitions that do not specifically refer to a verification requirement. For example, rule 8.495, relating to review of Workers' Compensation Appeals Board cases, does not specifically refer to verification of the petition.

In *New York Knickerbockers v. Workers Compensation Appeals Board* (2015) 240 Cal.App.4th 1229, the Second District Court of Appeal discussed the absence of a provision addressing verification in rule 8.495:

> It is true, the rule of the California Rules of Court specifically governing petitions for writs of review addressing decisions of the Appeals Board does not require verification. (Cal. Rules of Court, rule 8.495.) Other California Rules of Court, such as rule 8.496(a)(1), which governs petitions to review decisions of the Public Utilities Commission, explicitly require verification. Code of Civil Procedure section 1069 specifically requires verification, and this provision is made applicable to petitions to review decisions of the Appeals Board by Labor Code section 5954. The California Constitution requires the Judicial Council to adopt rules for court administration, and practice and procedure, not "inconsistent with statute." (Cal. Const., art. VI, § 6, subd. (d).) Here, to the extent rule 8.495 does not require verification for petitions for writs of review addressing Appeals Board decisions, that rule would be inconsistent with Code of Civil Procedure section 1069 and Labor Code section 5954 and therefore not controlling.

To avoid any implication that the California Rules of Court relating to these writ petitions are inconsistent with the statutory provisions requiring verification, the committee included on its annual agenda consideration of whether to amend the rules relating to writ petitions to consistently reflect these verification requirements.

Draft Rule Amendments

Staff reviewed all of the rules relating to writ proceedings in Title 8 of the California Rules of Court and identified those that do not currently include verification provisions. The attached draft invitation to comment includes draft amendments to rule 8.495 and several other rules relating to writ petitions that would add references to verification of the petition. For all of the

[2] See also, for example, rule 8.496, relating to review of Public Utilities Commission cases, rule 8.498, relating t review of Agricultural Labor Relations Board and Public Employment Relations Board cases, and rule 8.703, relating to review of California Environmental Quality Act Cases under Public Resources Code sections 21168.6.6, 21178–21189.3, and 21189.50–21189.57.

rules included in this draft other than rule 8.495, the Judicial Council has actually approved a form petition to use in the case type covered by the rule and the form petition includes a verification, even though the verification requirement is not mentioned in the rule.[3]

Committee Task

Attached for the committee's review is a draft invitation to comment reflecting the rules subcommittee recommendation that this proposal be circulated for public comment. **Please note** that the rules subcommittee reviewed the draft of the text of the rule amendments, but it did not review the draft invitation to comment cover memo.

The committee's task is to review this draft invitation to comment and:
(1) ask staff or committee members for further information/analysis;
(2) recommend to RUPRO that the invitation to comment, as proposed or as further revised by the committee, be approved for circulation; or
(3) reject the proposal.

[3] For rules 8.380 and 8.384, the relevant Judicial Council form is *Petition for Writ of Habeas Corpus* (form MC-275). For rules 8.452 and 8.456, the relevant Judicial Council form is Petition For Extraordinary Writ (form JV-825). For rule 8.931, the relevant Judicial Council form is *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151). For rule 8.972, the relevant Judicial Council form is *Petition for Writ (Small Claims)* (form SC-300).

Judicial Council of California

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR17-__

Title
Appellate Procedure: Verification of Writ Petitions

Proposed Rules, Forms, Standards, or Statutes
Amend California Rules of Court, rules 8.380, 8.384, 8.452, 8.456, 8.495, 8.931, and 8.972

Proposed by
Appellate Advisory Committee
Hon. Louis Mauro, Chair

Action Requested
Review and submit comments by ____

Proposed Effective Date
January 1, 2018

Contact
Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov

Executive Summary and Origin

The Appellate Advisory Committee is proposing amendments to several rules relating to writ petitions to include provisions reflecting statutory requirements that these petitions be verified. This proposal is in response to a recent Court of Appeal opinion that noted the absence of such a provision in one of these rules.

Background

The statutes addressing petitions for writs of mandate, certiorari, prohibition, and habeas corpus all require that the petitions seeking these writs must be verified.[1] Some of the California Rules of Court that address these writ petitions also include provisions that specifically require verification, reflecting these statutory requirements. For example, rule 8.486, the general rule relating to petitions for writs of mandate, certiorari, and prohibition in the Supreme Court and Court of Appeal, provides in subdivision (a)(4) that "[t]he petition must be verified."[2] However, there are some rules relating to writ petitions that do not specifically refer to a verification requirement. For example, rule 8.495, relating to review of Workers' Compensation Appeals Board cases, does not specifically refer to verification of the petition.

[1] See Code of Civil Procedure sections 1069, 1086, and 1103 and Penal Code section 1474.
[2] See also, for example, rule 8.496, relating to review of Public Utilities Commission cases, rule 8.498, relating t review of Agricultural Labor Relations Board and Public Employment Relations Board cases, and rule 8.703, relating to review of California Environmental Quality Act Cases under Public Resources Code sections 21168.6.6, 21178–21189.3, and 21189.50–21189.57.

In *New York Knickerbockers v. Workers Compensation Appeals Board* (2015) 240 Cal.App.4th 1229, the Second District Court of Appeal discussed the absence of a provision addressing verification in rule 8.495.

The Proposal

To clarify that the requirement for verification is applicable to all petitions for writs of mandate, certiorari, prohibition, and habeas corpus, the committee proposes to add a provision regarding the verification requirement to all of the rules relating to such petitions in Title 8 that do not already include such a provision.

Alternatives Considered

The committee considered not recommending any changes to these rules, but concluded that it would be helpful for all the rules to consistently alert petitioners to the verification requirement.

Implementation Requirements, Costs, and Operational Impacts

No appreciable implementation requirements, costs, or operation impacts are anticipated.

Request for Specific Comments

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

- 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?

Attachments and Links

Proposed amendments to rules 8.380, 8.384, 8.452, 8.456, 8.495, 8.931, and 8.972

California Rules of Court, rules 8.380, 8.384, 8.452, 8.456, 8.495, 8.931, and 8.972would be amended, effective January 1, 2018 to read:

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 4. Habeas Corpus Appeals and Writs

Rule 8.380. Petition for writ of habeas corpus filed by petitioner not represented by an attorney

(a) Required Judicial Council form

A person who is not represented by an attorney and who petitions a reviewing court for writ of habeas corpus seeking release from, or modification of the conditions of, custody of a person confined in a state or local penal institution, hospital, narcotics treatment facility, or other institution must file the petition on *Petition for Writ of Habeas Corpus* (form MC-275). For good cause the court may permit the filing of a petition that is not on that form, but the petition must be verified.

(b) Form and content

A petition filed under (a) need not comply with the provisions of rules 8.40, 8.204, or 8.486 that prescribe the form and content of a petition and require the petition to be accompanied by a memorandum. If any supporting documents accompanying the petition are sealed or confidential records, rules 8.45–8.47 govern these documents.

(c) * * *

Rule 8.384. Petition for writ of habeas corpus filed by an attorney for a party

(a) Form and content of petition and memorandum

(1) A petition for habeas corpus filed by an attorney need not be filed on *Petition for Writ of Habeas Corpus* (form MC-275) but must contain the information requested in that form and must be verified. All petitions filed by attorneys, whether or not on form MC-275, must be either typewritten or produced on a computer, and must comply with this rule and rules 8.40(b)–(c) relating to document covers and 8.204(a)(1)(A) relating to tables of contents and authorities. A petition that is not on form MC-275 must also comply with the remainder of rule 8.204(a) and 8.204(b).

California Rules of Court, rules 8.380, 8.384, 8.452, 8.456, 8.495, 8.931, and 8.972would be amended, effective January 1, 2018 to read:

(2) Any memorandum accompanying the petition must comply with rule 8.204(a)–(b). Except in habeas corpus proceedings related to sentences of death, any memorandum must also comply with the length limits in rule 8.204(c).

