JUDICIAL COUNCIL
OF CALIFORNIA

APPELLATE ADVISORY
COMMITTEE

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

APPELLATE ADVISORY COMMITTEE

MINUTES OF OPEN MEETING

September 11, 2017
12:00-1:30 PM
Teleconference

Advisory Body Members Present:	Hon. Louis R. Mauro, Chair; Hon. Kathleen M. Banke, Vice-chair; Ms. Laura Arnold; Mr. Kevin K. Green; Mr. Jonathan D. Grossman; Hon. Adrienne M. Grover; Hon. Richard D. Huffman; Mr. Daniel M. Kolkey; Hon. Leondra R. Kruger; Mr. Joseph A. Lane; Mr. Jeffrey Laurence; Ms. Mary K. McComb; Hon. Stephen D. Schuett; Ms. Kimberly A. Stewart
Advisory Body Members Absent:	Hon. Kent M. Kellegrew; Ms. Sheran L. Morton; Mr. Jorge Navarrete; Hon. M. Bruce Smith; Ms. Mary-Christine Sungaila; Hon. Thomas Willhite, Jr.
Others Present:	Ms. Christy Simons; Ms. Heather Anderson; Ms. Heather J. MacKay; Ms. Beth Robbins; Hon. Laurence D. Rubin; Mr. Timothy M. Schooley

OPEN MEETING

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

DISCUSSION AND ACTION ITEMS (ITEM 1)

Item 1

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 2017-2018.

Action:

The committee reviewed recommendations from the subcommittees regarding items to include and prioritization, and approved the content of a draft proposed annual agenda for submission to the Judicial Council's Rules and Projects Committee.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:30 PM.

Approved by the advisory body on enter date.

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OF CALIFORNIA

APPELLATE ADVISORY
COMMITTEE

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APPELLATE ADVISORY COMMITTEE

MINUTES OF OPEN MEETING

October 16, 2017
12:00-1:00 PM
Teleconference

Advisory Body Members Present:	Hon. Louis R. Mauro, Chair; Hon. Kathleen M. Banke, Vice-chair; Mr. Jonathan D. Grossman; Hon. Adrienne M. Grover; Mr. Daniel M. Kolkey; Hon. Leondra R. Kruger; Mr. Jeffrey Laurence; Ms. Heather J. MacKay; Ms. Mary K. McComb; Ms. Sheran L. Morton; Mr. Jorge Navarrete; Ms. Beth Robbins; Hon. Laurence D. Rubin; Mr. Timothy M. Schooley; ; Hon. M. Bruce Smith; Ms. Mary-Christine Sungaila
Advisory Body Members Absent:	Ms. Laura Arnold; Mr. Kevin K. Green; Hon. Richard D. Huffman; Hon. Kent M. Kellegrew; Hon. Stephen D. Schuett
Others Present:	Ms. Christy Simons; Ms. Heather Anderson

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 12:00 and roll was taken.

DISCUSSION AND ACTION ITEMS (ITEM 1)

Item 1

Format of Electronic Reporter's Transcripts (Action Required)

Consider public comments on proposed amendments to rule 8.144 to include additional provisions regarding the format of electronic reporter's transcripts.

Action:

The committee reviewed the public comments on the proposed rule amendments and approved the ad hoc working group's recommendations for responding to these comments. The committee approved proposed changes as modified by the discussion and authorized the ad hoc working group to edit the language of the rule. The committee recommended approval of the modified rule by the Judicial Council.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:00 PM.

Approved by the advisory body on enter date.

Item 01

Oral presentation provided at the meeting.

Item 02

Oral presentation provided at the meeting.

Item 03

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
February 20, 2018

To
Members of the Appellate Advisory Committee

From
Christy Simons
Attorney, Legal Services

Subject
Settled statement forms

Action Requested
Please review before February 27 committee meeting

Deadline
February 27, 2018

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

Introduction

Item 2 on the committee's annual agenda this committee year is to consider whether to recommend new and revised forms for the settled statement process in unlimited civil appeals, which include family law appeals, to assist litigants (particularly those who are self-represented) in accessing this procedure and successfully producing a statement that is certified ("settled") by the trial court. At its January 31 meeting, the Rules Subcommittee reviewed draft revisions to several existing forms and mocked-up versions of several proposed new forms. The Rules Subcommittee recommends that the committee move forward with circulating this proposal for public comment.

This is a joint proposal with the Family and Juvenile Law Advisory Committee (Fam/Juv). Fam/Juv considered this proposal at its meeting on February 1, 2018, and recommends moving forward.

The overall scope of this project to improve the settled statement procedure includes working with Fam/Juv to consider rule amendments and other possible new forms and revisions to forms in future rules cycles.

Background

2017 proposal

In 2017, this committee recommended amending the rule regarding settled statements in Court of Appeal proceedings (rule 8.137) to, among other things, remove the requirement for obtaining a court order to use this procedure in certain circumstances, approving a new optional form for appellants to use in preparing proposed statements, and revising the form for designating the record on appeal to conform to these changes. The intent of the proposal was to make the settled statement procedure in unlimited civil cases less burdensome for appellants and the courts.

The proposal circulated for public comment in the spring of 2017. The Appellate Advisory Committee (AAC) received a number of comments regarding the complexity of the forms and comments specifically directed at improving the forms for use by family law litigants. The comments raised questions about whether the forms could be adapted to apply to family law proceedings or whether separate settled statement forms for family law matters were necessary. AAC discussed these comments with Fam/Juv and the two committees agreed to work together on issues that were beyond the scope of that proposal.

The Judicial Council approved the final proposal, and the rule and form changes took effect January 1, 2018.

Suggestions

The committee received suggestions that *Proposed Statement on Appeal (Unlimited Civil Case)* (form APP-014) be reworded to eliminate complicated legal terminology and make the form more understandable and user-friendly for self-represented litigants and attorneys. The Advisory Committee on Providing Access and Fairness recommended prioritizing the self-represented litigant's ability to understand and successfully complete the form.

The comments also included suggestions for revising form APP-014 to meet the needs of family law litigants or to develop a new form specifically for family law appeals. These comments highlighted some differences in family law matters, such as that many of these matters are decided on the law-and-motion calendar, and thus do not involve a traditional "trial," but still result in appealable orders. At many family law hearings, the court receives testimony. Thus, the commentator suggested revising the item regarding testimony and evidence which instructed the appellant to skip it if there was no trial.

The committee also received comments on *Appellant's Notice Designating Record on Appeal (Unlimited Civil Case)* (form APP-003) suggesting that it be rewritten to be less complex and easier to understand and complete. A state bar standing committee comment suggested revising form APP-003 to look more like form APP-103, the form for appellants to designate the record on appeal in limited civil cases, because form APP-103 was easier to read and the formatting was clearer.

Finally, the committee received a suggestion to develop a form motion for litigants to use in seeking the court's permission to use a settled statement under rule 8.137(b)(2). The commentator indicated that a form would provide guidance and assist litigants in avoiding unnecessary procedural defaults.

Ad hoc joint working group

On January 12, a group with members representing Fam/Juv and AAC's Rules Subcommittee held a telephone conference to discuss this proposal and make some preliminary determinations to move the project forward. The group agreed with Fam/Juv's recommendation to convert the proposed settled statement form to standard format and move the instructions for filling out the form to an information sheet. The group also discussed possible amendments to rule 8.137, but agreed to pursue consideration of the rule after the current cycle.

Discussion

The following is a summary of proposed new forms and proposed revisions to current forms.

Form APP-014, *Proposed Settled Statement (Unlimited Civil Case)*

The proposed revisions to the current form, which was adopted effective January 1, 2018, are extensive and require repealing and replacing the current form. The revisions are intended to make the form more understandable and user-friendly, and to require appellants to provide only the information that is necessary for the trial court to be able to certify the statement. The major changes are described below.

The revised version of the form is in standard format, rather than plain language format, as noted above. Fam/Juv requested this change in format to be consistent with other appellate forms and to create more white space on the form to improve readability. The instructions have been moved to a more comprehensive information sheet (form APP-014-INFO), which results in a shorter settled statement form.

The space for describing motions on the current form (item 5) has been removed from the revised version. This change is intended to reflect the fact that many family law matters are heard in law-and-motion proceedings and involve witness testimony. These proceedings need not be described separately from trial proceedings. However, there are other motions that may

be relevant to an appeal, such as motions in limine, motions to strike, etc. The invitation to comment will include a question regarding whether the form should include a section for summarizing relevant motions.

Also removed from the proposed form are space for the appellant to describe the dispute in the trial court and to explain how the claimed errors in the trial court proceeding harmed the appellant. The Rules Subcommittee concluded that the trial court judge would recall the matter and/or could easily access the case file for any information on the dispute, and that it was unnecessary and burdensome to require appellants to describe the harm they suffered as a result of the error.

The revised version of the form reorganizes the sections for providing descriptions of testimony and evidence. It separates the description of party testimony and evidence from other witness testimony and evidence. This change was suggested by Fam/Juv because, often in family law proceedings, it is only the parties (e.g., mom and dad) testifying. The form provides space for describing party testimony and evidence; an attachment has been created for non-party testimony and evidence (new form APP-014A, described below). The committee may wish to include a question in the invitation to comment regarding this organization of the testimony and evidence.

Form APP-014A, *Other Party and Non-Party Witness Testimony and Evidence Attachment*

This proposed new form, an attachment for form APP-014, is for summarizing more party testimony and evidence than space allows on form APP-014, and all non-party testimony and evidence. The formatting is identical to the party testimony and evidence sections in form APP-014, walking the appellant through the process of summarizing the testimony and evidence.

Form APP-014-INFO, *Information Sheet for Proposed Settled Statement on Appeal*

This proposed new form provides information to the appellant on how to complete form APP-014, the proposed settled statement. The instructions from the current settled statement form have been moved to this information sheet as part of converting the current form from plain language format into standard format.

This information sheet is in plain language format, consistent with other appellate information sheets. In addition to providing expanded instructions for completing each section of the settled statement form, the information sheet includes definitions of legal terms, the time for filing the form, a description of the process of reviewing and proposing amendments to the settled statement prior to certification, and resources for finding general information on the appeals process.

Form APP-003, *Appellant's Notice Designating Record on Appeal*
This form has minor revisions intended to make it more understandable and easier to complete, as suggested in the comments to the 2017 proposal. Of note, it includes a notice in the caption advising appellants to read *Information on Appeal Procedures for Unlimited Civil Cases* (form APP-001-INFO) (see discussion regarding this proposed new form below).

The form also includes, for an appellant choosing to proceed with a reporter's transcript as the record of the oral proceedings, an expanded description of how the appellant pays for the transcript by depositing the approximate cost with the trial court.

Form APP-010, *Respondent's Notice Designating Record on Appeal*
This form has minor revisions that conform to the changes to form APP-003 and to the recent amendment of Code of Civil Procedure section 271 (see item 2b). The form includes the same advisement to read *Information on Appeal Procedures for Unlimited Civil Cases* (form APP-001-INFO) and the same expanded description of how to deposit the approximate cost of a reporter's transcript that have been added to form APP-003.

Form APP-020, *Response to Appellant's Proposed Settled Statement on Appeal*
This proposed new form is intended to facilitate a response by the respondent to the appellant's proposed settled statement. It allows the respondent to indicate approval or request changes.

Form APP-022, *Order on Appellant's Proposed Settled Statement*
This proposed new form is intended to streamline the court's role in the settled statement process. It provides for the court to order certification of the statement, the preparation of a reporter's transcript, or corrections/modifications to the appellant's proposed statement. There is space to specify any necessary corrections that must be made and any content required by rule 8.137 that must be added to the proposed statement. In addition, it includes space for the court to indicate the date by which the appellant must serve and file a corrected proposed statement.

Form APP-025, *Appellant's Motion to Use a Settled Statement*
This draft form motion is intended for use by appellants who wish to use a settled statement but are not automatically entitled to do so. Under rule 8.137(b)(1), an appellant may elect to use a settled statement as the record of the oral proceedings without filing a motion if the proceedings were not reported by a court reporter or the appellant has an order waiving court fees and costs. In other circumstances, an appellant who wants to use a settled statement as the record of the oral proceedings must seek court permission by filing a motion.

Rule 8.137(b)(2) requires that the motion be supported by a showing that:

- Using a settled statement will result in a substantial cost saving and will not significantly burden the court or the parties; or

- The designated oral proceedings cannot be transcribed; or
- Although the appellant does not have a fee waiver, the appellant cannot afford to pay for a transcript and funds are not available from the Transcript Reimbursement Fund (rule 8.130(c)).

The rule also requires the appellant to designate the proceedings to be included in the settled statement and provide specific information about each proceeding, including the date, the name of the court reporter (if any and if known), and whether a certified transcript was previously prepared. (Rule 8.137(b)(3).)

The proposed form motion includes a section for the appellant to support the motion with a showing of one (or more) of the reasons identified in rule 8.137(b)(2). The reasons are stated on the form, and space is provided for the appellant to explain why one (or more) of those reasons applies. The form also includes a chart for the appellant to identify the designated proceedings and provide the required information.

Form APP-001-INFO, *Information on Appeal Procedures for Unlimited Civil Cases*
This proposed new form updates and expands upon current form APP-001, also entitled *Information on Appeal Procedures for Unlimited Civil Cases*, and is intended to replace that form. Form APP-001-INFO is based on form APP-101-INFO, *Information on Appeal Procedures for Limited Civil Cases*.

Among the differences in new form APP-001-INFO as compared with form APP-001:

- The new form is in plain language format, which is reflected in the circled item numbers, more headings, headings in the form of questions, and lots of white space, bullet points, and other formatting mechanisms intended to make the form more user-friendly and easy to follow.
- It is renumbered –INFO to signify that it is an information sheet;
- It is divided into sections addressed to the appellant and the respondent (see pages 2 and 12);
- It includes expanded information on how to serve and file documents (see item 8);
- It includes a new section on whether a notice of appeal stays enforcement of the judgment (see items 11, 15);
- It includes an expanded description of the record on appeal and the options for providing a record of the documents and oral proceedings (see item 13)
- It includes new sections describing oral argument and what happens after oral argument.

Committee's task

Attached for the committee's review are draft forms reflecting the subcommittee's recommendations. Revisions to existing forms are highlighted.

The committee's task is to review the forms and:

- Ask staff or committee members for further information/analysis;
- Recommend to RUPRO that the proposal, as proposed or as further revised by the committee, be approved for circulation; or
- Reject the proposal.

Attachments

Revised form APP-003, *Appellant's Notice Designating Record on Appeal*, at pp. 8-11
Revised form APP-010, *Respondent's Notice Designating Record on Appeal*, at pp. 12-14
New form APP-014, *Proposed Settled Statement (Unlimited Civil Case)*, at pp. 15-19
New form APP-014A, *Other Party and Non-Party Witness Testimony and Evidence Attachment*, at pp. 20-22
New form APP-014-INFO, *Information Sheet for Proposed Settled Statement on Appeal*, at pp. 23-26
New form APP-020, *Response to Appellant's Proposed Settled Statement on Appeal*, at pp. 27-28
New form APP-022, *Order on Appellant's Proposed Settled Statement*, at pp. 29-30
New form APP-025, *Appellant's Motion to Use a Settled Statement*, at pp. 31-32
New form APP-001-INFO, *Information on Appeal Procedures for Unlimited Civil Cases*, at pp. 33-47

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):*	**DRAFT** **01-03-2018** **Not approved by the Judicial Council**
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 *Information on Appeal Procedures for Unlimited Civil Cases* (form APP-001-INFO) 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 choose 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, or d, 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 (item 4) on pages 2 and 3 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 rules 3.50-3.58; or

(b) ☐ An application for a waiver of court fees and costs under rules 3.50-3.58. *(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, and Fourth Appellate Districts, permit parties to stipulate (agree) 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).)*

2. RECORD OF ORAL PROCEEDINGS IN THE SUPERIOR COURT

I choose to proceed *(you must check a or b below):*

a. ☐ WITHOUT a record of the oral proceedings (what was said) 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 deciding whether an error was made in the superior court proceedings.

Form Approved for Optional Use
Judicial Council of California
APP-003 [Rev. January 1, 2019]

APPELLANT'S NOTICE DESIGNATING RECORD ON APPEAL (Unlimited Civil Case)

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 *(you must check (1), (2), or (3) below)*:

(1) ☐ A reporter's transcript under rule 8.130. *(You must fill out the reporter's transcript section (item 5) on pages 3 and 4 of this form.)* I have *(check all that apply):*

(a) ☐ Deposited with the superior court clerk the approximate cost of preparing the transcript by including the deposit 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 under rule 8.130(b)(3)(A) 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 stipulated (agreed) in writing 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 check (a), (b), or (c) below, and fill out the settled statement section (item 6) on page 4.)*

(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 I have an order waiving fees and costs.

(c) ☐ I am requesting to use a settled statement for reasons other than those listed in (a) or (b). *(You must attach the motion required under rule 8.137(b) to this form.)*

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

☐ I request that the clerk transmit to the Court of Appeal 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 choose 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 in the transcript the following documents that were filed in the superior court proceeding. *(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)		

☐ Check here if you need more space to list additional documents. List these documents on a separate page or pages labeled "Attachment 4b," and start with number (13).

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)			

☐ Check here if you need more space to list additional exhibits. List these exhibits on a separate page or pages labeled "Attachment 4c," and start with number (6).

5. NOTICE DESIGNATING REPORTER'S TRANSCRIPT

You must complete both a and b in this section if you checked item 2b(1) above indicating that you choose 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. **Format of the reporter's transcript**
I request that the reporters provide *(check one):*

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

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

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

(Code Civ. Proc., § 271.)

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 [if known], 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

☐ Check here if you need more space to list additional proceedings. List these exhibits on a separate page or pages labeled "Attachment 5b," and start with number (5).

6. **NOTICE DESIGNATING PROCEEDINGS TO BE INCLUDED IN SETTLED STATEMENT**

(You must complete this section if you checked item 2b(3) above indicating you choose to use a settled statement.) I request that the following proceedings in the superior court be included in the settled statement. *(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 [if known], 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

☐ Check here if you need more space to list additional proceedings. List these proceedings on a separate page or pages labeled "Attachment 6," and start with number (5).

7. a. The proceedings designated in 5b or 6 ☐ include ☐ do not include all of the testimony in the superior court.

b. 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) and rule 8.137(d)(1) provide that your appeal will be limited to these points unless the Court of Appeal permits otherwise.)*

Points are set forth: ☐ Below ☐ On a separate page labeled "Attachment 7."

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF APPELLANT OR ATTORNEY)

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*):			

DRAFT

01-04-2018

Not approved by the Judicial Council

SUPERIOR COURT OF CALIFORNIA, COUNTY OF
STREET ADDRESS:
MAILING ADDRESS:
CITY AND ZIP CODE:
BRANCH NAME:

PLAINTIFF/PETITIONER:
DEFENDANT/RESPONDENT:

RESPONDENT'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 *Information on Appeal Procedures for Unlimited Civil Cases* (form APP-001-INFO) before you fill out 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**

The appellant has elected (chosen) to use a clerk's transcript under rule 8.122.

a. ☐ **Additional documents.** *(If you want any documents from the superior court proceedings in addition to the documents designated by the appellant to be included in the clerk's transcript, you must identify those documents here.)*

In addition to the documents designated by the appellant, I request that the clerk include in the transcript the following documents from the superior court proceedings. *(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
(1)		
(2)		
(3)		

☐ Check here if you need more space to list additional documents. List these documents on a separate page or pages labeled "Attachment 1(a)," and start with number 4.

b. ☐ **Additional exhibits.** *(If you want any exhibits from the superior court proceedings in addition to those designated by the appellant to be included in the clerk's transcript, you must identify those exhibits here.)*

In addition to the exhibits designated by the appellant, 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)			

☐ Check here if you need more space to list additional exhibits. List these exhibits on a separate page or pages labeled "Attachment 1(b)," and start with number 4.

Form Approved for Optional Use
Judicial Council of California
APP-010 [Rev. January 1, 2019]

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:

1. c. ☐ **Copy of clerk's transcript.** I request a copy of the clerk's transcript. *(Check (1) or (2).)*

   (1) ☐ I will pay the superior court clerk for this transcript when I receive the clerk's estimate of the costs of this transcript. I understand that if I do not pay for this transcript, I will not receive a copy.