(3) The petition and any memorandum must support any reference to a matter in the supporting documents by a citation to its index number or letter and page.

(b) – (d) * * *

Chapter 5. Juvenile Appeals and Writs

Article 3. Writs

Rule 8.452. Writ petition to review order setting hearing under Welfare and Institutions Code section 366.26

(a) Petition

(1) The petition must be liberally construed and must include:

(A) The identities of the parties;

(B) The date on which the superior court made the order setting the hearing;

(C) The date on which the hearing is scheduled to be held;

(D) A summary of the grounds of the petition; and

(E) The relief requested.

(2) The petition must be verified.

~~(2)~~(3) The petition must be accompanied by a memorandum.

(b) – (i) * * *

Rule 8.456. Writ petition under Welfare and Institutions Code section 366.28 to review order designating or denying specific placement of a dependent child after termination of parental rights

(a) Petition

California Rules of Court, rules 8.380, 8.384, 8.452, 8.456, 8.495, 8.931, and 8.972would be amended, effective January 1, 2018 to read:

(1) The petition must be liberally construed and must include:

(A) The identities of the parties;

(B) The date on which the superior court made the posttermination placement order;

(C) A summary of the grounds of the petition; and

(D) The relief requested.

(2) The petition must be verified.

~~(2)~~(3) The petition must be accompanied by a memorandum.

(b) – (i) * * *

Chapter 8. Miscellaneous Writs

Rule 8.495. Review of Workers' Compensation Appeals Board cases

(a) Petition

(1) A petition to review an order, award, or decision of the Workers' Compensation Appeals Board must include:

(A) The order, award, or decision to be reviewed; and

(B) The workers' compensation judge's minutes of hearing and summary of evidence, findings and opinion on decision, and report and recommendation on the petition for reconsideration.

(2) If the petition claims that the board's ruling is not supported by substantial evidence, it must fairly state and attach copies of all the relevant material evidence.

(3) The petition must be verified.

~~(3)~~(4) The petition must be accompanied by proof of service of a copy of the petition on the Secretary of the Workers' Compensation Appeals Board in San Francisco, or two copies if the petition is served in paper form, and one copy on each party who appeared in the action and whose interest is adverse to the petitioner. Service on the board's local district office is not required.

California Rules of Court, rules 8.380, 8.384, 8.452, 8.456, 8.495, 8.931, and 8.972would be amended, effective January 1, 2018 to read:

(b) – (c) * * *

Division 2. Rules Relating to the Superior Court Appellate Division

Chapter 6. Writ Proceedings

Rule 8.931. Petitions filed by persons not represented by an attorney

(a) Petitions

A person who is not represented by an attorney and who petitions the appellate division for a writ under this chapter must file the petition on *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151). For good cause the court may permit an unrepresented party to file a petition that is not on form APP-151, but the petition must be verified.

(b) – (d) * * *

Division 3. Rules Relating to Appeals and Writs in Small Claims Cases

Chapter 2. Writ Petitions

Rule 8.972. Petitions filed by persons not represented by an attorney

(a) Petitions

(1) A person who is not represented by an attorney and who requests a writ under this chapter must file the petition on a *Petition for Writ (Small Claims)* (form SC-300). For good cause the court may permit an unrepresented party to file a petition that is not on that form, but the petition must be verified.

(2) If the petition raises any issue that would require the appellate division judge considering it to understand what was said in the small claims court, it must include a statement that fairly summarizes the proceedings, including the parties' arguments and any statement by the small claims court supporting its ruling.

(3) The clerk must file the petition even if it is not verified but if the party asking for the writ fails to file a verification within five days after the clerk gives notice of the defect, the court may strike the petition.

California Rules of Court, rules 8.380, 8.384, 8.452, 8.456, 8.495, 8.931, and 8.972would be amended, effective January 1, 2018 to read:

(b) – (d) * * *

TAB IIIJ

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MEMORANDUM

Date
January 25, 2017

To
Members of the Appellate Advisory Committee

From
Heather Anderson
Supervising Attorney

Subject
Possible Revisions to *Appellant's Notice Designating Record on Appeal* (Limited Civil Case) (form APP-103)

Action Requested
Please review for January 30 committee meeting

Deadline
January 30, 2017

Contact
Heather Anderson
415-865-7691 phone
415-865-7664 fax
heather.anderson@jud.ca.gov

Introduction

Item 7 on the committee's annual agenda this committee year is to consider whether to recommend revisions to the form for designating the record in limited civil appeals to address concerns about frequent defaults by appellant (this is a priority 1 project with a proposed January 1, 2018 completion date). This form is *Appellant's Notice Designating Record on Appeal* (Limited Civil Case) (form APP-103). Item 19 on the annual agenda is to consider recommending revisions to various appellate division forms, including form APP-103, to make them clearer and easier to use (this is a priority 2 project with a proposed January 1, 2019 completion date). The Appellate Division Subcommittee reviewed a draft of possible revisions to from APP-103 that are intended to address both of these projects. The Appellate Division Subcommittee recommends that the committee move forward with circulating this proposal for public comment. Attached for the committee's review is a draft invitation to comment addressing these proposed form revisions.

Draft Revisions

Warning Regarding Election to Proceed Without a Record of the Oral Proceedings

The San Diego Superior Court submitted a suggestion for revising the language on APP-103 that warns appellants about the consequences of choosing to proceed without a record of the oral proceedings. This warning appears in two places on the form. Under the heading "Record of Oral Proceedings in the Trial Court, " the form now states:

> You do not have to provide the appellate division with a record of what was said in the trial court (this is called a record of the "oral proceedings). But, if you do not, the appellate division will not be able to consider what was said during the trial court proceedings in deciding whether a legal error was made in those proceedings.

By the box that an appellant may check to indicate that he or she is electing to proceed without a record of the oral proceedings, the form now states:

> I understand that if I proceed without a record of the oral proceedings, the appellate division will not be able to consider what was said in the trial court during those proceedings in deciding whether an legal error was made.

The San Diego Superior Court suggested that these provisions should be revised to more specifically inform appellants of the limited scope of the appeal if they elect to proceed without an oral record. Subcommittee members expressed the view that it was a high priority to modify this language because many self-represented appellants fail to designate a record of the oral proceedings when one is necessary to consider the issues that they wish to raise, resulting in a default and requests to correct the default.

The San Diego Superior Court suggested the following possible revised language for the second warning on the form:

> I understand that if I elect to proceed without a record of the oral proceedings, the appeal will be strictly limited to legal error, and I will not be able to claim that the evidence was insufficient to support the judgment or to raise any other evidentiary issues."

To make this concept easier for self-represented litigants to understand, the Appellate Division Subcommittee is proposing the following slightly simpler language to try to convey this same idea:

> I understand that if I proceed without providing a record of the oral proceedings, the appellate division will not be able to review any issues I might want to raise about what

> was said in the trial court during those proceedings or any claim that there was not evidence to support the judgment, order or decision I am appealing..

The subcommittee is also proposing revising the language of the first warning in form APP-103 as follows so that it corresponds more closely with what is currently said in *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO):

> You do not have to provide the appellate division with a record of what was said in the tiral court (this is called a record of the "oral proceedings") But if you want to raise any issue in your appeal that would require the appellate division to consider what was said in the trial court, you will need to provide the appellate division with a record of those oral proceedings. For example, if you are claiming that there was not evidence supporting the judgment, order, or other decision you are appealing, you will need to provide a record of the oral proceedings.

These possible revisions are incorporated into the draft of form APP-103 attached to the invitation comment at page 2.

Los Angeles Superior Court Proposed Revisions to APP-103

Quite some time ago, before the Appellate Division Subcommittee was formed, the Los Angeles Superior Court submitted a large set of suggested revisions to various appellate division forms. Item 19 on the committee annual agenda reflects the subcommittee's recommendation that these revisions be considered as a Priority 2 project.

The Los Angeles Superior Court suggestions include possible revisions to form APP-103. Given that the subcommittee was considering recommending the other revisions to form APP-103, it also considered the Los Angeles Superior Court suggestions at this same time.

Attached are the suggestions from the Los Angeles Superior Court relating to form APP-103. To make is simpler to see the subcommittee's recommendations with respect to each suggestion, staff has put those responses in this attachment, using blue font to set them off from the text of the suggestions themselves. The revisions recommended by the subcommittee have also been incorporated into the draft of form APP-103 attached to the invitation to comment.

Committee Task

Attached for the committee's review is a draft invitation to comment reflecting the Appellate Division Subcommittee recommendation that this proposal be circulated for public comment. **Please note** that the Appellate Division Subcommittee reviewed the draft form revisions, but it did not review the draft invitation to comment cover memo.

The committee's task is to review this draft invitation to comment and:
(1) ask staff or committee members for further information/analysis;
(2) recommend to RUPRO that the invitation to comment, as proposed or as further revised by the committee, be approved for circulation; or
(3) reject the proposal.

SUGGESTED CHANGES FROM LOS ANGELES SUPERIOR COURT TO APP-103 Appellant's Notice Designating Record on Appeal (Limited Civil Case)

Appellate Division Subcommittee recommended responses to suggestions are in blue font following the suggestion

a. **Proposed modification to "Agreed Statement" section:**
Appellant's often choose Agreed Statement in section 3, and fail to complete the same choice in sections 4 and 5d. They do not understand that by making this choice, they forego both a Clerk's Transcript and any of the options in section 5. Instead we often see them combine their choice of Agreed Statement in 3b with reporter's transcript in 5a, or statement on appeal in 5e, causing a notice of default to be issued and further delay in the record preparation. We suggest that sections 3b and 5d on the designation be combined together in one paragraph in section 3b, and deleted as a separate option in section 5d.

In addition, the consequence of failing to file the agreed statement or notices that the parties are unable to agree and new notice of designation should be added.

Further cleanup to rule 8.836 (a) is also suggested, as it currently only states that an agreed statement replaces "the reporter's transcript," but it actually replaces any other form of oral proceedings record.

3 a. (continued)

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b. ☐ **Agreed Statement.** An agreed statement is a summary of the trial court proceedings agreed to by the parties. I understand that the agreed statement replaces the clerk's transcript, and is my choice of record for oral proceeding replacing any other listed in section 5 below. I understand that I must attach to the agreed statement copies of all the documents that are required to be included in the clerk's transcript. *These documents are listed in section 3a(1) above and in rule 8.832 of the California Rules of Court. See form APP-101-INFO for information about preparing an agreed statement. (Check (1) or (2) below. Skip sections 4 and 5; sign and date this form.):*

(1) I have attached an agreed statement to this notice.

(2) All the parties have agreed in writing (stipulated) to try to agree on a statement *(you must attach a copy of this agreement (stipulation) to this notice).* I understand that, within 30 days after I file this notice, I must file either the agreed statement or a notice indicating the parties were unable to agree on a statement and a new notice designating the record on appeal, and that if I do not, the court may dismiss my appeal.

5 I want to use the following record of what was said in the trial court proceedings in my case *(check and complete **only one** of the following below—a, b, c, or d):*

Appellate Division Subcommittee response – The subcommittee understands the concern raised, but suggests a different approach to addressing this issue. The main use of an agreed statement is as a record of the oral proceedings. It is rare to use it

as a replacement of the clerk's transcript. The subcommittee therefore thinks it would be better to have appellant's determining whether to use the agreed statement as the record of the oral proceedings first. One way of achieving this is to reorganize the form so that the appellant is making his or her decisions about the record of the oral proceedings first. This approach has been incorporated into the draft form.

b. **Proposed modifications to "Reporter Transcript" section:**
Section 5 regarding Reporter's transcript does not include instruction regarding the change to rule 8.834, i.e. "The notice must identify any proceeding for which a certified transcript has previously been prepared by placing an asterisk before that proceeding."

A place for the appellant to include the reporter's contact information will reduce the delay in ordering transcripts when it is a private reporter pro tempore that the parties hired to report the proceedings, and not an employee of the trial court. This will also assist the parties in contacting the reporter to pay for a copy of a certified transcript submitted by the other party.

Appellate Division Subcommittee response – The form was previously modified to address this rule requirement, so no additional change is needed at this time.

Alert regarding possible conflict in the rules: CRC 8.834(a)(4) states that the clerk is to notify the reporter to prepare a transcript, "except when a party deposits a certified transcript…*with the notice of designation*." But (b)(2)(D) states that "*within 10 days after the clerk notifies the appellant of the estimated cost of preparing the reporter's transcript or within 10 days after the reporter notifies the appellant directly…"* the appellant must "file a certified transcript." If we intend the certified transcript to be due with the designation, perhaps the reference in (b)(2)(D) about the appellant filing a certified transcript after receiving notice of the cost should be deleted.

Appellate Division Subcommittee response – The intent of the rules is to allow the certified transcript to be submitted with the designation of the record, but to require its submission no later than the time that a deposit for the transcript would be due. If the appellant is able to submit the transcript with the designation, then that would eliminate the necessity for obtaining an estimate of the cost of the transcript from the court reporter. At a later time, the subcommittee may consider rule amendments to clarify this intent.

In the section regarding payment of transcript, the appellant needs to clearly understand their choices for obtaining a reporter transcript and the consequences. The current language only presents partial options and consequences. Their indicated choice also signals to the respondent what to expect before they file their own designation.

⑤ I want to use the following record of what was said in the trial court proceedings in my case *(check and complete **only one** of the following below—a, b, c, or d):*

a. **Reporter's Transcript.** *This option is available only if there was a court reporter in the trial court who made a record of what was said in court. Check with the trial court to see if there was a court reporter in your case before choosing this option. (Complete (1) and (2).):*

(1) **Designation of proceedings to be included in reporter's transcript.** I request that the following proceedings in the trial court be included in the reporter's transcript. *(You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings [for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions], and, if you know it, the name and contact information of the court reporter who recorded the proceedings.)* ***You must identify any proceeding for which a certified transcript has previously been prepared by placing an asterisk before that proceeding.***

(*)	Date	Department	Description	Court Reporter's Name
	(a)			
	(b)			
	etc.			

Appellate Division Subcommittee response – As noted above, the form was previously modified to address this requirement, so no additional change is needed at this time.

Contact information for Court Reporter's listed above:

Court Reporter's Name	Contact Information

☐ *Check here if you need more space to list other proceedings and attach a separate page…..*

Appellate Division Subcommittee response – Neither the rule nor the current form require the appellant to provide contact information for the court reporter. Asking for this information may increase difficulties for self-represented litigants who are completing the form. The subcommittee therefore does not recommend adding this requirement to the form.

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⑤ a. (continued)

(3) ☐ **Certified transcripts**. I have attached to this designation an original certified transcript of all the proceedings I have designated for the appellate division. The transcript complies with the format requirements in rule 8.144. I understand that if the respondent lodges certified transcripts of additional proceedings the respondent designated, I must contact and pay the reporter(s) directly if I wish to receive a copy.

Appellate Division Subcommittee response – Adding the check box for deposit of certified transcripts seems like a very good idea. This has been incorporated into the attached draft of the form. The subcommittee suggests, however, leaving out the blue

highlighted text, as it is providing information about another stage in the record designation process and therefore might be more confusing than helpful to appellants trying to complete this form.