   (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 rules 3.50-3.58; or

   (b) ☐ An application for a waiver of court fees and costs under rules 3.50-3.58. (*Use* Request to Waive Court Fees *(form FW-001) to prepare and file this application.*)

2. **RECORD OF ORAL PROCEEDINGS IN THE SUPERIOR COURT**

   The appellant has elected to use a reporter's transcript under rule 8.130.

   a. ☐ **Designation of additional proceedings.** *(If you want any oral proceedings in addition to the proceedings designated by the appellant to be included in the reporter's transcript, you must identify those proceedings here.)*

   (1) In addition to the proceedings designated by the appellant, 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?
(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 additional proceedings. List these proceedings on a separate page or pages labeled "Attachment 2(a)(1)," and start with letter (h).

CASE NAME:	SUPERIOR COURT CASE NUMBER:

2. a. (2) **Deposit for additional proceedings.**

I have *(check a, b, c, or d):*

(a) ☐ Deposited with the superior court clerk the approximate cost of preparing the additional proceedings by including the deposit 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 under rule 8.130(b)(3)(A) 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).

b. **Copy of reporter's transcript.**

(1) ☐ I request a copy of the reporter's transcript.

(2) ☐ I request that the reporters provide *(check (a), (b), or (c))* :

(a) ☐ My copy of the reporter's transcript in electronic format.

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

(c) ☐ My copy of the reporter's transcript in electronic format and a second copy of the reporter's transcript in paper format.

(*Code Civ. Proc., § 271.)*

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF RESPONDENT OR ATTORNEY)

PARTY WITHOUT ATTORNEY OR ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **02-15-2018** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER PARENT/PARTY:	
APPELLANT'S PROPOSED SETTLED STATEMENT ☐ _____ Amended *(If applicable, specify:1st, 2nd, 3rd, etc. amended form)*	SUPERIOR COURT CASE NUMBER:
RE: Appeal filed on*(date):*	COURT OF APPEAL CASE NUMBER:

☑ Use this form to prepare a written record of the oral trial court proceedings for an appeal.

☑ File this form in the superior court, not in the Court of Appeal.

☑ For information on how to complete this form, read form APP-014-INFO, *Information Sheet for Proposed Settled Statement.*

1. **PRELIMINARY INFORMATION**
   a. I am appealing ☐ an order filed on ☐ a judgment entered on *(specify date):*
   b. On *(fill in the date):* _____, I filed a notice of appeal. A copy of the judgment or order I am appealing is attached.
   c. On *(fill in the date)*
      ☐ I filed a notice designating the record on appeal, choosing to use a settled statement.
      ☐ The court sent ☐ I was served with an order granting my request to use a settled statement.
   d. ☐ On *(fill in the date):* _____, the court ordered me to modify or correct my proposed settled statement.

2. **REASONS FOR YOUR APPEAL**
   (Check all that apply and describe the legal error or errors you believe the court made that are the reasons for this appeal.)
   a. ☐ ***No substantial evidence***. There was no substantial evidence that supported the judgment or order that I am appealing. *(Explain why you think the judgment or order was not supported by substantial evidence):*

☐ Attachment 2a

   b. ☐ ***Legal errors.*** The court made the following error or errors about either the law or court procedure that affected the outcome of the case. *(Describe each error.)*

☐ Attachment 2b

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER PARENT/PARTY:	SUPERIOR COURT CASE NUMBER	COURT OF APPEAL CASE NUMBER

3. **SUMMARY OF THE PARTIES' TESTIMONY AND OTHER EVIDENCE**

a. Did any of the parties testify at the trial or hearing? ☐ yes ☐ no

(Specify the name of the party who testified and the date on which the party testified. Then, write a complete and accurate summary of what each party said that is relevant to the reasons you gave in item 2 for this appeal (for example, what the party said in response to questions asked by his or her own attorney, the other party (or the attorney) and/or the court). Include only what was actually said; do not comment or give your opinion about what was said.)

(1) Name of party: _____ testified on *(date):* _____

Summary:

☐ Attachment 3a(1)

(A) Did a party (or attorney) make an objection to this party's testimony? ☐ no ☐ yes *(Specify in item 3b.)*

(B) During this party's testimony, were any exhibits (documents, records, or other materials) relevant to the appeal presented that the judge allowed to be used as evidence to support or disprove this party's testimony? ☐ no ☐ yes *(Specify in item 3c.)*

(C) During this party's testimony, were any exhibits (documents, records, or other materials) relevant to the appeal presented that the judge *did not* allow to be used as evidence to support or disprove this party's testimony? ☐ no ☐ yes *(Specify in item 3d.)*

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER PARENT/PARTY:	SUPERIOR COURT CASE NUMBER	COURT OF APPEAL CASE NUMBER

3. a. (2) Name of party: _____ testified on *(date)*: _____

Summary:

☐ Attachment 3a(2)

(A) Did a party (or attorney) make an objection to this party's testimony? ☐ no ☐ yes *(Specify in item 3b.)*

(B) During this party's testimony, were any exhibits (documents, records, or other materials) relevant to the appeal presented that the judge allowed to be used as evidence to support or disprove this party's testimony? ☐ no ☐ yes *(Specify in item 3c.)*

(C) During this party's testimony, were any exhibits (documents, records, or other materials) relevant to the appeal presented that the judge *did not* allow to be used as evidence to support or disprove this party's testimony? ☐ no ☐ yes *(Specify in item 3d.)*

(3) Was there testimony from other parties? ☐ no ☐ yes

(If you answered "yes," fill out and attach to this form Other Party and Non-Party Witness Testimony and Evidence Attachment (form APP-014(A)).)

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER PARENT/PARTY:	SUPERIOR COURT CASE NUMBER	COURT OF APPEAL CASE NUMBER

3. b. **Objections to a party's testimony relevant to the appeal**
(Indicate the person who made the objection, which party's testimony was objected to, and if the court "sustained the objection" (prevented the party from saying something) or "overruled the objection" (allowed the party to make a statement).)

Summary:

☐ Attachment 3b

c. **Exhibits (documents, records, or other materials) relevant to the appeal allowed to be used as evidence to support or disprove a party's testimony.** (*Write a complete and accurate summary of the exhibits presented by each party. Do not comment or give your opinion about the exhibits.)*

Summary:

☐ Attachment 3c

d. **Exhibits (documents, records, or materials) relevant to the appeal not allowed to be used as evidence to support or disprove a party's testimony.**
(Write a complete and accurate summary of the documents, records, or other materials. Do not comment or give your opinion about the items.)

☐ Attachment 3d

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER PARENT/PARTY:	SUPERIOR COURT CASE NUMBER	COURT OF APPEAL CASE NUMBER

4. **SUMMARY OF NON-PARTY TESTIMONY AND OTHER EVIDENCE**

Was there testimony from non-party witnesses that is relevant to the reasons for the appeal?

☐ No *(Skip to item 5)*

☐ Yes *(Fill out and attach to this form Other Party and Non-Party Witness Testimony and Evidence Attachment (form APP-014(A).)*

5. **TRIAL COURT'S FINDINGS**

a. Did the judge make findings at the hearing or trial in the case? ☐ No ☐ Yes *(Complete item 5b)*

(A judge makes a "finding" when he or she decides that something is a fact, is true, or is relevant.)

b. What are the findings that the judge made that are relevant to the reasons for the appeal?

☐ Attachment 5

6. **ORDER OR JUDGMENT YOU ARE APPEALING**

Attach a copy of the order or judgment you are appealing.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF PARTY OR ATTORNEY)

PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARENT/PARTY:	SUPERIOR COURT CASE NUMBER	COURT OF APPEAL CASE NUMBER

OTHER PARTY AND NON-PARTY WITNESS TESTIMONY AND EVIDENCE ATTACHMENT

Use this form as an attachment to *Appellant's Proposed Settled Statement* (form APP-014) if other parties or non-party witnesses provided testimony relevant to the reasons you are appealing the order or judgment in the case.

- Specify the name of any other party or non-party witnesses who testified at the trial or hearing and other information specified below.
- Write a complete and accurate summary of what each person said that is relevant to the reasons for this appeal (for example, in response to questions asked by any of the parties (or attorneys) and/or the court). Include only what was actually said; do not comment or give your opinion about what was said.

1. **SUMMARY OF TESTIMONY AND EVIDENCE**

a. Name: _____ ☐ a party ☐ a non-party witness in the case

testified on behalf of *(specify):* ☐ petitioner/plaintiff ☐ respondent/defendant ☐ other parent/party

on *(date):*

Summary:

☐ Attachment 1a

(1) Did a party (or attorney) make an objection to this person's testimony? ☐ no ☐ yes *(Specify in item 2)*

(2) During this person's testimony, were any exhibits (documents, records, or other materials) relevant to the appeal presented that the judge allowed to be used as evidence to support or disprove the testimony? ☐ no ☐ yes *(Specify in item 3)*

(3) During this person's testimony, were any exhibits (documents, records, or other materials) relevant to the appeal presented that the judge *did not* allow to be used as evidence to support or disprove the testimony? ☐ no ☐ yes *(Specify in item 4)*

PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARENT/PARTY:	SUPERIOR COURT CASE NUMBER	COURT OF APPEAL CASE NUMBER

b. Name: _____ ☐ a party ☐ a non-party witness in the case

testified on behalf of *(specify):* ☐ petitioner/plaintiff ☐ respondent/defendant ☐ other parent/party

on *(date):*

Summary:

☐ Attachment 1b

(1) Did a party (or attorney) make an objection to this person's testimony? ☐ no ☐ yes *(Specify in item 2)*

(2) During this person's testimony, were any exhibits (documents, records, or other materials) relevant to the appeal presented that the judge allowed to be used as evidence to support or disprove the testimony? ☐ no ☐ yes *(Specify in item 3)*

(3) During this person's testimony, were any exhibits (documents, records, or other materials) relevant to the appeal presented that the judge *did not* allow to be used as evidence to support or disprove the testimony? ☐ no ☐ yes *(Specify in item 4)*

c. Was there testimony from other parties or other non-party witnesses? ☐ no ☐ yes

(If you answered "yes," fill out and attach to this form another Other Party and Non-Party Witness Testimony and Evidence Attachment (form APP-014(A)) or provide information in another document, such as form MC-025, labeled as Attachment 1c.)

PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARENT/PARTY:	SUPERIOR COURT CASE NUMBER	COURT OF APPEAL CASE NUMBER

2. **Objections to the other party's or non-party witness's testimony relevant to the appeal**
(Indicate the person who made the objection, which person's testimony was objected to, and if the court "sustained the objection" (prevented the person from saying something) or "overruled the objection" (allowed the person to make a statement).)
Summary:

☐ Attachment 2

3. **Exhibits (documents, records, or other materials) relevant to the appeal allowed to be used as evidence to support or disprove the testimony.** (*Write a complete and accurate summary of the exhibits. Do not comment or give your opinion about the exhibits.)*
Summary:

☐ Attachment 3

4. **Exhibits (documents, records, other materials) relevant to the appeal not allowed to be used as evidence to support or disprove the testimony?**
(Write a complete and accurate summary of the documents, records, or other materials. Do not comment or give your opinion about the items.)

☐ Attachment 4

APP-014-INFO Information Sheet for Proposed Settled Statement

1 Where can I find general information about the appeals process?

This information sheet provides information about *Appellant's Proposed Settled Statement* (form APP-014).

It includes: instructions for completing the form, definitions of legal terms found in the form, deadlines for filing and serving the form, and the process for asking the court to certify your proposed statement for use in the Court of Appeal. This form does not cover general information about the appeals process.

For general information about the appeals process, read *Information on Appeal Procedures in Unlimited Civil Cases* (form APP-001-INFO) (family law cases are one type of unlimited civil case). To learn more, you can also:

- Visit the California Courts Online Self-Help Center at http://www.courts.ca.gov/selfhelp-appeals.htm
- Find out about self help resources for the district in which you filed your appeal, at *http://www.courts.ca.gov/courtsofappeal.htm.*
- Read rules 8.1-8.278 of the California Rules of Court, which set out the procedures for unlimited civil appeals. You can get these rules at any courthouse or county law library or online at *www.courts.ca.gov/rules*.
- Consult with a lawyer. Find a lawyer through your local bar association, the State Bar of California at *http:/calbar.ca.gov*, or the Lawyer Referral Service at 1-866-442-2529.

2 What is a settled statement on appeal?

A settled statement is a summary of the oral (spoken) trial court proceedings prepared by the person filing the appeal (the appellant) when authorized, as specified in 3. The trial court judge who conducted the proceeding must "settle" the statement before it is sent to the Court of Appeal. The Court of Appeal will rely on this statement in deciding your case.

3 When would I use *Proposed Settled Statement on Appeal?*

Use the form if you want prepare a record of the oral (spoken) trial court proceedings for an appeal if:

- The trial or hearing was not reported by a court reporter;
- You have an order waiving your court fees and costs; or
- The court orders that you can use a settled statement instead of a court reporter's transcript.

4 What must be included in a proposed settled statement on appeal?

The proposed settled statement must include all of the following:

- A statement of the points you are raising on appeal. (Described in item 6.)
- A concise factual summary of the evidence and testimony of each witness that relate to the points you plan to raise on appeal; and
- A copy of the judgment or order being appealed must be attached to it.

5 What is the deadline to file the form?

File the original form in the trial court:

- At the same time you file *Appellant's Notice Designating Record on Appeal (Unlimited Civil Case)* (form APP-003) or within **30 days** of that date,

OR

- Within 30 days of the date that the court sends, or a party serves, an order granting your motion to use a settled statement, if applicable.

6 What do these legal words mean that are found in form APP-014 and this information sheet?

- ***Evidence***: Any proof legally presented at a hearing or trial through witnesses, records, and/or exhibits.
- ***Substantial evidence:*** Evidence that is reasonable, credible, and of solid value. It is not just any evidence. The focus is on the quality--not the quantity--of evidence needed to support a legal conclusion.

APP-014-INFO Information Sheet for Proposed Settled Statement

6 Legal terms (continued)

- ***Findings*:** A determination by a judicial officer that something is a fact, or true, or is relevant to the case.
- ***Issue:*** A point that the parties disagree about in a lawsuit.
- ***Judgment:*** The official decision of a court that resolves the argument between the parties to a lawsuit and states the terms of the decision.
- ***Legal error:*** The appellant may ask the Court of Appeal to determine if an error was made by the trial court about either the law or court procedures in the case.
- ***Objection.*** A formal protest made by a party about what a party or witness says at the trial or hearing or to any documents or exhibits that the other side tries to introduce during a trial or hearing.
- ***Order.*** A decision made by a judicial officer on an issue that is raised by a party in a lawsuit.
- ***Rulings on objections.*** A ruling is a judge's decision on a party's objection to the introduction of a witness's testimony, records, or exhibits at the trial or hearing. The judge can "sustain the objection" or "overrule the objection."

  If the judge *sustains* the objection, the judge is agreeing with the objection and will not consider that part of the testimony or evidence that is being objected to. If the judge *overrules* the objection, the judge is disagreeing with the objection, and will allow the evidence to be introduced.
- ***Statement of the points the appellant is raising on appeal:*** means stating the errors you intend to raise on appeal.

7 How do I complete the caption (the top part of the form)?

Name and contact information. If you have a lawyer for the appeal, your lawyer will fill out the form. If you do not have a lawyer for the appeal, write your name and provide your contact information in the first part of the caption.

Court address. Complete the address for the superior court where your case is filed.

Party names. Write the names of the parties in the case. *Note for Domestic Violence Restraining Order cases:* If you are appealing a Domestic Violence Restraining Order, write your name next to Plaintiff/Petitioner if you are the Protected Person on the restraining order. Write your name next to Defendant/Respondent, if you are the Restrained Person on the restraining order.

Are you amending (changing) a proposed settled statement? If so, check the box under the name of the form. Then, on the line that follows the check box, write whether this is the first, second, third, fourth, etc. time you are amending the proposed settled statement.

Filing date of notice of appeal. Finally, fill in the date your appeal was filed, as well as the superior court case number and court of appeal case number.

8 How do I complete item 1: Preliminary Information?

In this section, write the dates that are requested about: the order or judgment, the notice of appeal, your choice to use, or the court's order allowing you to use, a settled statement. Also, if applicable, provide the date that the court ordered you to modify or correct your proposed settled statement.

APP-014-INFO Information Sheet for Proposed Settled Statement

9 How do I complete item 2: Reasons for Your Appeal?

In item 2 of APP-014, you describe the errors that you are raising on appeal by specifying the legal error or errors you believe were made by the court at the hearing or trial. For example:

- *No substantial evidence*
  You might argue that there was no substantial evidence that supported the judgment or order that is attached to the proposed settled statement.

- *Legal error*
  You might argue that the court made an error or errors about either the law or court procedure that affected the outcome of the trial or hearing.

Before you complete this item, you should understand that the Court of Appeal can only review a case based on an argument that the trial court made certain kinds of errors that changed the judgment or order in your case.

YOUR ARGUMENST/REASONS CAN BE BECAUSE:	
☑	There was no substantial evidence that supported the judgment or order.
☑	The court made an error or errors about either the law or court procedure. Examples are that the court: (1) misinterpreted the law, (2) wrongly ruled on an objection, or (3) misapplied the law.

YOUR ARGUMENTS/REASONS *CANNOT* BE TO:	
X	Present your case all over again to the Court of Appeal.
X	Present new evidence or new witnesses to the Court of Appeal.
X	Generally complain about the judge or a lawyer; or
X	Explain to the the Court of Appeal that a witness did not tell the truth at the trial.

10 How do I complete item 3: Summary of the Parties' Testimony and Other Evidence

Indicate in item 3 if a *party* in the case gave testimony at the trial or hearing. Item 3 provides space to summarize the testimony that is relevant to the reasons you gave in item 2 for this appeal.

After summarizing the testimony, indicate if there were any objections and exhibits relevant to the appeal that the judge allowed, or did not allow, to be used as evidence to support or disprove the party's testimony. If you answer "yes" to any of the questions following the summary of each party's testimony, complete items 3b-d on page 4.

If you need more space to describe the testimony or evidence, check the box below the summary of the testimony (for example, "Attachment 3a(1)"). Then, attach a separate page or pages (you can use form MC-025) to continue the summary. Label the attachment "APP-014, Attachment 3a(1)" if you are continuing to summarize the testimony of the party named in item 3a(1).

If more than two parties provided testimony, complete *Other Party and Non-Party Witness Testimony and Other Evidence* (form APP-014(A)) and attach it to form APP-014.

11 How do I complete item 4: Summary of Non-Party Witness Testimony and Other Evidence?

If another party or non-party witnesses (persons other than the parties in the case) provided testimony at the trial or hearing that is relevant to the reasons that you are appealing the judgment or order, you will need to complete a separate form or document and attach the form to APP-014.

You may use *Other Party and Non-Party Witness Testimony and Other Evidence* (form APP-014(A)) to provide this information as part of your proposed settled statement.

12 How do I complete item 5: Trial Court's Findings?

Indicate if the judge made any findings (decisions about the facts or the law) that are relevant to your reasons in item 2 for this appeal.

A judge makes a finding when he or she decides, for example, that something is or is not a fact, or is or is not true, or that a particular law applies or does not apply.

If you need more space to describe the trial court's findings, check the box "Attachment 6." Then, attach a separate page or pages (you can use form MC-025) to continue the summary. Label the attachment "APP-014, Attachment 5."

13 Attach order or judgment and make copies.

When you have finished your proposed settled statement:

- Attach a copy of the order or judgment you are appealing;
- Make one copy for each party in your case; and
- Keep a copy for your records.

14 Have all parties in the case served

Have each party in your case served with a copy of the complete proposed settled statement with attachments.

For information about serving your documents:

- See *Information Sheet for Proof of Service* (form APP-009), and
- Go to the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

15 File the proof of service forms with the court

- You can file the forms in person, by mail, or by e-filing (if available) in the court that made the order or judgment you are appealing.
- Ask the court clerk to stamp the extra copy for your records to show that the original was filed.

16 Respondent reviews, then court reviews

The respondent has 20 calendar days from the date you serve your proposed settled statement to serve and file proposed amendments (changes) to this statement. The trial court judge then reviews both your proposed settled statement and any proposed amendments filed by the respondent.