(4) ☐ **Payment for reporter's transcript.** Within 10 days of receipt of the court reporter's estimate of the costs for these transcripts, I will pay for the transcripts myself by depositing an amount equal to the estimated cost with the trial court, and a fee of $50 for the superior court to hold this deposit in trust. Alternatively, I will pay the reporter(s) directly and file with the trial court a copy of the written waiver of deposit signed by the reporter(s). I understand that if I do not comply with this, or any of the options in rule 8.834(b)(2), my appeal may be dismissed. I request that the reporters provide my copy of the reporter's transcript in:

☐ Paper format only.
☐ Computer readable format only.
☐ Both paper and computer readable format.

(5) ☐ **Transcript Reimbursement Fund Application.** If I find I cannot afford to pay this cost, within 10 days of receipt of the court reporter's estimate of the costs for these transcripts, I will file with the trial court a copy of my application to the Court Reporters Board for payment or reimbursement from the Transcript Reimbursement Fund. I understand that within 90 days after I file my application, I must file with the trial court a copy of the approval my application or comply with rule 8.834(b)(4). I understand that if I do not comply, my appeal may be dismissed.

Appellate Division Subcommittee response – Adding the check boxes for payment by the party or transcript reimbursement fund application seems like a very good idea. This has been incorporated into the attached draft of the form. The subcommittee recommends, however, putting the appellant's request regarding the format of the transcript into its own subsection.

* * * * * * * * * * * * * * * * * * * *

c. **Proposed modifications to "Transcript From Official Electronic Recording" section:**
This part of the form does not contain a place for the appellant to designate the proceeding date(s) that were recorded and that they wish to be transcribed. Additionally, the form states that payment for the transcript is required "when I receive the clerk's estimate of the costs," but there is no rule supporting this within **rule 8.835**. (Companion rules under misdemeanor and infraction appeals do specify how to pay, when to pay, etc.) In the absence of a rule for this, limited civil appeal clerks receive direction only from 8.818(d)(3) regarding fee waivers applicable, and the default rule, 8.842, which states that failure to procure the record may lead to a dismissal. Since the parties have 10 days to pay for reporter transcripts, and 10 days in misdemeanors and infractions to pay for electronic recording transcripts, wouldn't it make sense to at least modify the form accordingly (as long as 8.835 remains silent about this)?

Appellate Division Subcommittee response – Adding a place on the form for appellants to designate the parts of the electronic recording they would like to have transcribed seems like a very good idea. The procedures applicable to transcripts from official

electronic recordings are actually established in rule 2.952, which is referenced in rule 8.835(b). Rule 2.952 provides that the procedures in rule 8.130 are to be followed. Since rule 8.130 provides for designation of the proceedings by the appellant, including this on this form would be consistent with the rule. The attached draft of the form includes this suggested addition.

⑤ a. (continued)

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b. ☐ **Transcript From Official Electronic Recording.** *This option is available only if an official electronic recording was made of what was said in the trial court. Check with the trial court to see if an official electronic recording was made in your case before choosing this option. Identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings, and, if you know it, the name of the electronic recording monitor who recorded the proceedings:*

Date	Department	Description	Electronic Monitor's Name
(a)			
(b)			
(c)			

☐ *Check here if you need more space to list other proceedings and attach a separate page or pages listing those proceedings. At the top of each page, write "APP-103, item 5b."*

(Check and complete (1) or (2):

(1) ☐ I will pay the trial court clerk for this transcript myself within 10 days of receipt of the clerk's estimate of the costs of the transcript. I understand that if I do not pay for the transcript, my appeal may be dismissed.

(2) ☐ I am asking that the transcript be provided at no cost to me because I cannot afford to pay this cost. I have attached *(check (a) or (b) and attach the appropriate document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50-3.58, and 8.818(d)(3).

(b) ☐ An application for a waiver of court fees and costs under rules 3.50-3.58, and 8.818(d)(3). *(Use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.)*

Judicial Council of California

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR17-__

Title
Appellate Procedure: Designation of the Record in Limited Civil Cases

Proposed Rules, Forms, Standards, or Statutes
Revise *Appellant's Notice Designating Record on Appeal* (Limited Civil Case) (form APP-103)

Proposed by
Appellate Advisory Committee
Hon. Louis Mauro, Chair

Action Requested
Review and submit comments by ____

Proposed Effective Date
January 1, 2018

Contact
Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov

Executive Summary and Origin

The Appellate Advisory Committee is proposing revisions to the form that appellants in limited civil cases may use to designate the record on appeal. The proposed revisions are intended to clarify the consequences for an appellant of choosing not to designate a record of the oral proceedings in the trial court, make it easier for the appellant to identify what portions of an electronic regarding the appellant wants transcribed, and provide spaces where the appellant can indicate one of the permissible alternatives to a deposit for a court reporter's transcript is being used. This proposal is in response to suggestions received from two superior courts.

Background

Appellant's Notice Designating Record on Appeal (Limited Civil Case) (form APP-103) is the Judicial Council to the form that appellants in limited civil appeals can use to designate the record on appeal.

Form APP-103 currently addresses the designation of the record of the documents first and then the designation of the record of the oral proceedings in the trial court. Because some of the options for the record of the oral proceedings can also be used to provide a record of the documents, the current form has internal cross-references. A superior court has reported that these cross-references are confusing to some appellants and result in record designation errors.

The portion of form APP-103 that addresses designation of the record of the oral proceedings includes language cautioning appellants about the potential consequences if they choose not to

designate a record of the oral proceedings. A superior court has suggested that this language does not sufficiently alert appellants that they may not be able to appeal on certain grounds, such as sufficiency of the evidence, if they do not designate a record of the oral proceedings.

Under the rules relating to transcripts prepared from official electronic recordings, the procedures in rule 8.130 are to be followed in designating the proceedings to be transcribed from such a recording. Currently, however, form APP-103 does not have a space that appellants can use for this purpose.

Under the rules relating to reporter's transcripts, if an appellant deposits funds with the clerk to pay for a reporter's transcript, the appellant must also pay a fee to the court for holding these funds in trust. Currently, however, form APP-103 does not include any notice of this deposit fee. In addition, under these same rules, instead of depositing the estimated cost of a reporter's transcript that the appellant has designated, the appellant can instead deposit certified transcripts of the designated proceedings or a copy of an application the appellant has filed with the Transcript Reimbursement Fund. Currently, however, form APP-103 does not have a space that appellants can use to indicate that they are using one of these alternatives.

The Proposal

The committee is proposing to revise form APP-103 to address all of the concerns outline above. These prosed revisions include:

- Reorganizing the form so that the designation of the record of the oral proceedings comes first. This will eliminate the internal cross-references that were confusing to some appellants;
- Revising the cautionary language about not designating a record of the oral proceedings to clarify that certain bases for appeal will not be available with this record;
- Adding a place where appellants can designate what proceeding from official electronic recordings that they are requesting be transcribed
- Adding information about the fee for depositing funds with the court for a reporter's transcript; and
- Adding places where appellants can indicate if they are using one of the permissible alternatives to making a deposit for a designated reporter's transcript.

Alternatives Considered

The committee considered not recommending any changes to form APP-103, but concluded that these changes would be helpful to clarify appellants' options and obligations and the consequences of designation choices they might make.

Implementation Requirements, Costs, and Operational Impacts

No appreciable implementation requirements, costs, or operation impacts are anticipated.

Request for Specific Comments

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

- 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?

Attachments and Links

Proposed revisions to form APP-103

APP-103 Appellant's Notice Designating Record on Appeal (Limited Civil Case)

Clerk stamps date here when form is filed.

Instructions

- This form is only for choosing ("designating") the record on appeal in a **limited civil case.**
- Before you fill out this form, read *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO) to know your rights and responsibilities. You can get form APP-101-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- This form can be attached to your notice of appeal. If it is not attached to your notice of appeal, you must serve and file this form within 10 days after you file your notice of appeal. **If you do not file this form on time, the court may dismiss your appeal.**
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service on the California Courts Online Self-Help Center site at *www.courts.ca.gov/selfhelp-serving.htm.*
- Take or mail the original completed form and proof of service on the other parties to the clerk's office for the same court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Name of Appellant (the party who is filing this appeal):

Name: _____

b. Appellant's contact information *(skip this if the appellant has a lawyer for this appeal):*

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail: _____

c. Appellant's lawyer *(skip this if the appellant does not have a lawyer for this appeal):*

Name: _____ State Bar number: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different):* _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ E-mail: _____

Fax: _____

Trial Court Case Name: _____ Trial Court Case Number:

Information About Your Appeal

2 On *(fill in the date):* _____ I/my client filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

Record of Oral Proceedings in the Trial Court

You do not have to provide the appellate division with a record of what was said in the tiral court (this is called a record of the "oral proceedings") But if you want to raise any issue in your appeal that would require the appellate division to consider what was said in the trial court, you will need to provide the appellate division with a record of those oral proceedings. For example, if you are claiming that there was not evidence supporting the judgment, order, or other decision you are appealing, you will need to provide a record of the oral proceedings.

3 I elect (choose)/My client elects to proceed *(check a or b):*

a. ☐ WITHOUT a record of the oral proceedings in the trial court (*skip item 4; go to item 5*). I understand that if I proceed without providing a record of the oral proceedings, the appellate division will not be able to review any issues I might want to raise about what was said in the trial court during those proceedings or any claim that there was not evidence to support the judgment, order or decision I am appealing.
(Wite initials here): _____

b. ☐ WITH a record of the oral proceedings in the trial court *(complete item 4 below)*. I understand that if I elect (choose) to proceed WITH a record of the oral proceedings in the trial court, I have to choose the record I want to use and take the actions described below to make sure this record is provided to the appellate division. I understand that if I do not take the actions described below and the appellate division does not receive this record, I am not likely to succeed in my appeal. *(Wite initials here)*: _____

4 I want to use the following record of what was said in the trial court proceedings in my case *(check and complete **only one** of the following below—a, b, c, d, or e):*

a. ☐ **Reporter's Transcript.** *This option is available only if there was a court reporter in the trial court who made a record of what was said in court. Check with the trial court to see if there was a court reporter in your case before choosing this option. (Complete (1) and (2).):*

(1) **Designation of proceedings to be included in reporter's transcript.** I request that the following proceedings in the trial court be included in the reporter's transcript. (*You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings [for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions], the name of the court reporter who recorded the proceedings, and whether a certified transcript of the designated proceeding was previously prepared.*)

	Date	Department	Description	Reporter's Name	Prev. prepared?
(a)					☐ Yes ☐ No
(b)					☐ Yes ☐ No
(c)					☐ Yes ☐ No
(d)					☐ Yes ☐ No
(e)					☐ Yes ☐ No
(f)					☐ Yes ☐ No
(g)					☐ Yes ☐ No

☐ *Check here if you need more space to list other proceedings and attach a separate page or pages listing those proceedings. At the top of each page, write "APP-103, item 4a."*

4 (continued)

(2) The proceedings designated in (1) ☐ include ☐ do not include all of the testimony in the trial court. If the designated proceedings DO NOT include all of the testimony, state the points that you intend to raise on appeal. *(Rule 8.834(a)(2) provides that your appeal will be limited to these points unless, on motion, the appellate division permits otherwise.)*

_____

_____

_____

_____

☐ *Check here if you need more space to list other points and attach a separate page or pages listing those points. At the top of each page, write "APP-103, item 4a(2)."*

(3) ☐ **Certified transcripts.** I have attached to this Notice Designating The Record of Appeal an original certified transcript of all the proceedings I have designated in (1) The transcript complies with the format requirements in rule 8.144 under rule 8.834, no payment is due for this transcript (skip the rest of 4 and go to 5).

(4) **Payment for reporter's transcript.**

(a) ☐ I will pay for the reporter's transcript I have designated in (1). Within 10 days of getting the reporter's estimate of the cost of the transcript, I will deposit an amount equal to the estitmated cost with the trial court, and a fee of $50 for the superior court to hold this deposit in trust. Alternatively, I will pay the reporter(s) directly and file with the trial court a copy of the written waiver of deposit signed by the reporter(s). I understand that if I do not comply with this, my appeal may be dismissed.

(b) ☐ I am unable to afford the cost of the reporter's transcript I have designated in (1) and am therefore applying to the Transcript Reimbusement Fund to pay for this transcipt. Within 10 days of receipt of the court reporter's estimate of the costs for these transcripts. I will file with the trial court a copy of my application to the Court Reporters Board for payment or reimbusement from the Transcript Reimbusement Fund.

(5) **Format of reporter's transcript.** I request that the reporter's provide my copy of the reporter's transcript in:

(a) ☐ Paper format only.

(b) ☐ Computer readable format only.

(c) ☐ Both paper and computer readable format.

OR

b. ☐ **Transcript From Official Electronic Recording.** *This option is available only if an official electronic recording was made of what was said in the trial court. Check with the trial court to see if an official electronic recording was made in your case before choosing this option. Identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings, and if you know it, the name of the electronic recording monitor who recorded the proceedings:*

Date	Department	Description	Electronic Monitor's Name
(a)			
(b)			
(c)			

☐ *Check here if you need more space to describe the proceeding or to list other proceedings and attach a separate page or pages describing or listing those proceedings. At the top of each page, write "APP-103, item 4b."*

4 (continued)

(Check and complete (1) or (2).):

(1) ☐ I will pay the trial court clerk for this transcript myself within 10 days of receipt of the clerk's estimate of the costs of the transcript. I understand that if I do not pay for the transcript, my appeal may be dismissed.

(2) ☐ I am asking that the transcript be provided at no cost to me because I cannot afford to pay this cost. I have attached *(check (a) or (b) and attach the appropriate document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50–3.58, and 8.818(d).

(b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58, and 8.818(d). *(Use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.)*

OR

c. ☐ **Copy of Official Electronic Recording.** *This option is available only if an official electronic recording was made of what was said in the trial court, the court has a local rule for the appellate division permitting the use of the official electronic recording itself as the record of the proceedings, and all of the parties have agreed (stipulated) that they want to use the recording itself as the record of what was said in the case. Check with the trial court to see if an official electronic recording was made in your case before choosing this option. You must attach a copy of your agreement (stipulation) with the other parties to this notice. (Check and complete (1) or (2).):*

(1) ☐ I will pay the trial court clerk for this copy of the recording myself when I receive the clerk's estimate of the costs of this copy. I understand that if I do not pay for this copy of the recording, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that a copy of the recording be provided at no cost to me because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record *(check (a) or (b) and submit the appropriate document):*

(a) ☐ An order granting a waiver of the cost under rules 3.50–3.58 and 8.818(d).

(b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58 and 8.818(d). *(Use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.)*

OR

d. ☐ **Agreed Statement.** *An agreed statement is a summary of the trial court proceedings agreed to by the parties. See form APP-101-INFO for information about preparing an agreed statement. (Check (1) or (2).):*

(1) ☐ I have attached an agreed statement to this notice.

(2) ☐ All the parties have agreed in writing (stipulated) to try to agree on a statement *(you must attach a copy of this agreement (stipulation) to this notice)*. I understand that, within 30 days after I file this notice, I must file either the agreed statement or a notice indicating the parties were unable to agree on a statement and a new notice designating the record on appeal, and if I do not, the court may dismiss my appeal.