The trial judge will either make or order you (the appellant) to make any corrections or modifications to the statement that are needed to make sure the statement provides an accurate summary of the testimony and other evidence relevant to errors you believe the court made that are the reasons for this appeal.

17 Final steps before certification

- If the judge makes any corrections or changes to the proposed settled statement, the corrected or modified statement will be sent to you and the respondent for your review.

  If the judge orders you to make any corrections or modifications to the proposed settled statement, you must serve and file the corrected or modified statement within the time ordered by the judge.
- If you or the respondent disagree with anything in the modified or corrected statement, you have 10 calendar days from the date the modified or corrected statement is sent to you to serve and file proposed amendments or objections to the statement.
- The judge then reviews any proposed amendments or objections and determines if any further corrections or changes to the proposed settled statement are necessary.

  If corrections or changes are needed, the process of review and proposing amendments as set forth above takes place again.

  If corrections or changes are *not* needed, the judge will certify the statement as an accurate summary of the testimony and other evidence relevant to the reasons for this appeal.

18 Statement sent to Court of Appeal

Once the trial court judge certifies the settled statement, the trial court clerk will send the settled statement to the Court of Appeal.

PARTY WITHOUT ATTORNEY OR 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:	***FOR COURT USE ONLY*** **DRAFT-** **NOT APPROVED BY THE JUDICIAL COUNCIL** **02-15-18**
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER PARENT/PARTY:	
RESPONSE TO APPELLANT'S PROPOSED SETTLED STATEMENT ON APPEAL ☐ _____ Amended *(If applicable, specify:1st, 2nd, 3rd, etc. amended form)*	SUPERIOR COURT CASE NUMBER:
Notice: Use this form to prepare a response to *Appellant's Proposed Settled Statement* (form APP-014). For more information, read *Information on Appeals Procedures in Unlimited Civil Cases* (**form APP-001-INFO**) and *Information Sheet for Proposed Settled Statement* (form APP-014-INFO).	COURT OF APPEAL CASE NUMBER:

Important! Do not use this form if you elect to provide a reporter's transcript instead of proceeding with a settled statement.

1. **SUMMARY OF THE PARTIES' TESTIMONY AND OTHER EVIDENCE**
   a. ☐ I do not request changes to this section of appellant's proposed settled statement.
   b. ☐ I request the following changes to this section of appellant's proposed settled statement *(specify):*

   c. ☐ I request the above changes for the following reasons *(specify):*

☐ Attachment 1

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER PARENT/PARTY:	SUPERIOR COURT CASE NUMBER	COURT OF APPEAL CASE NUMBER

2. **SUMMARY OF OTHER PARTY AND NON-PARTY WITNESS TESTIMONY AND OTHER EVIDENCE**
   a. ☐ I do not request changes to this section of appellant's proposed settled statement.
   b. ☐ I request the following changes to this section of appellant's proposed settled statement *(specify):*

   c. ☐ I request the above changes for the following reasons *(specify):*

☐ Attachment 2

3. **TRIAL COURT'S FINDINGS**
   a. ☐ I do not request changes to this section of appellant's proposed settled statement.
   b. ☐ I request the following changes to this section of appellant's proposed settled statement *(specify):*

   c. ☐ I request the above changes for the following reasons *(specify):*

Date:

☐ Attachment 3

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF PARTY OR ATTORNEY)

PARTY WITHOUT ATTORNEY OR ATTORNEY:	STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):		**DRAFT- NOT APPROVED BY THE JUDICIAL COUNCIL 02-15-18**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER PARENT/PARTY:		
ORDER ON APPELLANT'S PROPOSED SETTLED STATEMENT ☐ _____ Amended *(If applicable, specify:1st, 2nd, 3rd, etc. amended order)*		SUPERIOR COURT CASE NUMBER: COURT OF APPEAL CASE NUMBER:

1. The court has received and reviewed the following:
   a. ☐ *Appellant's Proposed Settled Statement* (form APP-014) ☐ _____Amended filed by the appellant on *(date):*
   b. ☐ *Response to Appellant's Proposed Settled Statement on Appeal* (form APP-020) ☐ _____Amended filed by the respondent on *(date):*
   c. ☐ Other *(specify):*

2. The court makes the following order:
   a. ☐ *Certification*. The court certifies that the statement proposed by the appellant in 1a is an accurate summary of the evidence and testimony of each witness relevant to the points that the appellant states are being raised on appeal. The court settles the statement and certifies that it is ready to be sent to the Court of Appeal.
   b. ☐ *Court reporter transcript required*. The trial court proceedings in this case were reported by a court reporter. Instead of correcting the settled statement, the court orders under rule 8.137(f)(2) that a transcript be prepared as the record of these proceedings. *(Check the court's local rules to make sure the court has a rule providing that this option is available.)*
   c. ☐ *Corrections required.* Corrections are needed for the settled statement proposed by the appellant to be an accurate summary of the evidence and testimony for the issues the court addressed in the order or judgment being appealed.
      (1) ☐ A modified settled statement is attached to this order. This modified settled statement must be sent to the parties.
      (2) ☐ The appellant is ordered to prepare a settled statement incorporating the modifications listed below and to serve and file the modified statement.
      (A)
      (B)

Form Adopted for Mandatory Use
Judicial Council of California
APP-022 [New. January 1, 2019]

Cal. Rules of Court, rule 8.137
www.courts.ca.gov

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER PARENT/PARTY:	SUPERIOR COURT CASE NUMBER	COURT OF APPEAL CASE NUMBER

2. Court orders (continued)

(C)

(D)

(E)

(3) ☐ *Additional corrections required.* More corrections than could be listed above were needed in order for the settled statement proposed by the appellant to be an accurate summary of the testimony and other evidence that is relevant to the issues the appellant indicated are the reasons for this appeal. A list of required modifications is attached. The appellant is ordered to prepare a statement incorporating these modifications and serve and file the modified statement.

d. ☐ (1) The proposed settled statement does not contain the following material required by rule 8.137.

(2) The appellant is ordered to prepare a new proposed settled statement that includes this material.

e. The new proposed settled statement must be served and filed by *(date):* .

f. ☐ Other orders are specified below:

Date:

Signature of trial court judicial officer

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):*	**DRAFT** **12-22-2017** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
APPELLANT'S MOTION TO USE A SETTLED STATEMENT	SUPERIOR COURT CASE NUMBER:
RE: Appeal filed on *(date):*	COURT OF APPEAL CASE NUMBER *(if known)*:

INSTRUCTIONS TO APPELLANT

- *Use this form to request a court order to use a settled statement instead of a reporter's transcript of the trial court oral proceedings for an appeal.*
- *Attach this form to your notice designating the record on appeal.*
- *File both forms in the superior court, not the Court of Appeal.*

NOTICE OF HEARING

1. TO *(name(s)):* _____
   ☐ Petitioner ☐ Respondent ☐ Other Parent/Party ☐ Other *(specify):*
2. **A COURT HEARING WILL BE HELD AS FOLLOWS:**
   a. Date: Time: ☐ Dept.: ☐ Room.:
   b. Address of court ☐ same as noted above ☐ other *(specify):*
3. **WARNING to the person served with *Appellant's Motion to Use a Settled Statement on Appeal:*** The court may make the requested order without you if you do not file a response opposing the motion, serve a copy on the other party or parties at least nine court days before the hearing, and appear at the hearing.
4. **PROCEEDINGS**
   I request that the following proceedings in the trial court be included in the settled statement. *(You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceeding [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 reported the proceedings [if any and if known], and whether a certified transcript of the designated proceeding was previously prepared.)*

	Date	Department	Full/Partial Day	Description	Reporter's Name	Prev. prepared?
(a)						☐ Yes ☐ No
(b)						☐ Yes ☐ No
(c)						☐ Yes ☐ No
(d)						☐ Yes ☐ No

☐ Additional proceedings are listed on a separate page or pages. *(At the top of each page, write "Attachment 4" and begin with letter (e).)*

Form Approved for Optional Use
Judicial Council of California
APP-025 [New January 1, 2019]

Code Civ. Proc. § 1005
Cal. Rules of Court, rule 8.137
www.courts.ca.gov

CASE NAME:	SUPERIOR COURT CASE NUMBER:

5. **REASON FOR ALLOWING USE OF SETTLED STATEMENT**

You must support your motion to use a settled statement by showing one [or more] of the following:

a. ☐ A substantial cost saving will result and the statement can be settled without significantly burdening opposing parties or the court. Explain:

b. ☐ The oral proceedings requested in item 4 cannot be transcribed because:

c. ☐ I do not have a fee waiver, but I am unable to pay for the reporter's transcript and funds are not available from the Transcript Reimbursement Fund (see rule 8.130(c)). Explain:

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF APPELLANT OR ATTORNEY)

APP-001-INFO Information on Appeal Procedures for Unlimited Civil Cases

GENERAL INFORMATION

1 What does this information sheet cover?

This information sheet tells you about appeals in unlimited civil cases. These are civil cases in which the amount of money claimed is more than $25,000, as well as other types of cases, such those filed in family court, probate court, and juvenile court.

If you are the party who is appealing (asking for the trial court's decision to be reviewed), you are called the APPELLANT, and you should read Information for the Appellant, starting on page 2. If you received notice that another party in your case is appealing, you are called the RESPONDENT and you should read Information for the Respondent, starting on page 12.

This information sheet does not cover everything you may need to know about appeals in unlimited civil cases. It is meant only to give you a general idea of the appeal process. To learn more, you should read rules 8.1–8.278 of the California Rules of Court, which set out the procedures for unlimited civil appeals. You can get these rules at any courthouse or county law library or online at *www.courts.ca.gov/rules.*

2 What is an appeal?

An appeal is a request to a higher court to review a decision made by a judge or jury in a lower court. **In an unlimited civil case, the court hearing the appeal is the Court of Appeal for the district in which the superior court is located. The lower court—called the "trial court" in this information sheet—is the superior court.**

It is important to understand that **an appeal is NOT a new trial**. The Court of Appeal will not consider new evidence, such as the testimony of new witnesses or new exhibits. The appellate court's job is to review a record of what happened in the trial court and the trial court's decision to see if certain kinds of legal errors were made:

For information about appeal procedures in other kinds of cases, see:

- *Information on Appeal Procedures for Limited Cases* (form APP-101-INFO)
- *Information on Appeal Procedures for Infractions* (form CR-141-INFO)
- *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO)

You can get these forms at any courthouse or county law library or online at *www.courts.ca.gov/forms.*

- ***Prejudicial error:*** The appellant (the party who is appealing) may ask the Court of Appeal to determine if an error was made about either the law or court procedures in the case that caused substantial harm to the appellant (this is called "prejudicial error").

  Prejudicial error can include things like errors made by the judge about the law, errors or misconduct by the lawyers, incorrect instructions given to the jury, and misconduct by the jury that harmed the appellant. When it conducts its review, the Court of Appeal presumes that the judgment, order, or other decision being appealed is correct. It is the responsibility of the appellant to show the Court of Appeal that an error was made and that the error was harmful.
- ***No substantial evidence:*** The appellant may also ask the Court of Appeal to determine if there was no substantial evidence supporting the judgment, order, or other decision being appealed. When it conducts its review, the Court of Appeal only looks to see if there was evidence that reasonably supports the decision. The Court of Appeal generally will not reconsider the jury's or trial court's conclusion about which side had more or stronger evidence or whether witnesses were telling the truth or lying.

The Court of Appeal generally will not overturn the judgment, order, or other decision being appealed unless the record clearly shows that one of these legal errors was made.

3 Do I need a lawyer to represent me in an appeal?

You do not *have* to have a lawyer; if you are an individual (rather than a corporation, for example), you are allowed to represent yourself in an appeal in an unlimited civil case. But appeals can be complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about the appeal procedures, you should talk to a lawyer.

If you decide not to use a lawyer, you must put your address, telephone number, fax number (if available), and e-mail address (if available) on the first page of every document you file with the court and let the court know if this contact information changes so that the court can contact you if needed.

4 Where can I find a lawyer to help me with my appeal?

You have to hire your own attorney if you want one. You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-lowcosthelp* in the Getting Started section.

INFORMATION FOR THE APPELLANT

This part of the information sheet is written for the appellant—the party who is appealing the trial court's decision. It explains some of the rules and procedures relating to appealing a decision in an unlimited civil case. The information may also be helpful to the respondent. Additional information for respondents can be found starting on page 12 of this information sheet.

5 Who can appeal?

Only a party in the trial court case can appeal a decision in that case. You may not appeal on behalf of a friend, a spouse, a child, or another relative unless you are a legally appointed representative of that person (such as the person's guardian or conservator).

6 Can I appeal *any* decision the trial court made?

No. Generally, you can only appeal the final judgment—the decision at the end that decides the whole case. Other rulings made by the trial court before the final judgment generally cannot be separately appealed but can be reviewed only later as part of an appeal of the final judgment. There are a few exceptions to this general rule. Code of Civil Procedure section 904.1 lists a few types of orders in an unlimited civil case that can be appealed right away. These include orders that:

- Grant a motion to quash service of summons or grant a motion to stay or dismiss the action on the ground of inconvenient forum
- Grant a new trial or deny a motion for judgment notwithstanding the verdict
- Discharge or refuse to discharge an attachment or grant a right to attach
- Grant or dissolve an injunction or refuse to grant or dissolve an injunction
- Appoint a receiver
- Are made after final judgment in the case

(You can get a copy of Code of Civil Procedure section 904.1 at *http://leginfo.legislature.ca.gov/faces/codes.xhtml*.)

7 How do I start my appeal?

First, you must serve and file a notice of appeal. The notice of appeal tells the other party or parties in the case and the trial court that you are appealing the trial court's decision. You may use *Notice of Appeal/Cross-Appeal (Unlimited Civil Case)* (form APP-002) to prepare a notice of appeal in an unlimited civil case. You can get form APP-002 at any courthouse or county law library or online at *www.courts.ca.gov/forms*.

8 How do I "serve and file" the notice of appeal?

"Serve and file" means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the notice of appeal to the other party or parties in the way required by law. If the notice of appeal is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the notice of appeal has been served. This record is called a "proof of service." *Proof of Service (Court of Appeal)* (form APP-009) or *Proof of Electronic Service (Court of Appeal)* (form APP-009E) can be used to make this record. The proof of service must show who served the notice of appeal, who was served with the notice of appeal, how the notice of appeal was served (by mail, in person, or electronically), and the date the notice of appeal was served.
- Bring or mail the original notice of appeal and the proof of service to the trial court that issued the judgment, order, or other decision you are appealing. You should make a copy of the notice of appeal you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the notice of appeal to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more 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.*

9 Is there a deadline to serve and file my notice of appeal?

Yes. Generally, in an unlimited civil case, the notice of appeal must be served on the other party or parties in the case and filed with the clerk of the superior court within **60 calendar days** after the trial court clerk or a party serves either a document called a "Notice of Entry" of the trial court judgment or a file-stamped copy of the judgment. If the clerk served neither of these documents, the notice of appeal must be filed within 180 calendar days after entry of judgment (generally, the date the judgment is file-stamped).

This deadline for filing the notice of appeal cannot be extended. If your notice of appeal is late, the Court of Appeal will not be able to consider your appeal.

If a notice of appeal has been filed in a case, any other party to the case may file its own appeal from the same judgment or order. This is called a cross-appeal.

To cross-appeal, a party must file a notice of appeal within either the regular time for filing a notice of appeal or within 20 calendar days after the clerk of the superior court mails notice of the first appeal, whichever is later. You may use Judicial Council form APP-002, *Notice of Appeal/Cross-Appeal (Unlimited Civil Case),* to file this notice in an unlimited civil case.

10 Do I have to pay a fee to file a notice of appeal?

Yes. Unless the court waives this fee, you must pay a fee for filing your notice of appeal. You can ask the clerk of the court where you are filing the notice of appeal what the fee is or look up the fee for an appeal in an unlimited civil case in the current Statewide Civil Fee Schedule linked at *www.courts.ca.gov/7646.htm* (see the "Appeal and Writ Related Fees" section is near the end of this schedule.)

If you cannot afford to pay the fee, you can ask the court to waive it. To do this, you must fill out and file a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courts.ca.gov/forms.* You can file this application either before you file your notice of appeal or with your notice of appeal. The court will review this application to determine if you are eligible for a fee waiver.

11 If I file a notice of appeal, do I still have to do what the trial court ordered me to do?

Filing a notice of appeal does NOT automatically postpone most judgments or orders, such as those requiring you to pay another party money or to deliver property to another party (see Code of Civil Procedure

sections 917.1–917.9 and 1176; you can get a copy of these laws at *www.leginfo.ca.gov.calaw.html*). These kinds of judgments or orders will be postponed, or "stayed," only if you request a stay and the court grants your request.

In most cases, if the trial court denies your request for a stay, you can apply to the Court of Appeal for a stay. If you do not get a stay and you do not do what the trial court ordered you to do, court proceedings to collect the money or otherwise enforce the judgment or order may be started against you.

12 What do I need to do after I file my notice of appeal?

Within 15 days after the trial court clerk mails a notice that a notice of appeal has been filed in an unlimited civil case, the appellant must serve and file in the Court of Appeal a completed *Civil Case Information Sheet* (form APP-004), attaching a copy of the judgment or appealed order that shows the date it was entered. See rules 8.100 and 8.104 of the California Rules of Court.

In addition, since the Court of Appeal justices were not there to see what happened in the trial court, an official record of what happened must be prepared and sent to the Court of Appeal for its review.

Within 10 days of filing the notice of appeal, the appellant must tell the trial court in writing ("designate") what documents and oral proceedings, if any, to include in the record that will be sent to the Court of Appeal.

You will need to designate all parts of the record that the Court of Appeal will need to decide the issues you raised in the appeal. You can use *Notice Designating Record on Appeal (Unlimited Civil Case)* (form APP-003) to designate the record in an unlimited civil case. You can get form APP-003 at any courthouse or county law library or online at *www.courts.ca.gov/forms.htm*

You must serve and file this notice designating the record on appeal within 10 calendar days after you file your notice of appeal. "Serving and filing" this notice means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the notice to the other party or parties in the way required by law. If the notice is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the notice has been served. This record is called a "proof of service." *Proof of Service (Court of Appeal)* (form APP-009) or *Proof of Electronic Service (Court of Appeal)* (form APP-009E) can be used to make this record. The proof of service must show who served the notice, who was served with the notice, how the notice was served (by mail, in person, or electronically), and the date the notice was served.
- Bring or mail the original notice and the proof of service to the trial court that issued the judgment, order, or other decision you are appealing. You should make a copy of the notice you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the notice to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more 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.*

13 What is the official record of the trial court proceedings?

There are three parts of the official record:

a. A record of the documents filed in the trial court (other than exhibits)

b. A record of what was said in the trial court (this is called the "oral proceedings")

c. Exhibits that were admitted in evidence, refused, or lodged (temporarily placed with the court) in the trial court

Read below for more information about these parts of the record.

a. Record of the documents filed in the trial court

The first part of the official record of the trial court proceedings is a record of the documents that were filed in the trial court. There are three ways in which a record of the documents filed in the trial court can be prepared for the Court of Appeal:

(1) A *clerk's transcript* or an *appendix*
(2) The original *trial court file* or
(3) An *agreed statement*

Read below for more information about these options.

(1) Clerk's transcript or Appendix

Description: A clerk's transcript is a compilation of the documents filed in the trial court that is prepared by the trial court clerk. An appendix is a compilation of these documents prepared by a party. (Cal. Rules of Court, rule 8.124).

Contents: Certain documents, such as the notice of appeal and the trial court judgment or order being appealed, must be included in the clerk's transcript or appendix. These documents are listed in rule 8.122(b) and rule 8.124(b) of the California Rules of Court and in *Notice Designating Record on Appeal (Unlimited Civil Case)* (form APP-003).

Clerk's transcript. If you want any documents other than those listed in rule 8.122(b) to be included in the clerk's transcript, you must tell the trial court in your notice designating the record on appeal. You can use form APP-003 to do this. You will need to identify each document you want included in the clerk's transcript by its title and filing date or, if you do not know the filing date, the date the document was signed.