4 (continued)

OR

e. ☐ **Statement on Appeal.** *A statement on appeal is a summary of the trial court proceedings approved by the trial court. See form APP-101-INFO for information about preparing a proposed statement. (Check (1) or (2).):*

(1) ☐ I have attached my proposed statement on appeal to this notice. (*If you are not represented by a lawyer in this appeal, you must use* Proposed Statement on Appeal (Limited Civil Case) *(form APP-104) to prepare and file this proposed statement. You can get a copy of form APP-104 at any courthouse or county law library or online at* www.courts.ca.gov/forms.htm.)

(2) ☐ I have NOT attached my proposed statement on appeal to this notice. I understand that I must serve and file this proposed statement in the trial court within 20 days of the date I file this notice and that if I do not file the proposed statement on time, the court may dismiss my appeal.

Record of the Documents Filed in the Trial Court

5 I elect (choose)/My client elects to use the following record of the documents filed in the trial court *(check a or b and fill in any required information):*

a. ☐ **Clerk's Transcript.** *(Fill out (1)–(4).) Note that, if the appellate division has adopted a local rule permitting this, the clerk may prepare and send the original court file to the appellate division instead of a clerk's transcript.*

(1) **Required documents.** *The clerk will automatically include the following items in the clerk's transcript, but you must provide the date each document was filed or, if that is not available, the date the document was signed.*

Document Title and Description	Date of Filing
(a) Notice of appeal	
(b) Notice designating record on appeal (this document)	
(c) Judgment or order appealed from	
(d) Notice of entry of judgment (if any)	
(e) Notice of intention to move for new trial or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order (if any)	
(f) Ruling on any item included under (e)	
(g) Register of actions or docket	

5 (continued)

(2) **Additional documents.** *If you want any documents in addition to the required documents listed in (1) above to be included in the clerk's transcript, you must identify those documents here.*

☐ I request that the clerk include in the transcript the following documents that were filed in the trial court. *(Identify each document you want included by its title and provide the date it was filed or, if that is not available, the date the document was signed.)*

Document Title and Description	Date of Filing
(a)	
(b)	
(c)	
(d)	
(e)	

☐ *Check here if you need more space to list other documents and attach a separate page or pages listing those documents. At the top of each page, write "APP-103, item 5a(2)."*

(3) **Exhibits.**

☐ I request that the clerk include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the trial court. *(For each exhibit, give the exhibit number (such as Plaintiff's #1 or Defendant's A) and a brief description of the exhibit and indicate whether or not the court admitted the exhibit into evidence. If the trial court has returned a designated exhibit to a party, the party who has that exhibit must deliver it to the trial court clerk as soon as possible.)*

Exhibit Number	Description	Admitted Into Evidence
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No
		☐ Yes ☐ No

☐ *Check here if you need more space to list other exhibits and attach a separate page or pages listing those exhibits. At the top of each page, write "APP-103, item 5a(3)."*

5 (continued)

(4) **Payment for clerk's transcript.** *(Check a or b.)*

(a) ☐ I will pay the trial court clerk for this transcript myself when I receive the clerk's estimate of the costs of the transcript. I understand that if I do not pay for the transcript, it will not be prepared and provided to the appellate division.

(b) ☐ I am asking that the clerk's transcript be provided at no cost to me because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record *(check (i) or (ii) and submit the checked document):*

(i) ☐ An order granting a waiver of the cost under rules 3.50–3.58, and 8.818(d).

(ii) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58, and 8.818(d). *(Use* Request to Waive Court Fees *(form FW-001). The court will review this form to decide if you are eligible for a fee waiver.)*

OR

b. ☐ **Agreed statement.** *(This option is only available if you have chosen to use an agreed statement as the record of the oral proceedings under item 4 above and you attach to your agreed statement copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in 5a(1) above and in rule 8.832 of the California Rules of Court.)*

Date: _____

_____ ▶ _____

Type or print your name *Signature of appellant or attorney*

TAB IIIK

Date
January 26, 2017

To
Members of the Appellate Advisory Committee's Appellate Division Subcommittee

From
Jenny Wald, Attorney,
Heather Anderson, Supervising Attorney
Legal Services

Subject
Service of briefs in misdemeanor appeals

Action Requested
Please read before committee meeting on January 30, 2017

Deadline
January 30, 2017

Contact
Heather Anderson
415-865-7691 phone
415-865-7664 fax
heather.anderson@jud.ca.gov

Introduction

Item 13 on the Appellate Advisory Committee's annual agenda is to consider amending the rule on service of briefs in misdemeanor appeals to make it more consistent with the rule relating to briefs in felony appeals (this is a priority 2 project with a proposed January 1, 2018 completion date) The Appellate Division Subcommittee reviewed a draft of possible amendments to the service requirements of rule 8.882(e) for briefs in misdemeanor appeals to include procedures modeled on those applicable to service of defendants in felony appeals. The Appellate Division Subcommittee recommends that the committee move forward with circulating this proposal for public comment. Attached for the committee's review is a draft invitation to comment addressing these proposed amendments.

Background

Rule 8.360(d) establishes the following requirements for defendant's appellate counsel for the service of briefs in felony cases:

> (1) Defendant's appellate counsel must serve each brief for the defendant on the People and the district attorney, and must send a copy of each to the defendant personally unless the defendant requests otherwise.
> (2) The proof of service under (1) must state that a copy of the defendant's brief was sent to the defendant, or counsel must file a signed statement that the defendant requested in writing that no copy be sent.
> (3) The People must serve two copies of their briefs on the appellate counsel for each defendant who is a party to the appeal and one copy on the district appellate project. If the district attorney is representing the People, one copy of the district attorney's brief must be served on the Attorney General.

This rule contains special requirements for defendant's appellate counsel to send a copy of each brief for the defendant to the defendant unless the defendant requests otherwise and for the People to provide counsel for the defendant with two copies of their briefs. The history of this

rule indicates that these provisions were adopted to ensure that the defendant was kept apprised of the arguments being made in his or her case.

Rule 8.882 addresses briefs in limited civil and misdemeanor cases. This rule does not currently include similar requirements for the service of briefs by defendant's appellate counsel in misdemeanor cases. We received a suggestion from former committee member, Dennis Fischer, that rule 8.882 be amended to incorporate these requirements.

When the appellate division rules were comprehensively revised about eight years ago, one of the premises for the revisions was to make the appellate division rules consistent with the Court of Appeal rules for similar procedures unless there was difference in the law or the nature of the proceedings that required that the rules be different. There does not appear to be a reason that the rule on misdemeanor briefs should not provide for keeping misdemeanor defendants informed in this same way.

Draft Rule Amendments

The attached draft amendments to rule 8.882(e) are intended to ensure the same requirements for sending copies of briefs to the defendant that are in rule 8.360(d) governing the service of briefs on defendants in felony appeals apply to misdemeanor appeals. The draft does not include language from rule 8.360 regarding service of briefs on the district attorney. The Appellate Division subcommittee concluded that, in the appellate division context, it is sufficient for the rule to refer simply to the People.

Please note: staff is suggesting changes to the draft proposal reviewed by the subcommittee. Since rule 8.882 addresses briefs in both limited civil and misdemeanor appeals, staff suggests making clear that the proposed new requirements apply only in misdemeanor cases. These changes, which are shown in yellow highlighting, were not reviewed by the subcommittee.

In addition to the substantive amendments, the attached proposal includes a minor, technical amendment to correct cross-references in rule 8.882(e)(1) and (4). These rules currently refer to rule 8.25, which addresses service and filing in the Supreme Court and Courts of Appeal. The proposal would change this reference to rule 8.817, which addresses service and filing in the superior court appellate division.

Committee Task

Attached for the committee's review is a draft invitation to comment reflecting the Appellate Division Subcommittee recommendation that this proposal be circulated for public comment. **Please note** that the Appellate Division Subcommittee reviewed the draft form revisions, but it did not review the draft invitation to comment cover memo.