If you—the appellant—request a clerk's transcript, the respondent also has the right to ask the clerk to include additional documents in the clerk's transcript. If this happens, you will be served with a notice saying what other documents the respondent wants included in the clerk's transcript.

***Cost*:** The appellant is responsible for paying for preparing a clerk's transcript. The trial court clerk will send you a bill for the cost of preparing an original and one copy of the clerk's transcript.

You must do one of the following three things within 10 days after the clerk sends this bill or the Court of Appeal may dismiss your appeal:

- Pay the bill.
- Ask the court to waive the cost because you cannot afford to pay. To do this, you must fill out and file a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www courts.ca.gov/forms.* The court will review this application to determine if you are eligible for a fee waiver.
- Give the court a copy of a court order showing that your fees in this case have already been waived by the court.

Completion and delivery: After the cost of preparing the clerk's transcript has been paid or waived, the trial court clerk will compile the requested documents into a transcript format and, when the record on appeal is complete, will forward the original clerk's transcript to the Court of Appeal for filing. The trial court clerk will send you a copy of the transcript. If the respondent bought a copy, the clerk will also send a copy of the transcript to the respondent.

Appendix. If you choose to prepare an appendix of the documents filed in the superior court, rather than designating a clerk's transcript, that appendix must include all of the documents and be prepared in the form required by rule 8.124 of the California Rules of Court. The parties may prepare separate appendixes or stipulate (agree) to a joint appendix. If separate appendixes are prepared, each party must pay for its own appendix. If a joint appendix is prepared, the parties can agree on how the cost of preparing the appendix will be paid or the appellant(s) will pay the cost.

The party preparing the appendix must serve the appendix on each other party (unless the parties have agreed or the Court of Appeal has ordered

otherwise) and file the appendix in the Court of Appeal. The appellant's appendix or a joint appendix must be served and filed with the appellant's opening brief. See (15) for information about the brief.

(2) Trial court file

When available: If the Court of Appeal has a local rule allowing this, and the parties agree, the clerk can send the Court of Appeal the original trial court file instead of a clerk's transcript as a record of documents filed in the trial court (see rule 8.128 of the California Rules of Court).

Cost: As with a clerk's transcript, the appellant is responsible for paying for preparing the trial court file. The trial court clerk will send you a bill for this preparation cost.

You must do one of the following things within 10 days after the clerk sends this bill or the Court of Appeal may dismiss your appeal:

- Pay the bill.
- Ask the court to waive the cost because you cannot afford to pay. To do this, you must fill out and file a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courts.ca.gov/forms*. The court will review this application to determine if you are eligible for a fee waiver.
- Give the court a copy of a court order showing that your fees in this case have already been waived by the court.

Completion and delivery: After the cost of preparing the trial court file has been paid or waived and the record on appeal is complete, the trial court clerk will number the pages and send the file and a list of the documents in the file to the Court of Appeal. The trial court clerk will also send a copy of the list of documents to the appellant and respondent so that you can put your own files of documents from the trial court in the correct order and number the pages.

(3) Agreed statement

Description: An agreed statement is a summary of the trial court proceedings agreed to by the parties. (See rule 8.134 of the California Rules of Court.)

When available: If you and the respondent agree to this, you can use an agreed statement instead of a clerk's transcript as a record of documents filed in the trial court. To do this, you must attach to your agreed statement all of the documents that are required to be included in a clerk's transcript. (See rule 8.122(b) of the California Rules of Court.)

If you choose this alternative, you must file with your notice designating the record on appeal either the agreed statement or a written agreement with the respondent (a "stipulation"), stating that you are trying to agree on a statement. Within the next 30 days, you must then file the agreed statement or tell the court that you were unable to agree on a statement and file a new notice designating the record.

b. Record of what was said in the trial court (the "oral proceedings")

The second part of the official record of the trial court proceedings is a record of what was said in the trial court (this is called a record of the "oral proceedings"). You do not *have* to send the Court of Appeal a record of the oral proceedings. But if you want to raise any issue in your appeal that would require the Court of Appeal to consider what was said in the trial court, the Court of Appeal will need a record of those oral proceedings. For example, if you are claiming that there was not substantial evidence supporting the judgment, order, or other decision you are appealing, the Court of Appeal will need a record of the oral proceedings.

You are responsible for deciding how the record of the oral proceedings will be provided and, depending on what option you select and your circumstances, you may also be responsible for paying for preparing this record or for preparing an initial draft of the record. If you do not take care of these responsibilities, a record of the oral proceedings in the trial court will not be prepared and

sent to the Court of Appeal. **If the Court of Appeal does not receive this record, it will not be able to review any issues that are based on what was said in the trial court and it may dismiss your appeal.**

In an unlimited civil case, you can use *Notice Designating Record on Appeal (Unlimited Civil Case)* (form APP-003) to tell the court whether you want a record of the oral proceedings and, if so, the form of the record that you want to use. You can get form APP-003 at any courthouse or county law library or online at *www.courts.ca.gov/forms.*

There are three ways in which a record of the oral proceedings can be prepared for the Court of Appeal:

(1) If you or the other party arranged to have a court reporter there during the trial court proceedings, the reporter can prepare a record, called a *"reporter's transcript."*

(2) You can use an *agreed statement.*

(3) You can use a *settled statement.*

Read below for more information about these options.

(1) Reporter's transcript

Description: A reporter's transcript is a written record (sometimes called a "verbatim" record) of the oral proceedings in the trial court prepared by a court reporter. Rule 8.130 of the California Rules of Court establishes the requirements relating to reporter's transcripts.

When available: If a court reporter was there in the trial court and made a record of the oral proceedings, you can choose ("elect") to have the court reporter prepare a reporter's transcript for the Court of Appeal. A court reporter will not have been there unless you or another party in your case made specific arrangements to have a court reporter there. If you are unsure, check with the court to see if a court reporter made a record of the oral proceedings in your case before choosing this option.

Contents: If you elect to use a reporter's transcript, you must identify by date (this is called "designating") what proceedings you want to be included in the reporter's transcript. You can use the same form you used to tell the court you wanted to use a reporter's transcript—*Notice Designating Record on Appeal (Unlimited Civil Case)* (form APP-003)—to do this.

If you elect to use a reporter's transcript, the respondent also has the right to designate additional proceedings to be included in the reporter's transcript. If you elect to proceed without a reporter's transcript, however, the respondent may not designate a reporter's transcript without first getting an order from the Court of Appeal.

Cost: The appellant is responsible for paying for preparing a reporter's transcript. The trial court clerk or the court reporter will notify you of the cost of preparing an original and one copy of the reporter's transcript. You must deposit payment for this cost (and a fee for the trial court) or one of the substitutes allowed by rule 8.130 with the trial court clerk within 10 calendar days after this notice is sent. (See rule 8.130 for more information about this deposit and the permissible substitutes, such as a waiver of this deposit signed by the court reporter.)

Unlike the fee for filing the notice of appeal and the costs for preparing a clerk's transcript, the court cannot waive the fee for preparing a reporter's transcript. Money from a special fund, called the Transcript Reimbursement Fund, may be available to help you pay for the transcript. You can get information about this fund at: *www.courtreportersboard.ca.gov/consumers/index.shtml#rtf.*

If you are unable to pay the cost of a reporter's transcript, a record of the oral proceedings can be prepared in other ways, by using an agreed statement or a settled statement, which are described below.

Completion and delivery: After the cost of preparing the reporter's transcript or a permissible substitute has been deposited, the court reporter

will prepare the transcript and submit it to the trial court clerk. When the record is complete, the trial court clerk will submit the original transcript to the Court of Appeal and send you a copy of the transcript. If the respondent has purchased it, a copy of the reporter's transcript will also be mailed to the respondent.

(2) Agreed statement

Description: An agreed statement is a written summary of the trial court proceedings agreed to by all the parties. See rule 8.134 of the California Rules of Court.

When available: If the trial court proceedings were not recorded by a court reporter or if you do not want to use this option, you can choose ("elect") to use an agreed statement as the record of the oral proceedings. Please note that it may take more of your time to prepare an agreed statement than to use a reporter's transcript, if it is available.

Contents: An agreed statement must explain what the trial court case was about, describe why the Court of Appeal is the right court to consider an appeal in this case (why the Court of Appeal has "jurisdiction"), and describe the rulings of the trial court relating to the points to be raised on appeal.

The statement should include only those facts that you and the other parties think are needed to decide the appeal.

Preparation: If you elect to use this option, you must file the agreed statement with your notice designating the record on appeal or, if you and the other parties need more time to work on the statement, you can file a written agreement with the other parties (called a "stipulation") stating that you are trying to agree on a statement. If you file this stipulation, within the next 30 calendar days you must either file the agreed statement or tell the court that you and the other parties were unable to agree on a statement and file a new notice designating the record.

(4) Settled statement

Description: A settled statement is a summary of the trial court proceedings that is approved by the trial court judge who conducted those proceedings (the term "judge" includes commissioners and temporary judges).

When available: Under rule 8.137 of the California Rules of Court, you can choose ("elect") to use a settled statement as the record of the oral proceedings if (1) the trial court proceedings were not recorded by a court reporter or (2) if you have an order waiving your court fees and costs. Please note that it may take more of your time to prepare a settled statement than to use a reporter's transcript, if it is available.

If you want to use a settled statement as the record of the oral proceedings for reasons other than the two previously mentioned, you must file a motion (known in family law cases as a *Request for Order*) (form FL-300)) to ask the trial court for an order. You may use *Appellant's Motion to Use a Settled Statement* (form APP-025) for this purpose. Read rule 8.137 about the requirements of your motion or request for order.

Contents: A settled statement must include:

- A statement of the points you (the appellant) are raising on appeal;
- A condensed narrative of the oral proceedings that you specified in the notice designating the record on appeal or motion. The condensed narrative is a summary of the testimony of each witness and other evidence that is relevant to the issues you are raising on appeal; and
- A copy of the judgment or ordering you are appealing attached to it.

(See rule 8.137 of the California Rules of Court for more information about what must be included in a settled statement and the procedures for preparing a statement. You can get a copy of this rule at any courthouse or county law library or online at *www.courts.ca.gov/rules*.)

Preparing a proposed settled statement: If you elect to use a settled statement, you must prepare a proposed settled statement. You may use

Appellant's Proposed Settled Statement (form APP-014) to prepare your proposed statement. You can get the form at any courthouse or county law library or online at *www.courts.ca.gov/forms.*

Serving and filing a proposed settled statement: You must serve and file the proposed statement within 30 days after filing your notice electing to use a settled statement or within 30 days after the trial court clerk sends, or a party serves, the order granting the motion to use a settled statement. "Serve and file" means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the proposed settled statement to the respondent in the way required by law. If the proposed statement is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the proposed settled statement has been served. This record is called a "proof of service." *Proof of Service (Court of Appeal)* (form APP-009) or *Proof of Electronic Service (Court of Appeal)* (form APP-009E) can be used to make this record. The proof of service must show who served the proposed statement, who was served with the proposed statement, how the proposed statement was served (by mail, in person, or electronically), and the date the proposed statement was served.
- File the original proposed settled statement and the proof of service with the trial court. You should make a copy of the proposed statement you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the proposed statement to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more 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.*

Respondent's review: The respondent has 20 calendar days from the date you serve your proposed settled statement to serve and file either:

- Proposed changes (called "amendments") to the proposed statement; or
- If the oral proceedings in the trial court were reported by a court reporter, a notice indicating that the respondent is electing to provide a reporter's transcript instead of proceeding with a settled statement.

Review of appellant's proposed settled statement: If the respondent proposes changes, the trial court judge then reviews both your proposed statement and the respondent's proposed amendments. The trial judge will either make or order you (the appellant) to make any corrections or modifications to the statement that are needed to make sure that the statement provides an accurate summary of the testimony and other evidence relevant to the issues you indicated you are raising on appeal. For more information, see rule 8.137(f) of the California Rules of Court. See also rule 8.140, which explains the consequences for a party's failure to make corrections that are ordered to be made the proposed statement.

Note: Hearing possible to review proposed settled statement: No later than 10 days after the respondent files proposed amendments, or the time to do so has expired, 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. A judge will not ordinarily order a hearing unless there is a factual dispute about a material aspect of the trial court proceeding. If there is a hearing, see rule 8.137 for more information.

Additional review procedures: If there is no hearing after the respondent proposes changes to the settled statement, and if the judge makes any corrections or modifications to the proposed statement, the corrected or modified statement will be sent to you and the respondent for your review.

If the judge orders you to make any corrections or modifications to the proposed statement, you must serve and file the corrected or modified statement within the time ordered by the judge. See rule 8.140, which explains the consequences for a

party's failure to make corrections to the proposed statement.

If you or the respondent disagree with anything in the modified or corrected statement, you have 10 calendar days from the date the modified or corrected statement is sent to you to serve and file proposed amendments or objections to the statement. The judge then reviews the modified or corrected statement and any proposed modifications. If the judge decides that further corrections or modifications are necessary, the review process described above takes place again.

Completion and certification
If the judge does not order any corrections or modifications to the proposed statement, the judge must promptly certify the statement as an accurate summary of the evidence and testimony of each witness relevant to the issues you indicated you are raising on appeal.

Alternatively, the parties may serve and file a stipulation (agreement) that the statement as originally served or corrected or modified is correct. Such a stipulation is equivalent to the judge's certification of the statement.

Sending settled statement to the Court of Appeal: Once the trial court judge certifies the statement or the trial court receives the parties' stipulation, the trial court clerk will ~~transmit~~ send the statement to the Court of Appeal as required under rule 8.150 of the California Rules of Court.

c. Exhibits

The third part of the official record of the trial court proceeding is the exhibits, such as photographs, documents, or other items that were admitted in evidence, refused, or lodged (temporarily placed with the court) in the trial court. Exhibits are considered part of the record on appeal, but the clerk will not include any exhibits in the clerk's transcript unless you ask that they be included in your notice designating the record on appeal. *Notice Designating Record on Appeal (Unlimited Civil Case)* (form APP-003), includes a space for you to make this request.

You also can ask the trial court to send original exhibits to the Court of Appeal at the time briefs are filed. (See rule 8.224 for more information about this procedure and see below for information about briefs.)

Sometimes, the trial court returns an exhibit to a party at the end of the trial. If the trial court returned an exhibit to you or another party and you or the other party ask for that exhibit to be included in the clerk's transcript or sent to the Court of Appeal, the party who has the exhibit must deliver that exhibit to the trial court clerk as soon as possible.

(14) What happens after the official record has been prepared?

As soon as the record on appeal is complete, the clerk of the trial court will send it to the Court of Appeal for the district in which the trial court is located. When the Court of Appeal receives the record, it will send you a notice telling you when you must file your brief in the Court of Appeal.

(15) What is a brief?

Description: A "brief" is a party's written description of the facts in the case, the law that applies, and the party's argument about the issues being appealed. If you are represented by a lawyer in your appeal, your lawyer will prepare your brief. If you are not represented by a lawyer, you will have to prepare your brief yourself.

You should read rules 8.200–8.224 of the California Rules of Court, which set out the requirements for preparing, serving, and filing briefs in unlimited civil appeals, including requirements for the format and length of these briefs. You can get copies of these rules at any courthouse or county law library or online at *www.courts.ca.gov/rules.*

Contents and format of briefs: If you are the appellant, your brief, called an "appellant's opening brief," must clearly explain the legal errors you believe were made in the trial court. Your brief must refer to the exact places in the clerk's transcript and the reporter's transcript (or the other forms of the record you are using) that support your argument. Each brief must be no longer than 14,000 words if produced on a computer, including footnotes. A brief produced on a typewriter must not be longer than 50 pages. The brief must contain a table of

contents and a table of authorities. The cover of appellant's opening brief filed in paper form must be green. For other content and formatting requirements for the brief, read rules 8.40 and 8.204 of the California Rules of Court.

Remember that an appeal is not a new trial. The Court of Appeal will not consider new evidence, such as new exhibits or the testimony of new witnesses, so do not include any new evidence in your brief.

Serving and filing: You must serve and file your opening brief within 40 days after the record is filed in the Court of Appeal or 70 days from the date the appellant chooses to proceed with no reporter's transcript under rule 8.124. "Serve and file" means that you must:

- Have somebody over 18 years old mail, personally deliver, or electronically send ("serve") the brief to the other parties in the way required by law. If the brief is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the brief has been served. This record is called a "proof of service." *Proof of Service (Court of Appeal)* (form APP-009) or *Proof of Electronic Service (Court of Appeal)* (form APP-009E) can be used to make this record. The proof of service must show who served the brief, who was served with the brief, how the brief was served (by mail, in person, or electronically), and the date the brief was served.
- File the original brief and the proof of service with the Court of Appeal. You should make a copy of the brief you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the brief to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.
- Note: If a party chooses to prepare an appendix of the documents filed in the trial court instead of designating a clerk's transcript, the appellant's appendix or a joint appendix must be served and filed with the appellant's opening brief.

You can get more information about how to serve court papers and proof of service from *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

You and the other parties can agree (stipulate) to extend the time for filing this brief by up to 60 calendar days (see rule 8.212(b) for requirements for these agreements). You can also apply to the presiding justice of the court to extend the time for filing this brief if you can show good cause for an extension (see rule 8.63 for information about extensions of time). You can use *Application for Extension of Time to File Brief (Civil Case)* (form APP-006) to ask the court for an extension.

If you do not file your brief by the deadline set by the Court of Appeal, the court may dismiss your appeal.

16 What happens after I file my brief?

Within 30 days after you serve and file your brief, the respondent must respond by serving and filing a respondent's brief.

Within 20 days after the respondent's brief was filed, you may, but are not required to, file another brief replying to the respondent's brief. This is called a "reply brief."

17 What happens after all the briefs have been filed?

Once all the briefs have been filed or the time to file them has passed, the Court of Appeal will notify you of the date for oral argument in your case.

18 What is "oral argument?"

"Oral argument" is the parties' chance to explain their arguments to the Court of Appeal justices in person. You do not have to participate in oral argument if you do not want to; you can notify the Court of Appeal that you want to "waive" oral argument. If all parties waive oral argument, the justices will decide your appeal based on the briefs and the record that were submitted. But if one party waives oral argument and another party or parties do not, the Court of Appeal will hold oral argument with the party or parties who did not waive it.

If you do choose to participate in oral argument, you will have up to 30 minutes for your argument unless the Court of Appeal orders otherwise. Remember that the justices will have already read the briefs, so you do not

need to read your brief to the justices. It is more helpful to tell the justices what you think is most important in your appeal or ask the justices if they have any questions you could answer. Read rule 8.256 for more information.

(19) What happens after oral argument?

After oral argument is held (or the date it was scheduled passes if all the parties waive oral argument), the justices of the Court of Appeal will make a decision about your appeal. The Court of Appeal has 90 days after the date scheduled for oral argument to decide the appeal. The clerk of the court will mail you a notice of the Court of Appeal's decision.

(20) What should I do if I want to give up my appeal?

If you decide you do not want to continue with your appeal, you must file a written document with the Court of Appeal notifying it that you are giving up (this is called "abandoning") your appeal. You can use *Abandonment of Appeal (Unlimited Civil Case)* (form APP-005) to file this notice in an unlimited civil case. You can get form APP-005 at any courthouse or county law library or online at www.courts.ca.gov/forms.

INFORMATION FOR THE RESPONDENT

This section of this information sheet is written for the respondent—the party responding to an appeal filed by another party. It explains some of the rules and procedures relating to responding to an appeal in an unlimited civil case. The information may also be helpful to the appellant.

(21) I have received a notice of appeal from another party. Do I need to do anything?

You do not *have* to do anything. The notice of appeal simply tells you that another party is appealing the trial court's decision. However, this would be a good time to get advice from a lawyer, if you want it. You do not *have* to have a lawyer; if you are an individual (not a corporation, for example), you are allowed to represent yourself in an appeal in an unlimited civil case. But appeals can be complicated and you will have to follow the same rules that lawyers have to follow.

If you have any questions about the appeal procedures, you should talk to a lawyer. You must hire your own lawyer if you want one. You can get information about finding a lawyer on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-lowcosthelp.htm*.

(22) If the other party appealed, can I appeal too?