The committee's task is to review this draft invitation to comment and:

(1) ask staff or committee members for further information/analysis;
(2) recommend to RUPRO that the invitation to comment, as proposed or as further revised by the committee, be approved for circulation; or
(3) reject the proposal.

Judicial Council of California

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www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR17-__

Title
Appellate Procedure: Service of Briefs in Misdemeanor Cases

Proposed Rules, Forms, Standards, or Statutes
Amend California Rules of Court, rule 8.882

Proposed by
Appellate Advisory Committee
Hon. Louis Mauro, Chair

Action Requested
Review and submit comments by ____

Proposed Effective Date
January 1, 2018

Contact
Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov

Executive Summary and Origin

The Appellate Advisory Committee is proposing amendments to the rule regarding service of briefs in misdemeanor appeals to add provisions requiring the defendant's appellate counsel to send to the defendant a copy of each brief for the defendant. This proposal is based on a suggestion from an attorney.

Background

California Rules of Court, rule 8.360(d) addresses service of briefs in felony appeals. This rule contains special requirements for defendant's appellate counsel to send a copy of each brief for the defendant to the defendant unless the defendant requests otherwise and for the People to provide counsel for the defendant with two copies of their briefs. The history of this rule indicates that these provisions were adopted to ensure that the defendant was kept apprised of the arguments being made in his or her case.

Rule 8.882 does not currently include similar requirements for the service of briefs by defendant's appellate counsel in misdemeanor cases. There does not appear to be a reason that the rule on misdemeanor briefs should not also include these provisions for keeping the defendant informed.

The Proposal

The committee is proposing that rule 8.882(e) be amended to apply the same requirements for sending copies of briefs to the defendant that are in rule 8.360(d) governing the service of briefs on defendants in felony appeals to misdemeanor appeals.

In addition to these substantive amendments, the attached proposal includes a minor, technical amendment to correct cross-references in rule 8.882(e)(1) and (4). These rules currently refer to rule 8.25, which addresses service and filing in the Supreme Court and Courts of Appeal. The proposal would change this reference to rule 8.817, which addresses service and filing in the superior court appellate division.

Alternatives Considered

The committee considered not recommending any changes to these rules, but concluded that it would be appropriate for the rules to treat defendants in felony and misdemeanor appeals similarly with respect to being sent copies of briefs in their cases.

Implementation Requirements, Costs, and Operational Impacts

No appreciable implementation requirements, costs, or operation impacts are anticipated.

Request for Specific Comments

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

- 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?

Attachments and Links

Proposed amendments to rule 8.882

California Rules of Court, rule 8.882 would be amended, effective January 1, 2018 to read:

Title 8. Appellate Rules

Division 2. Rules Relating to the Superior Court Appellate Division

Chapter 4. Briefs, Hearing, and Decision in Limited Civil and Misdemeanor Appeals

Rule 8.882. Briefs by parties and amici curiae

(a) – (d) * * *

(e) Service and filing

(1) Copies of each brief must be served as required by rule ~~8.25~~ 8.817.

(2) Unless the court provides otherwise by local rule or order in the specific case, only the original brief, with proof of service, must be filed in the appellate division.

(3) A copy of each brief must be served on the trial court clerk for delivery to the judge who tried the case.

(4) A copy of each brief must be served on a public officer or agency when required by rule ~~8.29~~ 8.817.

(5) In misdemeanor appeals:

(A) Defendant's appellate counsel must serve each brief for the defendant on the People, and must send a copy of each to the defendant personally unless the defendant requests otherwise.

(B) The proof of service under (A) must state that a copy of the defendant's brief was sent to the defendant, or counsel must file a signed statement that the defendant requested in writing that no copy be sent.

(C) The People must serve two copies of their briefs on the appellate counsel for each defendant who is a party to the appeal.

TAB IIIL

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
January 25, 2017

To
Members of the Appellate Advisory Committee's Rules Subcommittee

From
Jenny Wald, Attorney
Heather Anderson, Supervising Attorney, Legal Services

Subject
Payments for partially prepared transcripts

Action Requested
Please read before January 30 committee meeting

Deadline
January 30, 2017

Contact
Heather Anderson
415-865-7691
heather.anderson@jud.ca.gov

Introduction

Item 14 on the Appellate Advisory Committee's annual agenda is to consider whether to recommend amendments to clarify the payment for partially prepared transcripts in misdemeanor appeals (this is a priority 2 project with a proposed January 1, 2018 completion date). The Appellate Division Subcommittee reviewed draft amendments to rules 8.866 and 8.919 to provide for the payment of the costs of the preparation of the reporter's transcript in appeals that are abandoned or dismissed. The subcommittee recommends that the committee move forward with circulating this proposal for public comment. Attached for the committee's review is a draft invitation to comment addressing these proposed rule amendments.

Background

Subdivision (f) of rule 8.130, relating to reporter's transcripts in civil appeals to the Court of Appeal, and rule 8.834(d), relating to reporter's transcripts in civil appeals to the superior court appellate division, both provide for paying court reporters for portions of a transcript that were already completed at the point an appeal is abandoned or dismissed using funds deposited by the appellant:

> If the appeal is abandoned or is dismissed before the reporter has filed the transcript, the reporter must inform the superior court clerk of the cost of the portion of the transcript that the reporter has completed. The clerk must pay that amount to the reporter from the appellant's deposited funds and refund any excess deposit.

Rules 8.866 and 8.919, which relate to reporter's transcripts in misdemeanor and infraction appeals, like rule 8.316, relating to felony appeals do not currently address payment of costs to reporters for the preparation of transcripts if an appeal is dismissed or abandoned before the transcript is filed. However, as in civil appeals and unlike in felony appeals, there are circumstances in which appellants in misdemeanor and infraction cases must pay for a reporter's transcript themselves and have deposited funds with the court to pay for these transcripts. [1] It seems to make sense that the same provisions regarding payment for partially prepared transcripts out of these deposited sums be included in the rules relating to misdemeanor and infraction appeals.

Draft Rule Amendments

The attached draft amendment to rules 8.866 and 8.919 adopt the same requirements and procedures of rule 8.834(d)(3) for the payment of the costs of the partially prepared reporter's transcripts in misdemeanor appeals in which the appellant has deposited funds with the clerk for the cost of the transcript.

Please note: staff is suggesting a change to the draft proposal reviewed by the subcommittee. Since rule appellants in misdemeanor and infraction appeals are not always required to pay for or make a deposit for the cost of a reporter's transcript, staff suggests making clear that the proposed new requirements apply only in cases in which such deposits are made. These changes, which are shown in yellow highlighting, were not reviewed by the subcommittee.

Committee Task

Attached for the committee's review is a draft invitation to comment reflecting the rules subcommittee recommendation that this proposal be circulated for public comment. **Please note** that the rules subcommittee reviewed the draft of the text of the rule amendments, but it did not review the draft invitation to comment cover memo.

The committee's task is to review this draft invitation to comment and:

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[1] See rule 8.866(a), which is included in the draft invitation to comment, for your information.

(1) ask staff or committee members for further information/analysis;
(2) recommend to RUPRO that the invitation to comment, as proposed or as further revised by the committee, be approved for circulation; or
(3) reject the proposal.

Judicial Council of California

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR17-__

Title
Appellate Procedure: Payment for Partially Prepared Reporter's Transcripts

Proposed Rules, Forms, Standards, or Statutes
Amend California Rules of Court, rules 8.866 and 8.919

Proposed by
Appellate Advisory Committee
Hon. Louis Mauro, Chair

Action Requested
Review and submit comments by ____

Proposed Effective Date
January 1, 2018

Contact
Heather Anderson, 415-865-7691
heather.anderson@jud.ca.gov

Executive Summary and Origin

The Appellate Advisory Committee is proposing amendments to the rules regarding preparation of reporter's transcripts in misdemeanor and infraction appeals to add language providing for paying court reporters out of funds deposited by an appellant for portions of transcripts that have been prepared at the point the appeal is abandoned or dismissed. This proposal is based on a suggestion received from a court reporters' association.

Background

Subdivision (f) of rule 8.130, relating to reporter's transcripts in civil appeals to the Court of Appeal, and rule 8.834(d), relating to reporter's transcripts in civil appeals to the superior court appellate division, both provide for paying court reporters for portions of a transcript that were already completed at the point an appeal is abandoned or dismissed using funds deposited by the appellant. In some cases, appellants in misdemeanor and infraction cases also deposit funds to pay for reporter's transcripts. The rules relating to these transcripts do not currently address using the deposited funds to pay for portions of transcripts that have been prepared at the time an appeal is abandoned or dismissed.

The Proposal

The committee is proposing that rules 8.866 and 8.919, which address reporter's transcripts in misdemeanor and infraction appeals, be amended to provide that if the appellant deposited funds with the court for a reporter's transcript and the appeal is abandoned or dismissed, the clerk will pay the court reporter out of these deposited funds for the portion of the transcript that was

completed before the abandonment or dismissal of the appeal and will refund any excess deposit to the appellant.

Alternatives Considered

The committee considered not recommending any changes to these rules, but concluded that it would be appropriate for these rules to treat deposits for reporter's transcripts in misdemeanor and infraction appeals that are abandoned or dismissed consistent with the way these deposits are treated in civil appeals.

Implementation Requirements, Costs, and Operational Impacts

These amendments would impose some additional duties on superior court clerks to make payments to court reporters from funds deposited for reporter's transcripts in misdemeanor and infraction appeals that are abandoned or dismissed. The committee believes that the operational impacts of this change are likely to be small because the committee believes that the number of cases in which this situation is likely to arise is small.

Request for Specific Comments

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

- 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?

Attachments and Links

Proposed amendments to rules 8.866 and 8.919

California Rules of Court, rules 8.866 and 8.919 would be amended, effective January 1, 2018 to read:

Title 8. Appellate Rules

Division 2. Rules Relating to the Superior Court Appellate Division

Chapter 3. Appeals and Records in Misdemeanor Cases

Article 2. Record in Misdemeanor Appeals

Rule 8.866. Preparation of reporter's transcript

(a) When preparation begins

(1) Unless the court has adopted a local rule under rule 8.865(b) that provides otherwise, the reporter must immediately begin preparing the reporter's transcript if the notice sent to the reporter by the clerk under rule 8.864(a)(1) indicates either:

(A) That the defendant was represented by appointed counsel at trial; or

(B) That the appellant is the People.

(2) If the notice sent to the reporter by the clerk under rule 8.864(a)(1) indicates that the appellant is the defendant and that the defendant was not represented by appointed counsel at trial:

(A) Within 10 days after the date the clerk sent the notice under rule 8.864(a)(1), the reporter must file with the clerk the estimated cost of preparing the reporter's transcript.

(B) The clerk must promptly notify the appellant and his or her counsel of the estimated cost of preparing the reporter's transcript. The notification must show the date it was sent.

(C) Within 10 days after the date the clerk sent the notice under (B), the appellant must do one of the following:

(i) Deposit with the clerk an amount equal to the estimated cost of preparing the transcript;

(ii) File a waiver of the deposit signed by the reporter;

(iii) File a declaration of indigency supported by evidence in the form required by the Judicial Council;

California Rules of Court, rules 8.866 and 8.919 would be amended, effective January 1, 2018 to read:

(iv) File a certified transcript of all of the proceedings required to be included in the reporter's transcript under rule 8.865. The transcript must comply with the format requirements of rule 8.144;

(v) Notify the clerk by filing a new election that he or she will be using a statement on appeal instead of a reporter's transcript. The appellant must prepare, serve, and file a proposed statement on appeal within 20 days after serving and filing the notice and must otherwise comply with the requirements for statements on appeal under rule 8.869; or

(vi) Notify the clerk by filing a new election that he or she now elects to proceed without a record of the oral proceedings in the trial court; or

(vii) Notify the clerk that he or she is abandoning the appeal by filing an abandonment in the reviewing court under rule 8.855.

(D) If the trial court determines that the appellant is not indigent, within 10 days after the date the clerk sends notice of this determination to the appellant, the appellant must do one of the following:

(i) Deposit with the clerk an amount equal to the estimated cost of preparing the transcript;

(ii) File with the clerk a waiver of the deposit signed by the reporter;

(iii) File a certified transcript of all of the proceedings required to be included in the reporter's transcript under rule 8.865. The transcript must comply with the format requirements of rule 8.144;

(iv) Notify the clerk by filing a new election that he or she will be using a statement on appeal instead of a reporter's transcript. The appellant must prepare, serve, and file a proposed statement on appeal within 20 days after serving and filing the notice and must otherwise comply with the requirements for statements on appeal under rule 8.869;

(v) Notify the clerk by filing a new election that he or she now elects to proceed without a record of the oral proceedings in the trial court; or

(vi) Notify the clerk that he or she is abandoning the appeal by filing an abandonment in the reviewing court under rule 8.855.

California Rules of Court, rules 8.866 and 8.919 would be amended, effective January 1, 2018 to read:

(E) The clerk must promptly notify the reporter to begin preparing the transcript when:

(i) The clerk receives the required deposit under (C)(i) or (D)(i);

(ii) The clerk receives a waiver of the deposit signed by the reporter under (C)(ii) or (D)(ii); or

(iii) The trial court determines that the appellant is indigent and orders that the appellant receive the transcript without cost.

(b)-(c)***

(d) When preparation must be completed

(1) The reporter must deliver the original and all copies to the trial court clerk as soon as they are certified but no later than 20 days after the reporter is required to begin preparing the transcript under (a). Only the presiding judge of the appellate division or his or her designee may extend the time to prepare the reporter's transcript (see rule 8.810).

(2) On request, and unless the trial court orders otherwise, the reporter must provide the reviewing court or any party with a copy of the reporter's transcript in computer-readable format. Each computer-readable copy must comply with the requirements of rule 8.144(a)(4).

(3) If the appellant deposited with the clerk an amount equal to the estimated cost of preparing the transcript and the appeal is abandoned or is dismissed before the reporter has filed the transcript, the reporter must inform the clerk of the cost of the portion of the transcript that the reporter has completed. The clerk must pay that amount to the reporter from the appellant's deposited funds and refund any excess deposit.

Chapter 5. Appeals in Infraction Cases

Article 2. Record in Infraction Appeals

Rule 8.919 Preparation of reporter's transcript

(a)-(c) ***

California Rules of Court, rules 8.866 and 8.919 would be amended, effective January 1, 2018 to read:

(d) When preparation must be completed

(1) The reporter must deliver the original and all copies to the trial court clerk as soon as they are certified but no later than 20 days after the reporter is required to begin preparing the transcript under (a). Only the presiding judge of the appellate division or his or her designee may extend the time to prepare the reporter's transcript (see rule 8.810).

(2) On request, and unless the trial court orders otherwise, the reporter must provide the reviewing court or any party with a copy of the reporter's transcript in computer-readable format. Each computer-readable copy must comply with the requirements of rule 8.144(a)(4).

(3) If the appellant deposited with the clerk an amount equal to the estimated cost of preparing the transcript and the appeal is abandoned or is dismissed before the reporter has filed the transcript, the reporter must inform the clerk of the cost of the portion of the transcript that the reporter has completed. The clerk must pay that amount to the reporter from the appellant's deposited funds and refund any excess deposit.