Yes. Even if another party has already appealed, you may still appeal the same judgment or order. This is called a "cross-appeal." To cross-appeal, you must serve and file a notice of appeal. You can use *Notice of Appeal/Cross-Appeal (Unlimited Civil Case)* (form APP-002) to file this notice in an unlimited civil case. Please read the information for appellants about filing a notice of appeal, starting on page 2 of this information sheet, if you are considering filing a cross-appeal.

(23) Is there a deadline to file a cross-appeal?

Yes. You must serve and file your notice of appeal within either the regular time for filing a notice of appeal (generally 60 days after service of Notice of Entry of the judgment or a file-stamped copy of the judgment) or within 20 days after the clerk of the trial court serves notice of the first appeal, whichever is later.

(24) I have received a notice designating the record on appeal from another party. Do I need to do anything?

You do not *have* to do anything. A notice designating the record on appeal lets you know what kind of official record the appellant has asked to be sent to the Court of Appeal. Depending on the kind of record chosen by the appellant, however, you may have the option to:

- Add to what is included in the record
- Participate in preparing the record *or*
- Ask for a copy of the record

Look at the appellant's notice designating the record on appeal to see what kind of record the appellant has chosen and read about that form of the record in the response to question (13) above. Then read below for

what your options are when the appellant has chosen that form of the record.

(a) Clerk's transcript or Appendix

If the appellant is using a clerk's transcript, you have the option of asking the clerk to include additional documents in the clerk's transcript.

To do this, within 10 calendar days after the appellant serves its notice designating the record on appeal, you must serve and file a notice designating additional documents to be included in the clerk's transcript. You may use *Respondent's Notice Designating Record on Appeal (Unlimited Civil Case)* (form APP-010) for this purpose.

Whether or not you ask for additional documents to be included in the clerk's transcript, you must pay a fee if you want a copy of the clerk's transcript. The trial court clerk will send you a notice indicating the cost for a copy of the clerk's transcript. If you want a copy, you must deposit this amount with the court within 10 days after the clerk's notice was sent.

If you cannot afford to pay this cost, you can ask the court to waive it. To do this, you must fill out and file a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courts.ca.gov/forms.* The court will review this application and determine if you are eligible for a fee waiver. The clerk will not prepare a copy of the clerk's transcript for you unless you deposit payment for the cost or obtain a fee waiver.

Appendix. If the appellant is using an appendix, and you and the appellant have not agreed to a joint appendix, you may prepare a separate respondent's index. See page 5 for more information about preparing an appendix.

(b) Reporter's transcript

If the appellant is using a reporter's transcript, you have the option of asking for additional proceedings to be included in the reporter's transcript. To do this, within 10 days after the appellant files its notice designating the record on appeal, you must serve and file a notice designating additional proceedings to be included in the reporter's transcript. You may use *Respondent's Notice Designating Record on Appeal (Unlimited Civil Case)* (form APP-010) for this purpose.

Whether or not you ask for additional proceedings to be included in the reporter's transcript, you must generally pay a fee if you want a copy of the reporter's transcript. The trial court clerk or reporter will send you a notice indicating the cost of preparing a copy of the reporter's transcript. If you want a copy of the reporter's transcript, you must deposit this amount (and a fee for the trial court) or substitute one of the options allowed by rule 8.130 with the trial court clerk within 10 calendar days after this notice is sent. (See rule 8.130 for more information about this deposit and the permissible substitutes, such as a waiver of this deposit signed by the court reporter.)

Unlike the fee for preparing a clerk's transcript, the court cannot waive the fee for preparing a reporter's transcript. Money from a special fund, called the Transcript Reimbursement Fund, may be available to help you pay for the transcript. You can get information about this fund at: *www.courtreportersboard.ca.gov/consumers/index.shtml#trf.*

The reporter will not prepare a copy of the reporter's transcript for you unless you deposit the cost of the transcript, or provide one of the permissible substitutes, or your application for payment by the Transcript Reimbursement Fund is approved.

(c) Agreed statement

If you and the appellant agree to prepare an agreed statement (a summary of the trial court proceedings that is agreed to by the parties), you and the appellant will need to reach an agreement on that statement within 40 calendar days after the appellant files its notice of appeal. See rule 8.134 of the California Rules of Court.

(d) Settled statement

If the appellant elects to use a settled statement (a summary of the trial court proceedings that is approved by the trial court), the appellant will send you a proposed settled statement to review. You will have 20 calendar-days from the date the appellant served you this proposed statement to serve and file either:

- Suggested changes (called "amendments") that you think are needed to make sure that the settled statement provides an accurate summary of the evidence and testimony of each witness relevant to the issues the appellant is raising on appeal;* or

- If the oral proceedings in the trial court were reported by a court reporter, a notice indicating that you are choosing to provide a reporter's transcript, at your expense, instead of proceeding with a settled statement.**

* See page 9 of this form and rule 8.137(e)-(h) for more information about the amendment process.

** See rule 8.137(e)(2) for the requirements for choosing to provide a reporter's transcript.

Have somebody over 18 years old mail, personally deliver, or electronically send ("serve") the proposed amendments to the appellant in the way required by law. If the proposed amendments are mailed or personally delivered, it must be by someone who is not a party to the case—so not you.

- Make a record that the proposed amendments have been served. This record is called a "proof of service." *Proof of Service (Court of Appeal)* (form APP-009) or *Proof of Electronic Service (Court of Appeal)* (form APP-009E) can be used to make this record. The proof of service must show who served the proposed amendments, who was served with the proposed amendments, how the proposed amendments were served (by mail, in person, or electronically), and the date the proposed amendments were served.

- File the original proposed amendments and the proof of service with the trial court. You should make a copy of the proposed amendments you are planning to file for your own records before you file them with the court. It is a good idea to bring or mail an extra copy of the proposed amendments to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *Information Sheet for Proof of Service (Court of Appeal* (form APP-009-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm*.

(25) What happens after the official record has been prepared?

As soon as the record on appeal is complete, the clerk of the trial court will send it to the Court of Appeal. When the Court of Appeal receives this record, it will send you a notice telling you when you must file your brief in the Court of Appeal.

A brief is a party's written description of the facts in the case, the law that applies, and the party's argument about the issues being appealed. If you are represented by a lawyer, your lawyer will prepare your brief. If you are not represented by a lawyer in your appeal, you will have to prepare your brief yourself.

You should read rules 8.200–8.224 of the California Rules of Court, which set out the requirements for preparing, serving, and filing briefs in unlimited civil appeals, including requirements for the format and length of these briefs. You can get these rules at any courthouse or county law library or online at *www.courts.ca.gov/rules.htm.*

The appellant serves and files the first brief, called an "appellant's opening brief." You must respond by serving and filing a "respondent's brief" within 30 days after the appellant's opening brief is filed. "Serve and file" means that you must:

- Have somebody over 18 years old mail, personally deliver, or electronically send ("serve") the brief to the other parties in the way required by law. If the brief is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.

- Make a record that the brief has been served. This record is called a "proof of service." *Proof of Service (Court of Appeal)* (form APP-009) or *Proof of Electronic Service (Court of Appeal)* (form APP-009E) can be used to make this record. The proof of service must show who served the brief, who was served with the brief, how the brief was served (by mail, in person, or electronically), and the date the brief was served.

- File the original brief and the proof of service with the Court of Appeal. You should make a copy of the brief you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the brief to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

You and the other parties can agree (stipulate) to extend the time for filing this brief by up to 60 days (see rule 8.212(b) for requirements for these agreements). You can also apply to the presiding justice of the Court of Appeal to extend the time for filing this brief if you can show good cause for an extension. You can use *Application for Extension of Time to File Brief (Unlimited Civil Case)* (form APP-006) to ask the court for an extension.

If you do not file a respondent's brief, the appellant does not automatically win the appeal. The court will decide the appeal on the record, the appellant's brief, and any oral argument by the appellant. Remember that an appeal is not a new trial. The Court of Appeal will not consider new evidence, such as new exhibits or the testimony of new witnesses, so do not include any new evidence in your brief.

If you file a respondent's brief, the appellant then has an opportunity to serve and file another brief within 20 calendar days replying to your brief.

26 What happens after all the briefs have been filed?

Once all the briefs have been filed or the time to file them has passed, the court will notify you of the date for oral argument in your case.

"Oral argument" is the parties' chance to explain their arguments to Court of Appeal justices in person. You do not have to participate in oral argument if you do not want to; you can notify the Court of Appeal that you want to "waive" oral argument. If all parties waive oral argument, the justices will decide the appeal based on the briefs and the record that were submitted. But if one party waives oral argument and another party or parties do not, the Court of Appeal will hold oral argument with the party or parties who did not waive it.

If you do choose to participate in oral argument, you will have up to 30 minutes for your argument unless the Court of Appeal orders otherwise. Remember that the justices will have already read the briefs, so you do not need to read your brief to the justices. It is more helpful to tell the justices what you think is most important in the appeal or ask the justices if they have any questions you could answer.

After oral argument is held (or the scheduled date passes if all parties waive argument), the justices of the Court of Appeal will make a decision about the appeal. The Court of Appeal has 90 calendar days after oral argument to decide the appeal. The clerk of the court will send you a notice of the Court of Appeal's decision.

Item 04

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
February 21, 2018

To
Members of the Appellate Advisory Committee

From
Ingrid Leverett
Attorney, Legal Services

Subject
Rules modernization: sealed and confidential records, lodged records

Action Requested
Please read before February 27 committee meeting

Deadline
February 27, 2018

Contact
Ingrid Leverett
(415) 865-8031 phone
Ingrid.Leverett@jud.ca.gov

Introduction

Item 5 on the Appellate Advisory Committee's annual agenda, Modernize Appellate Court Rules for E-filing and E-business, includes considering whether to recommend amendments to the rules governing sealed and confidential records to establish procedures for handling materials that are submitted electronically, including the return of lodged electronic records. The Joint Appellate Technology Subcommittee (JATS) recommends that the committee move forward with circulating this proposal for public comment.

Background

This proposal is part of the Appellate Advisory Committee's ongoing efforts to modernize the appellate court rules to establish or improve procedures relating to electronically submitted materials. Prior rule amendments upon which this proposal is based were part of the Rules Modernization Project, a collaborative effort led by the Information Technology Advisory Committee, working together with several advisory committees with subject matter expertise, to

comprehensively review and modernize the California Rules of Court to be consistent with and foster modern e-business practices. Over a two-year period, this work resulted in technical rule amendments to address language in the rules that was incompatible with statutes and rules governing electronic filing and service, and substantive rule amendments to promote electronic filing, electronic service, and modern e-business practices. These rule amendments took effect January 1, 2016, and January 1, 2017.

Relevant rule history:

Modernization of trial court rules re return of lodged sealed and confidential electronic records

Rules 2.550 and 2.551 govern sealed records in the trial court. Amendments that took effect January 1, 2016 (phase I) included:[1]

- Defining "record" to encompass materials filed or lodged electronically (see rule 2.550(b)(1));
- Accommodating electronic records and notices in the rules governing the filing and maintenance by the court of sealed material (see rule 2.551; see also rule 3.1302 [regarding lodged material in law and motion proceedings]);
- Providing for the return of materials lodged in electronic form (see rule 2.551).[2]

During the next year[3], responding to concerns that the new rule language providing for the return of materials lodged in electronic form did not necessarily require their deletion, the committees took up these rules again. They revised rule 2.551(b)(6)[4] to provide that, unless otherwise ordered, the moving party has 10 days following an order denying a motion or application to seal to direct the court to file the lodged material unsealed. If the clerk receives no notification within 10 days of the order, the clerk must return the lodged records if in paper form or permanently delete them if lodged in electronic form. Based on responses to the invitation to comment, the committees decided not to require that courts send a separate notice of destruction before deleting electronic lodged records. The order denying the sealing motion was thought to provide sufficient notice to the moving party.

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[1] The Judicial Council report dated September 16, 2015 describes the phase I rule amendments. The report is available at: https://jcc.legistar.com/View.ashx?M=F&ID=4103509&GUID=4234BC37-DBCC-4795-A932-0DC9EEF95AFF

[2] The phase II proposal also involved technical amendments that had not been identified during phase I.

[3] The phase II amendments are described in the Judicial Council report dated October 27, 2016. The report is available at: https://jcc.legistar.com/View.ashx?M=F&ID=4754371&GUID=8F6F2BC1-73E4-4392-9D98-E169A95483A9.

[4] These amendments were also made to rule 2.577, which governs procedures for filing confidential name change records under seal.

The committees also revised rule 3.1302(b) to provide that courts may continue to maintain other lodged materials but that, if they do not, they must return them by mail if in paper form or permanently delete them after notifying the lodging party if in electronic form. The committees decided to require that a notice be sent before destruction of any electronic lodged records under rule 3.1302 because the submitting party would not otherwise have notice of the destruction.

Modernization of appellate rules re electronic records
The phase I rules modernization proposal included amendments to the appellate rules. As relevant here, these:

- Added definitions of "attach or attachment," "copy or copies," "cover," and "written or writing" to clarify their application to electronically filed documents (see renumbered and amended rule 8.803 and amended rule 8.10);
- Added new rule 8.11 and amended rule 8.800(b) to clarify that the rules are intended to apply to documents filed and served electronically;
- Replaced references to "mail" with "send" throughout;
- Replaced references to "file-stamped" with "filed-endorsed" throughout;
- Added language requiring that all confidential or sealed documents that are transmitted electronically must be transmitted in a secure manner (see amended rules 8.45(c), 8.46(d), 8.47(b) and (c), and 8.482(g)).

The Proposal

The proposal amends rule 8.46 and rule 8.47 to:

- Provide for the disposition of a lodged electronic record when the court denies a motion or application to seal;
- Add a provision that material lodged in connection with a motion to seal be transmitted to the court in a secure manner that preserves confidentiality;
- Add a provision that conditionally sealed material disclosed in a lodged unredacted version of a filing must be identified as such; and
- Make other minor clarifying changes.

Discussion

In reviewing the appellate rules on sealed and confidential records, staff and JATS identified differences between these rules and corresponding trial court rules, as well as inconsistencies within the appellate court rules. The proposed amendments are intended to address those differences and inconsistencies and to conform the appellate court rules to the trial court rules where appropriate. At its meeting on February 5, 2018, JATS considered and approved the

proposed amendments after directing modifications for clarity and specificity. The draft amended rules attached to this memo are in the form approved by the subcommittee; proposed amendments are highlighted. Rule 8.45 is included for context; there are no proposed amendments to this rule.

Procedure to return a lodged record

The current procedure for returning a lodged record when the court denies a motion or application to seal fails to accommodate records lodged in electronic form. The trial court rules account for this situation. (See rule 2.551(b)(6).)

Proposed amendment to rule 8.46(d)(7):

> If the court denies the motion or application, ~~the clerk must not place the lodged record in the case file but must return it to the submitting party unless that party notifies the clerk in writing that the record is to be filed. Unless otherwise ordered by the court, the submitting party must notify the clerk within 10 days after the order denying the motion or application~~ the moving party may notify the court that the lodged record is to be filed unsealed. This notification must be received within 10 days of the order denying the motion or application to seal, unless otherwise ordered by the court. On receipt of this notification, the clerk must unseal and file the record. If the moving party does not notify the court within 10 days of the order, the clerk must (1) return the lodged record to the moving party if it is in paper form, or (2) permanently delete the lodged record if it is in electronic form.

The same amendment is also proposed for rule 8.46(f)(3)(D) and rule 8.47(b)(3)(D) and (c)(2)(D). (See attached draft amended rules.)

The committee should review and consider the language of each of these four amendments. Differences in the motions or applications being addressed result in differences in the language of the amendments.

Transmission of lodged records

Where it is necessary to disclose material contained in a conditionally sealed record in a filing (such as a brief or petition) in the reviewing court, the rules require that a public redacted version be filed and that an unredacted version be lodged. Trial court rules include the requirement that the filing "must be transmitted in a secure manner that preserves the confidentiality of the filing being lodged." (See rule 2.551(d)(1).)

This requirement is already included in rule 8.47(b)(3)(C)(ii) and (c)(2)(C)(ii). The proposal adds this requirement to rule 8.46(f)(3)(B) for consistency.

Identify conditionally sealed material

Rule 8.47(c)(2)(C)(ii) includes the requirement, for a lodged unredacted version of a filing, that conditionally sealed material disclosed in that version must be identified. Rule 8.46(f)(2)(B), regarding an unredacted version of a filing that discloses sealed material, also requires identification of the sealed material that is disclosed. This requirement is not included in rules 8.46(f)(3)(B) and 8.47(b)(3)(C)(ii). JATS recommends including this requirement in all rules provisions that address sealed or conditionally sealed material that is disclosed in an unredacted version of a filing. The subcommittee further recommends language clarifying that disclosed material in the unredacted version of a filing must be identified *as such in the filing*.

Other amendments

Other proposed amendments are minor changes in language and punctuation intended to clarify the rules.

Committee's task

The committee's task is to review the attached draft invitation to comment and:

- Approve the proposal as presented and recommend to RUPRO that the invitation to comment, as proposed or as further revised by the committee, be approved for circulation;
- Reject the proposal; or
- Ask staff or committee members for further information/analysis.

Attachments

Rules 8.45-8.47, with proposed amendments

Title 8. Appellate Rules

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

Chapter 1. General Provisions

Article 3. Sealed and Confidential Records

Rule 8.45. General provisions

(a) Application

The rules in this article establish general requirements regarding sealed and confidential records in appeals and original proceedings in the Supreme Court and Courts of Appeal. Where other laws establish specific requirements for particular types of sealed or confidential records that differ from the requirements in this article, those specific requirements supersede the requirements in this article.

(b) Definitions

As used in this article:

(1) "Record" means all or part of a document, paper, exhibit, transcript, or other thing filed or lodged with the court by electronic means or otherwise.

(2) A "lodged" record is a record temporarily deposited with the court but not filed.

(3) A "sealed" record is a record that is closed to inspection by the public or a party by order of a court under rules 2.550–2.551 or rule 8.46.

(4) A "conditionally sealed" record is a record that is filed or lodged subject to a pending application or motion to file it under seal.

(5) A "confidential" record is a record that, in court proceedings, is required by statute, rule of court, or other authority except a court order under rules 2.550–2.551 or rule 8.46 to be closed to inspection by the public or a party.

(6) A "redacted version" is a version of a filing from which all portions that disclose material contained in a sealed, conditionally sealed, or confidential record have been removed.

(7) An "unredacted version" is a version of a filing or a portion of a filing that discloses material contained in a sealed, conditionally sealed, or confidential record.

(Subd (b) amended effective January 1, 2016.)

(c) Format of sealed and confidential records

(1) Unless otherwise provided by law or court order, sealed or confidential records that are part of the record on appeal or the supporting documents or other records accompanying a motion, petition for a writ of habeas corpus, other writ petition, or other filing in the reviewing court must be kept separate from the rest of a clerk's or reporter's transcript, appendix, supporting documents, or other records sent to the reviewing court and in a secure manner that preserves their confidentiality.

(A) If the records are in paper format, they must be placed in a sealed envelope or other appropriate sealed container. This requirement does not apply to a juvenile case file but does apply to any record contained within a juvenile case file that is sealed or confidential under authority other than Welfare and Institutions Code section 827 et seq.

(B) Sealed records, and if applicable the envelope or other container, must be marked as "Sealed by Order of the Court on (*Date)*."

(C) Confidential records, and if applicable the envelope or other container, must be marked as "Confidential (*Basis*)—May Not Be Examined Without Court Order." The basis must be a citation to or other brief description of the statute, rule of court, case, or other authority that establishes that the record must be closed to inspection in the court proceeding.

(D) The superior court clerk or party transmitting sealed or confidential records to the reviewing court must prepare a sealed or confidential index of these materials. If the records include a transcript of any in-camera proceeding, the index must list the date and the names of all parties present at the hearing and their counsel. This index must be transmitted and kept with the sealed or confidential records.

(2) Except as provided in (3) or by court order, the alphabetical and chronological indexes to a clerk's or reporter's transcript, appendix, supporting documents, or other records sent to the reviewing court that are available to the public must list each sealed or confidential record by title, not

disclosing the substance of the record, and must identify it as "Sealed" or "Confidential"—May Not Be Examined Without Court Order."

(3) Records relating to a request for funds under Penal Code section 987.9 or other proceedings the occurrence of which is not to be disclosed under the court order or applicable law must not be bound together with, or electronically transmitted as a single document with, other sealed or confidential records and must not be listed in the index required under (1)(D) or the alphabetical or chronological indexes to a clerk's or reporter's transcript, appendix, supporting documents to a petition, or other records sent to the reviewing court.

(Subd (c) amended effective January 1, 2016.)

(d) Transmission of and access to sealed and confidential records

(1) Unless otherwise provided by (2)–(4) or other law or court order, a sealed or confidential record that is part of the record on appeal or the supporting documents or other records accompanying a motion, petition for a writ of habeas corpus, other writ petition, or other filing in the reviewing court must be transmitted only to the reviewing court and the party or parties who had access to the record in the trial court or other proceedings under review and may be examined only by the reviewing court and that party or parties. If a party's attorney but not the party had access to the record in the trial court or other proceedings under review, only the party's attorney may examine the record.

(2) Except as provided in (3), if the record is a reporter's transcript or any document related to any in-camera hearing from which a party was excluded in the trial court, the record must be transmitted to and examined by only the reviewing court and the party or parties who participated in the in-camera hearing.

(3) A reporter's transcript or any document related to an in-camera hearing concerning a confidential informant under Evidence Code sections 1041–1042 must be transmitted only to the reviewing court.

(4) A probation report must be transmitted only to the reviewing court and to appellate counsel for the People and the defendant who was the subject of the report.

Rule 8.45 amended effective January 1, 2016; adopted effective January 1, 2014.

Advisory Committee Comment

Subdivision (a). Many laws address sealed and confidential records. These laws differ from each other in a variety of respects, including what information is closed to inspection, from whom it is closed, under what circumstances it is closed, and what procedures apply to closing or opening it to inspection. It is very important to determine if any such law applies with respect to a particular record because where other laws establish specific requirements that differ from the requirements in this article, those specific requirements supersede the requirements in this article.

Subdivision (b)(5). Examples of confidential records are records in juvenile proceedings (Welf. & Inst. Code, § 827 and California Rules of Court, rule 8.401), records of the family conciliation court (Fam. Code, § 1818(b)), fee waiver applications (Gov. Code, § 68633(f)), and court-ordered diagnostic reports (Penal Code, § 1203.03). This term also encompasses records closed to inspection by a court order other than an order under rules 2.550–2.551 or 8.46, such as situations in which case law, statute, or rule has established a category of records that must be closed to inspection and a court has found that a particular record falls within that category and has ordered that it be closed to inspection. Examples include discovery material subject to a protective order under Code of Civil Procedure sections 2030.090, 2032.060, or 2033.080 and records closed to inspection by court order under *People v. Marsden* (1970) 2 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. For more examples of confidential records, please see appendix 1 of the *Trial Court Records Manual* at *www.courts.ca.gov/documents/trial-court-records-manual.pdf*.

Subdivisions (c) and (d). The requirements in this rule for format and transmission of and access to sealed and confidential records apply only unless otherwise provided by law. Special requirements that govern transmission of and/or access to particular types of records may supersede the requirements in this rule. For example, rules 8.619(g) and 8.622(e) require copies of reporters' transcripts in capital cases to be sent to the Habeas Corpus Resource Center and the California Appellate Project in San Francisco, and under rules 8.336(g)(2) and 8.409(e)(2), in non-capital felony appeals, if the defendant—or in juvenile appeals, if the appellant or the respondent—is not represented by appellate counsel when the clerk's and reporter's transcripts are certified as correct, the clerk must send that counsel's copy of the transcripts to the district appellate project.

Subdivision (c)(1)(C). For example, for juvenile records, this mark could state "Confidential—Welf. & Inst. Code, § 827" or "Confidential—Juvenile Case File"; for a fee waiver application, this mark could state "Confidential—Gov. Code, § 68633(f)" or "Confidential—Fee Waiver Application"; and for a transcript of an in-camera hearing under *People v. Marsden* (1970) 2 Cal.3d 118, this mark could say "Confidential—*Marsden* Hearing."

Subdivision (c)(2). Subdivision (c)(2) requires that, with certain exceptions, the alphabetical and chronological indexes to the clerk's and reporter's transcripts, appendixes, and supporting documents must list any sealed and confidential records but identify them as sealed or

confidential. The purpose of this provision is to assist the parties in making—and the court in adjudicating—motions to unseal sealed records or to provide confidential records to a party. To protect sealed and confidential records from disclosure until the court issues an order, however, each index must identify sealed and confidential records without disclosing their substance.

Subdivision (c)(3). Under certain circumstances, the Attorney General has a statutory right to request copies of documents filed under Penal Code section 987.9(d). To facilitate compliance with such requests, this subdivision requires that such documents not be bound with other confidential documents.

Subdivision (d). See rule 8.47(b) for special requirements concerning access to certain confidential records.

Subdivision (d)(1) and (2). Because the term "party" includes any attorney of record for that party, under rule 8.10(3), when a party who had access to a record in the trial court or other proceedings under review or who participated in an in-camera hearing—such as a *Marsden* hearing in a criminal or juvenile proceeding—is represented by appellate counsel, the confidential record or transcript must be transmitted to that party's appellate counsel. Under rules 8.336(g)(2) and 8.409(e)(2), in non-capital felony appeals, if the defendant—or in juvenile appeals, if the appellant or the respondent—is not represented by appellate counsel when the clerk's and reporter's transcripts are certified as correct, the clerk must send the copy of the transcripts that would go to appellate counsel, including confidential records such as transcripts of *Marsden* hearings, to the district appellate project.

Subdivision (d)(4). This rule limits to whom a copy of a probation report is transmitted based on the provisions of Penal Code section 1203.05, which limit who may inspect or copy probation reports.

Rule 8.46. Sealed records

(a) Application

This rule applies to sealed records and records proposed to be sealed on appeal and in original proceedings, but does not apply to confidential records.

(Subd (a) amended effective January 1, 2014; previously amended effective January 1, 2006, and January 1, 2007.)

(b) Record sealed by the trial court

If a record sealed by order of the trial court is part of the record on appeal or the supporting documents or other records accompanying a motion, petition for a writ of habeas corpus, other writ petition, or other filing in the reviewing court:

(1) The sealed record must remain sealed unless the reviewing court orders otherwise under (e). Rule 8.45 governs the form and transmission of and access to sealed records.

(2) The record on appeal or supporting documents filed in the reviewing court must also include:

(A) The motion or application to seal filed in the trial court;

(B) All documents filed in the trial court supporting or opposing the motion or application; and

(C) The trial court order sealing the record.

(Subd (b) amended and relettered effective January 1, 2014; adopted as subd (c); previously amended effective January 1, 2004, and January 1, 2007.)

(c) Record not sealed by the trial court

A record filed or lodged publicly in the trial court and not ordered sealed by that court must not be filed under seal in the reviewing court.

(Subd (c) relettered effective January 1, 2014; adopted as subd (d).)

(d) Record not filed in the trial court; motion or application to file under seal

(1) A record not filed in the trial court may be filed under seal in the reviewing court only by order of the reviewing court; it must not be filed under seal solely by stipulation or agreement of the parties.

(2) To obtain an order under (1), a party must serve and file a motion or application in the reviewing court, accompanied by a declaration containing facts sufficient to justify the sealing. At the same time, the party must lodge the record under (3), unless good cause is shown not to lodge it.

(3) To lodge a record, the party must transmit the record to the court in a secure manner that preserves the confidentiality of the record to be lodged. The record must be transmitted separate from the rest of a clerk's or reporter's transcript, appendix, supporting documents, or other records sent to the reviewing court with a cover sheet that complies with rule 8.40(c) and labels the contents as "CONDITIONALLY UNDER SEAL." If the record is in

paper format, it must be placed in a sealed envelope or other appropriate sealed container.

(4) If necessary to prevent disclosure of material contained in a conditionally sealed record, any motion or application, any opposition, and any supporting documents must be filed in a redacted version and lodged in a complete unredacted version conditionally under seal. The cover of the redacted version must identify it as "Public—Redacts material from conditionally sealed record." In juvenile cases, the cover of the redacted version must identify it as "Redacted version—Redacts material from conditionally sealed record." The cover of the unredacted version must identify it as "May Not Be Examined Without Court Order—Contains material from conditionally sealed record." Unless the court orders otherwise, any party that had access to the record in the trial court or other proceedings under review must be served with a complete, unredacted version of all papers as well as a redacted version.

(5) On receiving a lodged record, the clerk must note the date of receipt on the cover sheet and retain but not file the record. The record must remain conditionally under seal pending determination of the motion or application.

(6) The court may order a record filed under seal only if it makes the findings required by rule 2.550(d)–(e).

(7) If the court denies the motion or application to seal the record, ~~the clerk must not place the lodged record in the case file but must return it to the submitting party unless that party notifies the clerk in writing that the record is to be filed. Unless otherwise ordered by the court, the submitting party must notify the clerk within 10 days after the order denying the motion or application~~ the moving party may notify the court that the lodged record is to be filed unsealed. This notification must be received within 10 days of the order denying the motion or application to seal, unless otherwise ordered by the court. On receipt of this notification, the clerk must unseal and file the record. If the moving party does not notify the court within 10 days of the order, the clerk must (1) return the lodged record to the moving party if it is in paper form, or (2) permanently delete the lodged record if it is in electronic form.

(8) An order sealing the record must direct the sealing of only those documents and pages or, if reasonably practical, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.

(9) Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in anything that is subsequently publicly filed.

(Subd (d) amended effective January 1, 2016; adopted as subd (e); previously amended effective July 1, 2002, January 1, 2004, and January 1, 2007; previously amended and relettered as subd (d) effective January 1, 2014.)

(e) Unsealing a record in the reviewing court

(1) A sealed record must not be unsealed except on order of the reviewing court.

(2) Any person or entity may serve and file a motion, application, or petition in the reviewing court to unseal a record.

(3) If the reviewing court proposes to order a record unsealed on its own motion, the court must send notice to the parties stating the reason for unsealing the record. Unless otherwise ordered by the court, any party may serve and file an opposition within 10 days after the notice is sent, and any other party may serve and file a response within 5 days after an opposition is filed.

(4) If necessary to prevent disclosure of material contained in a sealed record, the motion, application, or petition under (2) and any opposition, response, and supporting documents under (2) or (3) must be filed in both a redacted version and a complete unredacted version. The cover of the redacted version must identify it as "Public—Redacts material from sealed record." In juvenile cases, the cover of the redacted version must identify it as "Redacted version—Redacts material from sealed record." The cover of the unredacted version must identify it as "May Not Be Examined Without Court Order—Contains material from sealed record." Unless the court orders otherwise, any party that had access to the sealed record in the trial court or other proceedings under review must be served with a complete, unredacted version of all papers as well as a redacted version. If a party's attorney but not the party had access to the record in the trial court or other proceedings under review, only the party's attorney may be served with the complete, unredacted version.

(5) In determining whether to unseal a record, the court must consider the matters addressed in rule 2.550(c)–(e).

(6) The order unsealing a record must state whether the record is unsealed entirely or in part. If the order unseals only part of the record or unseals the record only as to certain persons, the order must specify the particular part of

the records that is ~~are~~ unsealed, the particular persons who may have access to the record, or both.

(7) If, in addition to the record that is the subject of the sealing order, a court has previously ordered the sealing order itself, the register of actions, or any other court records relating to the case to be sealed, the unsealing order must state whether these additional records are unsealed.

(Subd (e) amended effective January 1, 2016; adopted as subd (f); previously amended effective January 1, 2004, and January 1, 2007; previously amended and relettered as subd (e) effective January 1, 2014.)

(f) Disclosure of nonpublic material in public filings prohibited

(1) Nothing filed publicly in the reviewing court—including any application, brief, petition, or memorandum—may disclose material contained in a record that is sealed, lodged conditionally under seal, or otherwise subject to a pending motion to file under seal.

(2) If it is necessary to disclose material contained in a sealed record in a filing in the reviewing court, two versions must be filed:

(A) A public redacted version. The cover of this version must identify it as "Public—Redacts material from sealed record." In juvenile cases, the cover of the redacted version must identify it as "Redacted Version—Redacts material from sealed record."

(B) An unredacted version. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of this version, and if applicable the envelope or other container, must identify it as "May Not Be Examined Without Court Order—Contains material from sealed record." Sealed material disclosed in this version must be identified as such in the filing and accompanied by a citation to the court order sealing that material.

(C) Unless the court orders otherwise, any party who had access to the sealed record in the trial court or other proceedings under review must be served with both the unredacted version of all papers as well as the redacted version. Other parties must be served with only the public redacted version. If a party's attorney but not the party had access to the record in the trial court or other proceedings under review, only the party's attorney may be served with the unredacted version.

(3) If it is necessary to disclose material contained in a conditionally sealed record in a filing in the reviewing court:

(A) A public redacted version must be filed. The cover of this version must identify it as "Public—Redacts material from conditionally sealed record." In juvenile cases, the cover of the redacted version must identify it as "Redacted version—Redacts material from conditionally sealed record."

(B) An unredacted version must be lodged. The filing must be transmitted in a secure manner that preserves the confidentiality of the filing being lodged. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of this version, and if applicable the envelope or other container, must identify it as "May Not Be Examined Without Court Order—Contains material from conditionally sealed record." Conditionally sealed material disclosed in this version must be identified as such in the filing.

(C) Unless the court orders otherwise, any party who had access to the conditionally sealed record in the trial court or other proceedings under review must be served with both the unredacted version of all papers as well as the redacted version. Other parties must be served with only the public redacted version.

(D) If the court denies the motion or application to seal the record, ~~the clerk must not place the unredacted version lodged under (B) in the case file but must return it to the party who filed the application or motion to seal unless that party notifies the clerk that the record is to be publicly filed, as provided in (d)(7)~~ the party who filed the motion or application to seal may notify the court that the unredacted version lodged under (B) is to be filed unsealed. This notification must be received within 10 days of the order denying the motion or application to seal, unless otherwise ordered by the court. On receipt of this notification, the clerk must unseal and file the lodged unredacted version. If the party who filed the motion or application to seal does not notify the court within 10 days of the order, the clerk must (1) return the lodged unredacted version to the party who filed the motion or application to seal if it is in paper form, or (2) permanently delete the lodged unredacted version if it is in electronic form.

(Subd (f) amended and relettered effective January 1, 2014; adopted as subd (g); previously amended effective January 1, 2007.)

Rule 8.46 amended effective January 1, 2016; repealed and adopted as rule 12.5 effective January 1, 2002; previously amended and renumbered as rule 8.160 effective January 1, 2007; previously renumbered as rule 8.46 effective January 1, 2010; previously amended effective July 1, 2002, January 1, 2004, January 1, 2006, and January 1, 2014.

Advisory Committee Comment

This rule and rules 2.550–2.551 for the trial courts provide a standard and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. The sealed records rules apply to civil and criminal cases. They recognize the First Amendment right of access to documents used at trial or as a basis of adjudication. Except as otherwise expressly provided in this rule, motions in a reviewing court relating to the sealing or unsealing of a record must follow rule 8.54.

Rule 8.47. Confidential records

(a) Application

This rule applies to confidential records but does not apply to records sealed by court order under rules 2.550–2.551 or rule 8.46 or to conditionally sealed records under rule 8.46. Unless otherwise provided by this rule or other law, rule 8.45 governs the form and transmission of and access to confidential records.

(b) Records of *Marsden* hearings and other in-camera proceedings

(1) This subdivision applies to reporter's transcripts of and documents filed or lodged by a defendant in connection with:

(A) An in-camera hearing conducted by the superior court under *People v. Marsden* (1970) 2 Cal.3d 118; or

(B) Another in-camera hearing at which the defendant was present but from which the People were excluded in order to prevent disclosure of information about defense strategy or other information to which the prosecution was not allowed access at the time of the hearing.

(2) Except as provided in (3), if the defendant raises a *Marsden* issue or an issue related to another in-camera hearing covered by this rule in a brief, petition, or other filing in the reviewing court, the following procedures apply:

(A) The brief, including any portion that discloses matters contained in the transcript of the in-camera hearing, and other documents filed or lodged in connection with the hearing, must be filed publicly. The requirement

to publicly file this brief does not apply in juvenile cases; rule 8.401 governs the format of and access to such briefs in juvenile cases.

(B) The People may serve and file an application requesting a copy of the reporter's transcript of, and documents filed or lodged by a defendant in connection with, the in-camera hearing.

(C) Within 10 days after the application is filed, the defendant may serve and file opposition to this application on the basis that the transcript or documents contain confidential material not relevant to the issues raised by the defendant in the reviewing court. Any such opposition must identify the page and line numbers of the transcript or documents containing this irrelevant material.

(D) If the defendant does not timely serve and file opposition to the application, the reviewing court clerk must send to the People a copy of the reporter's transcript of, and documents filed or lodged by a defendant in connection with, the in-camera hearing.

(3) A defendant may serve and file a motion or application in the reviewing court requesting permission to file under seal a brief, petition, or other filing that raises a *Marsden* issue or an issue related to another in-camera hearing covered by this subdivision, and requesting an order maintaining the confidentiality of the relevant material from the reporter's transcript of, or documents filed or lodged in connection with, the in-camera hearing.

(A) Except as otherwise provided in this rule, rule 8.46(d) governs a motion or application under this subdivision.

(B) The declaration accompanying the motion or application must contain facts sufficient to justify an order maintaining the confidentiality of the relevant material from the reporter's transcript of, or documents filed or lodged in connection with, the in-camera hearing and sealing of the brief, petition, or other filing.

(C) At the time the motion or application is filed, the defendant must:

(i) File a public redacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The cover of this version must identify it as "Public—Redacts material from conditionally sealed record." The requirement to publicly file the redacted version does not apply in juvenile cases; rule 8.401 generally governs access to filings in juvenile cases. In juvenile

cases, the cover of the redacted version must identify it as "Redacted version—Redacts material from conditionally sealed record."

(ii) Lodge an unredacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The filing must be transmitted in a secure manner that preserves the confidentiality of the filing being lodged. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of the unredacted version of the document, and if applicable the envelope or other container, must identify it as "May Not Be Examined Without Court Order—Contains material from conditionally sealed record." Conditionally sealed material disclosed in this version must be identified as such in the filing.

(D) If the court denies the motion or application to file the brief, petition, or other filing under seal, ~~the clerk must not place the unredacted brief, petition, or other filing lodged under (C)(ii) in the case file but must return it to the defendant unless the defendant notifies the clerk in writing that it is to be filed. Unless otherwise ordered by the court, the defendant must notify the clerk within 10 days after the order denying the motion or application~~ the defendant may notify the court that the unredacted brief, petition, or other filing lodged under (C)(ii) is to be filed unsealed. This notification must be received within 10 days of the order denying the motion or application to file the brief, petition, or other filing under seal, unless otherwise ordered by the court. On receipt of this notification, the clerk must unseal and file the lodged unredacted brief, petition, or other filing. If the defendant does not notify the court within 10 days of the order, the clerk must (1) return the lodged unredacted brief, petition, or other filing to the defendant if it is in paper form, or (2) permanently delete the lodged unredacted brief, petition, or other filing if it is in electronic form.

(Subd (b) amended effective January 1, 2016.)

(c) Other confidential records

Except as otherwise provided by law or order of the reviewing court:

(1) Nothing filed publicly in the reviewing court—including any application, brief, petition, or memorandum—may disclose material contained in a confidential record, including a record that, by law, a party may choose be

kept confidential in reviewing court proceedings and that the party has chosen to keep confidential.

(2) To maintain the confidentiality of material contained in a confidential record, if it is necessary to disclose such material in a filing in the reviewing court, a party may serve and file a motion or application in the reviewing court requesting permission for the filing to be under seal.

(A) Except as otherwise provided in this rule, rule 8.46(d) governs a motion or application under this subdivision.

(B) The declaration accompanying the motion or application must contain facts sufficient to establish that the record is required by law to be closed to inspection in the reviewing court and to justify sealing of the brief, petition, or other filing.

(C) At the time the motion or application is filed, the party must:

(i) File a redacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The cover of this version must identify it as "Public—Redacts material from conditionally sealed record," In juvenile cases, the cover of this version must identify it as "Redacted version—Redacts material from conditionally sealed record."

(ii) Lodge an unredacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The filing must be transmitted in a secure manner that preserves the confidentiality of the filing being lodged. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of the unredacted version of the document, and if applicable the envelope or other container, must identify it as "May Not Be Examined Without Court Order—Contains material from conditionally sealed record." Material from a confidential record disclosed in this version must be identified as such in the filing and accompanied by a citation to the statute, rule of court, case, or other authority establishing that the record is required by law to be closed to inspection in the reviewing court.

(D) If the court denies the motion or application to file the brief, petition, or other filing under seal, ~~the clerk must not place the unredacted brief, petition, or other filing lodged under (C)(ii) in the case file but must~~

~~return it to the lodging party unless the party notifies the clerk in writing that it is to be filed. Unless otherwise ordered by the court, the party must notify the clerk within 10 days after the order denying the motion or application~~ the defendant may notify the court that the unredacted brief, petition, or other filing lodged under (C)(ii) is to be filed unsealed. This notification must be received within 10 days of the order denying the motion or application to file the brief, petition, or other filing under seal, unless otherwise ordered by the court. On receipt of this notification, the clerk must unseal and file the lodged unredacted brief, petition, or other filing. If the defendant does not notify the court within 10 days of the order, the clerk must (1) return the lodged unredacted brief, petition, or other filing to the moving party if it is in paper form, or (2) permanently delete the lodged unredacted brief, petition, or other filing if it is in electronic form.

(Subd (c) amended effective January 1, 2016.)

Rule 8.47 amended effective January 1, 2016; adopted effective January 1, 2014.

Advisory Committee Comment

Subdivisions (a) and (c). Note that there are many laws that address the confidentiality of various records. These laws differ from each other in a variety of respects, including what information is closed to inspection, from whom it is closed, under what circumstances it is closed, and what procedures apply to closing or opening it to inspection. It is very important to determine if any such law applies with respect to a particular record because this rule applies only to confidential records as defined in rule 8.45, and the procedures in this rule apply only "unless otherwise provided by law." Thus, where other laws establish specific requirements that differ from the requirements in this rule, those specific requirements supersede the requirements in this rule. For example, although Penal Code section 1203.05 limits who may inspect or copy probation reports, much of the material contained in such reports—such as the factual summary of the offense(s); the evaluations, analyses, calculations, and recommendations of the probation officer; and other nonpersonal information—is not considered confidential under that statute and is routinely discussed in openly filed appellate briefs (see *People v. Connor* (2004) 115 Cal.App.4th 669, 695–696). In addition, this rule does not alter any existing authority for a court to open a confidential record to inspection by the public or another party to a proceeding.

Subdivision (c)(1). The reference in this provision to records that a party may choose be kept confidential in reviewing court proceedings is intended to encompass situations in which a record may be subject to a privilege that a party may choose to maintain or choose to waive.

Subdivision (c)(2). Note that when a record has been sealed by court order, rule 8.46(f)(2) requires a party to file redacted (public) and unredacted (sealed) versions of any filing that

discloses material from the sealed record; it does not require the party to make a motion or application for permission to do so. By contrast, this rule requires court permission before redacted (public) and unredacted (sealed) filings may be made to prevent disclosure of material from confidential records.

Item 05

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
February 20, 2018

To
Members of the Appellate Advisory Committee

From
Sarah Abbott,
Attorney, Legal Services

Subject
Possible amendment of rules 8.887, 8.888, 8.889, 8.935, 8.976 and 8.1005

Action Requested
Please review for February 27 committee meeting

Deadline
February 27, 2016

Contact
Sarah Abbott
415-865-7687
Sarah.abbott@jud.ca.gov

Introduction

Item 4 on the committee's annual agenda this committee year is to conduct a review of the rules regarding deadlines and finality of decisions in appellate division matters and to consider whether to recommend amendments to the rules to address certain issues of timing. This is a priority 1 project with a proposed January 1, 2019 completion date. At its February 8, 2018 meeting, the Appellate Division Subcommittee reviewed a draft of possible amendments to rules 8.888, 8.889, 8.935, 9.976 and 8.1005. In a subsequent action by email, the subcommittee considered a related proposed amendment to rule 8.887. The subcommittee recommends that the committee move forward with circulating for public comment a proposal that would amend these rules to require court clerks to send appellate division decisions on the day they are filed and to tether the date of finality of appellate division decisions to the date they are sent, rather than the date they are filed. Attached for the committee's review is a draft invitation to comment addressing these proposed amendments.

Background

Proceedings in the appellate division of the superior courts are governed by rules 8.800 through 8.936. Transfer of appellate division cases to the Court of Appeal is governed by rules 8.1000 through 8.1018. Rules 8.1100 through 8.1125 govern the publication of appellate opinions of

both the appellate division and the Court of Appeal.[1] In general, the rules governing timing and procedure in the appellate division largely mirror corresponding Court of Appeal rules as they relate to deadlines and finality. For example, in both the appellate division and the Court of Appeal, most decisions become final 30 days after they are filed and litigants then have 15 days from the date of finality to file a petition for rehearing or a petition for review by a higher court.[2] In both the appellate division and the courts of appeal, the time for finality of decisions certified for publication begins to run on the date of the publication order.[3] Creating a parallel structure between the two sets of rules was a significant priority when the appellate division rules were repealed and replaced in full in 2008.[4]

However, the Honorable Helen E. Williams of the Superior Court of Santa Clara County, Presiding Judge of the appellate division, and Johnathan Grossman of the Sixth District Appellate Program and a current member of the committee, have identified certain operational differences between the appellate division and the Court of Appeal that they contend warrant amendment of the rules governing finality of appellate division opinions. Specifically, in the Court of Appeal, parties generally receive immediate electronic notification when decisions are filed and then have 15 days to prepare a petition for rehearing[5] or 40 days to prepare a petition for review.[6] In the appellate division, an application for certification to transfer to the Court of Appeal (the functional equivalent of a petition for review) and a petition for rehearing are likewise due 15 days after the decision is filed.[7] However, unlike in the Court of Appeal, there is no immediate electronic notification when an appellate division decision is filed and instead filed decisions are generally sent by mail.

In their initial proposal, the proponents of the amendments explained that under the current rules, some litigants feel there is insufficient time to prepare and file applications for certification for

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[1] Rules governing the publication of appellate opinions are adopted by the Supreme Court under section 14 of article VI of the California Constitution and published in the California Rules of Court at the direction of the Judicial Council.

[2] See rules 8.888(a)(1) and 8.264(b)(1) (decisions final 30 days after filing); rules 8.889(b)(1) and 8.258(b)(2) (petition for rehearing due no later than 15 days after finality, with exceptions); rules 8.1005(b) and 8.500(e) (petition to certify for transfer/petition for review to higher court due no later than 15 days after finality, with exceptions).

[3] See rules 8.888(a)(2) and 8.264(b)(3).

[4] See Judicial Council of Cal., Appellate Advisory Com. Rep., *Appellate Procedure: Rules and Forms for the Superior Court Appellate Divisions* (Feb. 8, 2008), p. 8. ("In developing its proposed revisions to the appellate division rules, the advisory committee therefore took as its starting premise that the language of the Court of Appeal rules should be used as a model for revisions to equivalent provisions in the appellate division rules.") However, where appropriate to account for substantive differences between proceedings in the appellate divisions and in the Court of Appeal and to keep appellate division matters as simple as possible, not all of the existing appellate division rules mirror the corresponding rule governing the Court of Appeal. *Ibid*. You can access this report at: http://www.courts.ca.gov/documents/022208item7.pdf

[5] See rule 8.268(b)(2).

[6] See rule 8.500(e).

[7] See rule 8.1005(b); rule 8.889(b)(1).

transfer and petitions for rehearing prior to the time the appellate division loses jurisdiction (i.e., 30 days after the opinion is filed) because: (1) litigants are unfamiliar with the procedure for preparing applications for certification for transfer; (2) most superior courts notify the parties by mail; and (3) despite rule 8.887(b) requiring the court clerk to "promptly" file and send all opinions and orders, there are often delays in mailing those decisions. To remedy this timing issue, Judge Williams and Mr. Grossman proposed amending rules 8.888(a) and (b), 8.889(b), and 8.1005(b) to change the trigger for finality of appellate division decisions from the date of filing to the date the decision is sent by the clerk. The proponents believe that this would ensure that litigants are not prejudiced due to appellate division decisions not being sent by the clerk in a timely manner.

Moreover, the proponents of the amendments identified an issue of timing with respect to published appellate division decisions. Rule 8.888(a)(2) governing the appellate division, and corresponding rule 8.264(b)(3) governing the Court of Appeal, both provide that if a decision is filed and subsequently certified for publication, the decision becomes final 30 days after the publication order, not the date the decision was filed. Proponents of the amendments explained that this delay in finality is warranted because more people tend to scrutinize decisions to be published and suggest changes, and courts should retain jurisdiction to modify such orders after they are certified for publication. They pointed out that in the Court of Appeal, tethering finality to the publication order date is appropriate because published decisions are posted online immediately, and 30 days after the publication order is sufficient time for interested parties to propose modifications. In contrast, in the appellate division a decision certified for publication often is not posted on the website for a month or more.

This delay in posting appellate division opinions appears to be designed to accommodate possible transfer to the Court of Appeal. Under rule 8.887(c)(2), a copy of all appellate division decisions certified for publication must immediately be sent to the Court of Appeal "to assist the Court of Appeal in deciding whether to order the case transferred to the court on the court's own motion under rules 8.100-8.1018." The Court of Appeal has 30 days from the date the appellate division decision becomes final to decide whether to transfer the case on its own motion.[8] Because published decisions become final 30 days after the date of certification for publication, conceivably the Court of Appeal has up to 60 days to decide whether to transfer an appellate division case with a decision certified for publication. During the time that the Court of Appeal is considering whether to transfer on its own motion, it appears to be the practice of the Reporter of Decisions not to publicly post appellate division decisions certified for publication. If the Court of Appeal decides not to transfer the case or the time for decision lapses, the decision becomes final immediately.[9] By the time the public receives notice of a decision certified for publication through posting on the website, the appellate division may have lost jurisdiction and cannot consider any proposed modifications. To remedy this issue, the proponents proposed amending rules 8.888(a)(2), 8.889(b)(1), and 8.1005(b)(1) so that the finality period for

[8] See rule 8.1008(a)(1)(B).

[9] See rules 8.1008(a)(3); 8.1018(a).

published opinions would run from the date they are posted on the court's website, not the date of the publication order.[10]

Draft Rule Amendments

The subcommittee conducted a comprehensive review of the rules governing finality in the appellate division and reviewed all of the amendments proposed by Judge Williams and Mr. Grossman. Though the proponents of the original proposal were focused on rules 8.888, 8.889 and 8.1005 governing appellate division decisions in limited civil and misdemeanor cases, the subcommittee considered whether similar rules governing the deadlines and finality for other types of appellate division decisions should be amended to conform to these proposed changes. Specifically, rule 8.935 governing writ proceedings in infraction cases and rule 8.976 governing writ petitions in small claims proceedings were examined.[11] The provisions in these rules regarding modification and rehearing refer to the rules governing limited civil and misdemeanor cases,[12] so no amendment to those portions of rules 8.935 and 8.976 would be necessary. However, the finality dates contained in these rules mirror finality for limited civil and misdemeanor cases, and would need to be amended so that finality runs from the date a decision is sent if these amendments are adopted elsewhere.

The subcommittee recommends that amendments be made to rules 8.888, 8.889, 8.935, 9.976 and 8.1005 so that the date of finality for appellate division decisions is triggered by the date on which the court clerk sends the decision to the parties, as opposed to the date on which the decision is filed. The proposed amendments retain the existing 15-day deadline for filing applications for certification for transfer and petitions for rehearing and instead extend the time of finality that triggers these deadlines. The suggested changes do not affect the time for a petition for transfer filed in the Court of Appeal after the decision is final under rule 8.1006.

As an added measure, the subcommittee also recommends amending rule 8.887 to require court clerks to send appellate division decisions to the parties on the same day they are filed, electronically when possible. Rule 8.887(b) currently requires the appellate division clerk to "promptly file all opinions and orders of the court and promptly send copies showing the filing date to the parties and, when relevant, to the trial court." However, it appears that at least in some courts there is a delay between the filing date and the date a decision is sent. Because all

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[10] Of note, the proponents of the proposed amendments raised an additional issue with published appellate division decisions but did not present a proposed remedy. They note that frequently the Court of Appeal will certify a case for transfer after an appellate division decision has been certified for publication (see rule 8.887), but there is no mechanism for alerting the public to this. In contrast, it is widely publicized when a court grants review or rehearing of a published Court of Appeal decision, or when a decision is ordered depublished. The proponents of the amendments generally propose that a similar publicity system should be established for published appellate division cases.

[11] Infraction appeals are also heard by the appellate division. However, rule 8.925 relating to the finality of decisions in infraction cases before the appellate division provides that rules 8.880-8.890 govern appellate division infraction cases. Thus, the proposed amendments to rules 8.888 and 8.889 would automatically apply to this category of cases and there would be no need to amend this rule to conform to the proposed amendments.

[12] See rule 8.935(c) and (d); rule 8.976(c).

appellate division court clerks should have access to electronic mail, and in most courts the volume of appellate division decisions is relatively small, it seems that requiring that the parties be notified on the same day that a decision or order is filed, electronically whenever possible, could be implemented without significant added expense or training.

Rules 8.887(b), 8.888(a)(1) and (b)(2), 8.889(b)(1)(a), 8.935(b)(2), 8.976(b)(2) and 8.1005(b)(1)(a)

The attached draft invitation to comment includes draft amendments to the rules intended to remedy the issue of insufficient time to prepare an application for certification for transfer and/or a petition for rehearing due to parties not receiving appellate division opinions in a timely manner. The amendments require the court clerk to send copies of appellate division decisions to parties on the day they are filed, electronically when possible, and tethers the date of finality to the date the opinion is sent rather than the date it is filed.

Alternatives Considered

The subcommittee considered and rejected one of the original suggestions. As discussed above, the original proposal included a suggestion to amend the rules so that an appellate division decision certified for publication would become final 30 days after the date of posting on the court's website, rather than the date of the publication order. For several reasons, the subcommittee does *not* recommend amending the rules to tether the date of finality of published appellate division decisions to the date of posting on the court's website. No other rules appear to contain a filing deadline triggered by a website posting and there could be issues of proper notice and due process if these amendments were implemented.

Moreover, the subcommittee was concerned that the proposed amendments tethering the finality of published appellate division decisions to the date of posting on the website could negate the existing deadline by which the Court of Appeal must decide whether to transfer a case on its own motion. More specifically, if: (1) published appellate division decisions do not become final until 30 days after being posted on the website, as was proposed; (2) under existing rule 8.1008(a)(1)(B) the Court of Appeal has 30 days after appellate division decisions become final to decide whether to transfer; and (3) published appellate division decisions are not posted on the website until after the Court of Appeal has decided on transfer, then it seems that the Court of Appeal would have an indefinite amount of time to decide whether to transfer an appellate division case that had been previously certified for publication because the decision might never become final.

Additionally, the subcommittee understands that it is the practice of the Reporter of Decisions not to post appellate division decisions certified for publication on the court's website until after the Court of Appeal has decided whether to transfer such cases on the court's own motion.[13] Thus, the delay between the date of a publication order and the date an appellate division opinion is posted on the court's website seems to be an operational issue that may be remedied in coordination with the Reporter of Decisions and does not require amendment of the rules.

[13] See rule 8.887(c); 8.1105(f).

Finally, the subcommittee considered the feasibility of requiring appellate divisions to immediately post their own published decisions online as is done by the Reporter of Decisions for published (and unpublished) decisions of the Court of Appeal. The subcommittee does not recommend this option because it would create a hardship for the superior courts, when the issue likely can be remedied by an operational change.

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 amendments, but it did not review the draft invitation to comment or this 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

SPR18-__

Title
Appellate Procedure: Finality of Appellate Division Decisions

Proposed Rules, Forms, Standards, or Statutes
Amend California Rules of Court, rules 8.887, 8.888, 8.889, 8.835, 8.976, and 8.1005

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

Action Requested
Review and submit comments by _____

Proposed Effective Date
January 1, 2019

Contact
Sarah Abbott, 415-865-7687
sarah.abbott@jud.ca.gov

Executive Summary and Origin

The Appellate Advisory Committee is proposing amendments to several rules relating to the finality of appellate division decisions. The proposed amendments are intended to ensure that parties have sufficient time after receiving notice of appellate division decisions to prepare and file applications for certification for transfer and petitions for rehearing prior to the time the appellate division loses jurisdiction. This proposal is in response to suggestions from the presiding judge of an appellate division and a member of this committee.

Background

In general, the rules governing timing and procedure in the appellate division largely mirror corresponding Court of Appeal rules as they relate to deadlines and finality. For example, in both the appellate division and the Court of Appeal, most decisions become final 30 days after they are filed and litigants then have 15 days from the date of finality to file a petition for rehearing or a petition for review by a higher court.[1] Creating a parallel structure between the two sets of rules was a significant priority when the appellate division rules were repealed and replaced in full in 2008.[2]

[1] See rules 8.888(a)(1) and 8.264(b)(1) (decisions final 30 days after filing); rules 8.889(b)(1) and 8.258(b)(2) (petition for rehearing due no later than 15 days after finality, with exceptions); rules 8.1005(b) and 8.500(e) (petition to certify for transfer/petition for review to higher court due no later than 15 days after finality, with exceptions)

[2] See Judicial Council of Cal., Appellate Advisory Com. Rep., *Appellate Procedure: Rules and Forms for the Superior Court Appellate Divisions* (Feb. 8, 2008), p. 8. ("In developing its proposed revisions to the appellate

However, it has been reported that certain operational differences between the appellate division and the Court of Appeal warrant amendment of the rules governing the finality of appellate division opinions. Specifically, in the Court of Appeal, parties generally receive immediate electronic notification when decisions are filed and then have 15 days to prepare a petition for rehearing[3] or 40 days to prepare a petition for review.[4] In the appellate division, an application for certification to transfer to the Court of Appeal (the functional equivalent of a petition for review) and a petition for rehearing are likewise due 15 days after the decision is filed.[5] However, unlike in the Court of Appeal, there is no immediate electronic notification when an appellate division decision is filed and instead filed decisions are generally sent by mail.

Some litigants in the appellate division feel that under the current rules there is insufficient time to prepare and file applications for certification for transfer and petitions for rehearing prior to the time the appellate division loses jurisdiction (i.e., 30 days after the opinion is filed) because: (1) litigants are unfamiliar with the procedure for preparing applications for certification for transfer; (2) most superior courts notify the parties by mail; and (3) despite rule 8.887(b) requiring the court clerk to "promptly" file and send all opinions and orders, there are often delays in mailing those decisions.

The Proposal

To remedy this timing issue, the committee is proposing to amend rules 8.887, 8.888, 8.889, 8.935, 9.976, and 8.1005 to require the court clerk to send appellate division opinions on the date they are filed and to modify the trigger for finality of appellate division opinions from the date of filing to the date the opinion is sent. This would ensure that litigants are not prejudiced due to appellate division decisions not being sent by the clerk in a timely manner.

Alternatives Considered

The committee also considered not making any changes to these rules, but concluded that the proposed amendments would help ensure that litigants have sufficient time to prepare and file applications for certification for transfer and petitions for rehearing prior to the time that the appellate division loses jurisdiction.

The committee also considered a proposal to amend the rules to change the trigger for finality of appellate division opinions certified for publication from the date of the publication order to the date that such decisions are posted on the court's website to remedy a perceived timing issue with respect to public notice of published appellate division opinions. The committee decided

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division rules, the advisory committee therefore took as its starting premise that the language of the Court of Appeal rules should be used as a model for revisions to equivalent provisions in the appellate division rules.") However, where appropriate to account for substantive differences between proceedings in the appellate divisions and in the Court of Appeal and to keep appellate division matters as simple as possible, not all of the existing appellate division rules mirror the corresponding rule governing the Court of Appeal. *Ibid.*

[3] See rule 8.268(b)(2).

[4] See rule 8.500(e).

[5] See rule 8.1005(b); rule 8.889(b)(1).

not to recommend these amendments because the timing issue may be resolved by an operational change.

Implementation Requirements, Costs, and Operational Impacts

No appreciable implementation requirements, costs or operation impacts are anticipated. However, some training will be required to ensure that court clerks send appellate division opinions on the date they are filed.

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?
- If the amendment to rule 8.887 is implemented and court clerks are required to send opinions on the same day they are filed, are the other amendments still beneficial?

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.
- Is it feasible for court clerks to send appellate division opinions on the same day they are filed, electronically when permissible?
- What are the impediments to court clerks providing parties with immediate electronic notice of appellate division opinions as is done in the Court of Appeal?
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

Proposed amendments to rules 8.887, 8.888, 8.889, 8.835, 8.976, and 8.1005

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 8.887. Decisions

(a) Written opinions

Appellate division judges are not required to prepare a written opinion in any case but may do so when they deem it advisable or in the public interest. A decision by opinion must identify the participating judges, including the author of the majority opinion and of any concurring or dissenting opinion, or the judges participating in a "by the court" opinion.

(b) Filing the decision

The appellate division clerk must promptly file all opinions and orders of the court and ~~promptly~~on the same day send copies (by e-mail where permissible under rule 2.251) showing the filing date to the parties and, when relevant, to the trial court.

(c) Opinions certified for publication

(1) Opinions certified for publication must comply to the extent practicable with the *California Style Manual*.

(2) When the opinion is certified for publication, the clerk must immediately send:

(A) Two paper copies and one electronic copy to the Reporter of Decisions in a format approved by the Reporter.

(B) One copy to the Court of Appeal for the district. The copy must bear the notation "This opinion has been certified for publication in the Official Reports. It is being sent to assist the Court of Appeal in deciding whether to order the case transferred to the court on the court's own motion under rules 8.1000–8.1018." The clerk/executive officer of the Court of Appeal must promptly file that copy or make a docket entry showing its receipt.

(Subd (c) amended effective January 1, 2018; previously amended effective January 1, 2011, and March 1, 2014.)

Rule 8.887 amended effective January 1, 2018; adopted effective January 1, 2009; previously amended effective January 1, 2011, and March 1, 2014.

Rule 8.888. Finality and modification of decision

(a) Finality of decision

(1) Except as otherwise provided in this rule, an appellate division decision, including an order dismissing an appeal involuntarily, is final 30 days after the decision is ~~filed~~sent by the court clerk to the parties.

(2) If the appellate division certifies a written opinion for publication or partial publication after its decision is filed and before its decision becomes final in that court, the finality period runs from the filing date of the order for publication.

(3) The following appellate division decisions are final in that court when filed:

(A) The denial of a petition for writ of supersedeas;

(B) The denial of an application for bail or to reduce bail pending appeal; and

(C) The dismissal of an appeal on request or stipulation.

(b) Modification of judgment

(1) The appellate division may modify its decision until the decision is final in that court. If the clerk's office is closed on the date of finality, the court may modify the decision on the next day the clerk's office is open.

(2) An order modifying a decision must state whether it changes the appellate judgment. A modification that does not change the appellate judgment does not extend the finality date of the decision. If a modification changes the appellate judgment, the finality period runs from the ~~filing~~ date ~~of~~ the modification order is sent by the court clerk to the parties.

(c) Consent to increase or decrease in amount of judgment

If an appellate division decision conditions the affirmance of a money judgment on a party's consent to an increase or decrease in the amount, the judgment is reversed unless, before the decision is final under (a), the party serves and files a copy of a consent in the appellate division. If a consent is filed, the finality period runs from the filing date of the consent. The clerk must send one filed-endorsed copy of the consent to the trial court with the remittitur.

(Subd (c) amended effective January 1, 2016.)

Rule 8.888 amended effective January 1, 2016; adopted effective January 1, 2009.

Rule 8.889. Rehearing

(a) Power to order rehearing

(1) On petition of a party or on its own motion, the appellate division may order rehearing of any decision that is not final in that court on filing.

(2) An order for rehearing must be filed before the decision is final. If the clerk's office is closed on the date of finality, the court may file the order on the next day the clerk's office is open.

(b) Petition and answer

(1) A party may serve and file a petition for rehearing within 15 days after the following is sent by the court clerk to the parties, whichever is later:

(A) The decision ~~is filed~~;

(B) A publication order restarting the finality period under rule 8.888(a)(2), if the party has not already filed a petition for rehearing;

(C) A modification order changing the appellate judgment under rule 8.888(b); or

(D) ~~The filing of a~~A consent filed under rule 8.888(c).

(2) A party must not file an answer to a petition for rehearing unless the court requests an answer. The clerk must promptly send to the parties copies of any order requesting an answer and immediately notify the parties by telephone or another expeditious method. Any answer must be served and filed within 8 days after the order is filed unless the court orders otherwise. A petition for

rehearing normally will not be granted unless the court has requested an answer.

(3) The petition and answer must comply with the relevant provisions of rule 8.883.

(~~4~~) Before the decision is final and for good cause, the presiding judge may relieve a party from a failure to file a timely petition or answer.

(c) No extensions of time

The time for granting or denying a petition for rehearing in the appellate division may not be extended. If the court does not rule on the petition before the decision is final, the petition is deemed denied.

(d) Effect of granting rehearing

An order granting a rehearing vacates the decision and any opinion filed in the case. If the appellate division orders rehearing, it may place the case on calendar for further argument or submit it for decision.

Rule 8.889 adopted effective January 1, 2009.

Chapter 6. Writ Proceedings

Rule 8.935. Filing, finality, and modification of decisions; rehearing; remittitur

(a) Filing of decision

(1) The appellate division clerk must promptly file all opinions and orders of the court and promptly send copies showing the filing date to the parties and, when relevant, to the trial court.

(2) A decision must identify the participating judges, including the author of any majority opinion and of any concurring or dissenting opinion, or the judges participating in a "by the court" decision.

(Subd (a) adopted effective January 1, 2014.)

(b) Finality of decision

(1) Except as otherwise ordered by the court, the following appellate division decisions regarding petitions for writs within the court's original jurisdiction are final in the issuing court when filed:

(A) An order denying or dismissing such a petition without issuance of an alternative writ, order to show cause, or writ of review; and

(B) An order denying or dismissing such a petition as moot after issuance of an alternative writ, order to show cause, or writ of review.

(2) Except as otherwise provided in (3), all other appellate division decisions in a writ proceeding are final 30 days after the decision is ~~filed~~sent by the court clerk to the parties.

(3) If necessary to prevent mootness or frustration of the relief granted or to otherwise promote the interests of justice, an appellate division may order early finality in that court of a decision granting a petition for a writ within its original jurisdiction or denying such a petition after issuing an alternative writ, order to show cause, or writ of review. The decision may provide for finality in that court on filing or within a stated period of less than 30 days.

(Subd (b) amended and relettered effective January 1, 2014; adopted as subd (a).)

(c) Modification of decisions

Rule 8.888(b) governs the modification of appellate division decisions in writ proceedings.

(Subd (c) adopted effective January 1, 2014.)

(d) Rehearing

Rule 8.889 governs rehearing in writ proceedings in the appellate division.

(Subd (d) adopted effective January 1, 2014.)

(e) Remittitur

Except as provided in rule 8.1018 for cases transferred to the Courts of Appeal, the appellate division must issue a remittitur after the court issues a decision in a writ proceeding except when the court issues one of the orders listed in (b)(1). Rule 8.890(b)–(d) govern issuance of a remittitur in these proceedings, including the

clerk's duties, immediate issuance, stay, and recall of remittitur, and notice of issuance.

(Subd (e) amended and relettered effective January 1, 2014; adopted as subd (e).)

Rule 8.935 amended effective January 1, 2014; adopted effective January 1, 2009.

Advisory Committee Comment

Subdivision (b). This provision addresses the finality of decisions in proceedings relating to writs of mandate, certiorari, and prohibition. See rule 8.888(a) for provisions addressing the finality of decisions in appeals.

Subdivision (b)(1). Examples of situations in which the appellate division may issue an order dismissing a writ petition include when the petitioner fails to comply with an order of the court, when the court recalls the alternative writ, order to show cause, or writ of review as improvidently granted, or when the petition becomes moot.

Subdivision (d). Under this rule, a remittitur serves as notice that the writ proceedings have concluded.

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

Chapter 2. Writ Petitions

Rule 8.976. Filing, finality, and modification of decisions; remittitur

(a) Filing of decision

The appellate division clerk must promptly file all opinions and orders in proceedings under this chapter and ~~promptly~~ on the same day send copies showing the filing date to the parties and, when relevant, to the small claims court.

(b) Finality of decision

(1) Except as otherwise ordered by the appellate division judge, the following decisions regarding petitions for writs under this chapter are final in the issuing court when filed:

(A) An order denying or dismissing such a petition without issuance of an alternative writ, order to show cause, or writ of review; and

(B) An order denying or dismissing such a petition as moot after issuance of an alternative writ, order to show cause, or writ of review.

(2) Except as otherwise provided in (3), all other decisions in a writ proceeding under this chapter are final 30 days after the decision is ~~filed~~sent by the court clerk to the parties.

(3) If necessary to prevent mootness or frustration of the relief granted or to otherwise promote the interests of justice, a judge in the appellate division may order early finality of a decision granting a petition for a writ under this chapter or denying such a petition after issuing an alternative writ, order to show cause, or writ of review. The decision may provide for finality on filing or within a stated period of less than 30 days.

(c) Modification of decisions

Rule 8.888(b) governs the modification of decisions in writ proceedings under this chapter.

(d) Remittitur

The appellate division must issue a remittitur after the judge issues a decision in a writ proceeding under this chapter except when the judge issues one of the orders listed in (b)(1). The remittitur is deemed issued when the clerk enters it in the record. The clerk must immediately send the parties notice of issuance of the remittitur, showing the date of entry.

Rule 8.976 adopted effective January 1, 2016.

Advisory Committee Comment

Subdivision (b)(1). Examples of situations in which the appellate division judge may issue an order dismissing a writ petition include when the petitioner fails to comply with an order, when the judge recalls the alternative writ, order to show cause, or writ of review as improvidently granted, or when the petition becomes moot.

Division 4. Transfer of Appellate Division Cases to the Court of Appeal

Rule 8.1005. Certification for transfer by the appellate division

(a) Authority to certify

(1) The appellate division may certify a case for transfer to the Court of Appeal on its own motion or on a party's application if it determines that transfer is necessary to secure uniformity of decision or to settle an important question of law.

(2) Except as provided in (3), a case may be certified for transfer by a majority of the appellate division judges to whom the case has been assigned or who decided the appeal or, if the case has not yet been assigned, by any two appellate division judges.

(3) If an appeal from a conviction of a traffic infraction is assigned to a single appellate division judge under Code of Civil Procedure section 77, the case may be certified for transfer by that judge.

(4) If an assigned or deciding judge is unable to act on the certification for transfer, a judge designated or assigned to the appellate division by the chair of the Judicial Council may act in that judge's place.

(Subd (a) amended effective January 1, 2011; previously amended effective January 1, 2007.)

(b) Application for certification

(1) A party may serve and file an application asking the appellate division to certify a case for transfer at any time after the record on appeal is filed in the appellate division but no later than 15 days after the following is sent by the court clerk to the parties:

(A) The decision ~~is filed~~;

(B) A publication order restarting the finality period under rule 8.888(a)(2);

(C) A modification order changing the appellate judgment under rule 8.888(b); or

(D) ~~The filing of a~~A consent filed under rule 8.888(c).

(2) The party may include the application in a petition for rehearing.

(3) The application must explain why transfer is necessary to secure uniformity of decision or to settle an important question of law.

(4) Within five days after the application is filed, any other party may serve and file an answer.

(5) No hearing will be held on the application. Failure to certify the case within the time specified in (c) is deemed a denial of the application.

(Subd (b) amended effective January 1, 2011.)

(c) Time to certify

The appellate division may certify a case for transfer at any time after the record on appeal is filed in the appellate division and before the appellate division decision is final in that court.

(Subd (c) amended and relettered effective January 1, 2011; adopted as subd (d).)

(d) Contents of order certifying case for transfer

An order certifying a case for transfer must:

(1) Clearly state that the appellate division is certifying the case for transfer to the Court of Appeal;

(2) Briefly describe why transfer is necessary to secure uniformity of decision or to settle an important question of law; and

(3) State whether there was a decision on appeal and, if so, its date and disposition.

(Subd (d) amended and relettered effective January 1, 2011; adopted as subd (e); previously amended effective January 1, 2007.)

(e) Superior court clerk's duties

(1) If the appellate division orders a case certified for transfer, the clerk must promptly send a copy of the certification order to the clerk/executive officer of the Court of Appeal, the parties, and, in a criminal case, the Attorney General.

(2) If the appellate division denies a certification application by order, the clerk must promptly send a copy of the order to the parties.

(Subd (e) amended effective January 1, 2018; adopted as subd (f); previously amended and relettered effective January 1, 2011.)

Rule 8.1005 amended effective January 1, 2018; repealed and adopted as rule 63 effective January 1, 2003; previously amended and renumbered effective January 1, 2007; previously amended effective January 1, 2010, and January 1, 2011.

Item 06

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
February 20, 2018

To
Members of the Appellate Advisory Committee

From
Christy Simons
Attorney, Legal Services

Subject
Possible revisions to appellate division forms

Action Requested
Please review for February 27 committee meeting

Deadline
February 27, 2018

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

Introduction

Item 12 on the committee's annual agenda is to consider whether to recommend revisions to several appellate division forms to make corrections and to make them clearer and easier to use. The suggestions were submitted by the Los Angeles Superior Court (LASC), and address two groups of forms: (1) the notice of appeal and record on appeal forms; and (2) the settled statement and order on settled statement forms. The Appellate Division Subcommittee reviewed draft possible revisions to the notice on appeal and record on appeal forms and recommends that the committee move forward with circulating this proposal for public comment. Attached for the committee's review are the notice of appeal and record on appeal forms with proposed revisions highlighted.

The subcommittee recommends deferring work on the suggestions pertaining to the settled statement forms in light of the joint project with the Family and Juvenile Law Advisory Committee regarding the settled statement process in unlimited civil cases. This project is broader in scope than the LASC suggestions and is likely to result in additional recommended revisions to the appellate division settled statement forms.

Background

The LASC submitted these suggestions while the notice of appeal and record on appeal forms were subject to revision as part of a rules modernization proposal to facilitate modern e-business practices, e-filing, and e-service. At the time, a few of the suggested changes were made to the forms; the rest were deferred due to lack of resources. The revised forms took effect January 1, 2017.

Draft Revisions

Form APP-102, *Notice of Appeal/Cross-Appeal (Limited Civil Case)*

The LASC notes that an appeal may involve multiple appellants, and suggests modifying *item 1* to make "appellant" plural so that the names of all appellants will be included. Subcommittee members agreed that providing space for multiple appellants would be helpful, and propose adding a checkbox and an instruction to attach a separate page listing additional appellants and their contact information.

The LASC also suggests revisions to *item 4* to clarify the appellant's choice to serve and file the notice designating the record either together with the notice of appeal or later, within 10 days of filing the notice of appeal, and to include the consequence for failing to file it on time. According to the LASC, this item creates confusion because appellants often check the box indicating that they have attached the notice designating the record when in fact they have not; the trial court asks the appellate division to dismiss the appeal for lack of compliance, but the form indicates that the notice designating the record was attached. The subcommittee proposes the simplified language shown on the form to clarify this item.

Form CR-132, *Notice of Appeal (Misdemeanor)*

The LASC suggests revising *item 1* to include a heading for appellant's contact information and to indicate that this information is required, and to clarify the section regarding appellant's lawyer. Specifically, the LASC suggests requesting information about appellant's lawyer on appeal, if any, and separately requesting information about the lawyer filling out the form for appellant, if any.

The subcommittee agreed with adding the heading, and agreed that the current section regarding information on appellant's lawyer is confusing. The subcommittee discussed the purpose of requesting this information and concluded that the item should collect information on the appellant's lawyer in the trial court, with checkboxes to indicate whether the same lawyer is representing the appellant on appeal and an instruction to see item 4 on the form if court appointed counsel on appeal is being requested.

The proposed revisions to *item 3* correct a couple of typographical errors and add the consequence for failing to timely file the notice designating the record on appeal.

The LASC suggests changing the procedure by which appellants request court-appointed counsel (see *item 4* on the form) to require the submission of certain forms and to require that they be filed in the appellate division rather than the trial court.[1] The suggestions would require amending rule 8.851(b), which is beyond the scope of the project on the committee's annual agenda. *Note that rule 8.851(a) is the subject of the proposal (deferred) to expand the court's authority to appoint counsel for misdemeanor defendants who have not been convicted (i.e., defendants appealing a pre-conviction ruling or defendants who are respondents in the appellate division).* Amending the rule is beyond the scope of this project. The subcommittee recommends deferring this suggestion for possible consideration in the future.

However, the subcommittee recommends revisions to *item 4* at this time to clarify the process of requesting a court-appointed lawyer and determining which forms to complete and attach to the notice of appeal.

Form CR-142, *Notice of Appeal and Record on Appeal (Infraction)*

Item 1 contains the same proposed revisions as discussed above regarding form CR-132.

The LASC suggests two revisions to item *5a(2)*. First, LASC recommends deleting the reference to *serving* the proposed statement on appeal because item 5a(1) only refers to filing, and a defendant only needs to serve the proposed statement when the prosecutor appears in court. Second, LASC suggests revising the language regarding the consequence of not filing the proposed statement on time to be consistent with the recent amendment to rule 8.924.

Subcommittee members expressed the view that the reference to service should be retained and that the item should specify the circumstance in which service of the proposed statement on

[1] The LASC explains that, currently, appellants or their counsel will complete item 4 asking for appointed counsel, or will file a notice of appeal on pleading paper and include a request for appointed counsel but fail to complete form CR-133, *Request for Court-Appointed Lawyer in Misdemeanor Appeal*, and/or form MC-210, *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense*. LASC suggests a rule requirement that these forms be completed in order for a request for counsel be considered. Currently, the LASC appellate division requires the trial court appeals clerk to provide documentation to verify whether appellant had appointed counsel in the trial court, is subject to incarceration, fine, etc. If the MC-210 is required, the appellate division contacts the appellant or the trial court. All of this delays the appointment of counsel.

The LASC also suggests a requirement that these forms (CR-133 and MC-210) be filed directly with the appellate division rather than the trial court. Allowing them to be filed in the trial court causes delay because the documents must be forwarded to the appellate division. The LASC contends filing these forms in the trial court is unnecessary because the trial court clerk only needs to know whether a request for appointed counsel was filed and what the ruling was in order to determine when appellant's notice of election is due.

appeal is required. In addition, the subcommittee noted that the current language on the form regarding the consequence of not timely filing the proposed statement on appeal, that the appeal may be dismissed, is incorrect under rule 8.924 and must be revised.

The third set of proposed revisions is to *item 5d*. Currently, the section on electing a reporter's transcript as the record of the oral proceedings does not include all of an appellant's choices for obtaining the transcript. LASC suggests expanding the language on paying for the transcript to include both depositing the amount with the trial court and paying the reporter directly and filing a waiver of deposit, and to include the option of providing a certified transcript. In addition, LASC suggests changing the reference to appellant's being eligible for "a free reporter's transcript," to being eligible for "the court to pay for the transcript on your behalf." LASC explains that there is no free transcript and suggests the change "to avoid misleading appellants."

The subcommittee has reorganized *item 5d* to set forth the appellant's options for paying for a transcript, requesting one at no cost, and filing certified transcripts. The subcommittee proposes rewording "a free reporter's transcript" to "a reporter's transcript at no cost to you."

Form APP-110, *Respondent's Notice Designating Record on Appeal (Limited Civil Case)*
The suggestions from LASC for this form are all proposed revisions to item 5, record of the oral proceedings in the trial court.

Item 5a, reporter's transcript
The LASC suggests two revisions to *item 5a(1)*, designating additional proceedings for the reporter's transcript: deleting the instruction regarding designating additional proceedings, and including a chart for the respondent to provide the court reporter's contact information. The subcommittee recommends retaining the instruction because it is helpful. The subcommittee does not recommend a chart or space for the court reporter's contact information because this information is not necessary and the inclusion of a chart that seems to require the information would make the form harder to complete.

The LASC also proposes changes to *item 5a(2)*, copy of the reporter's transcript, to conform to recent rule changes and the appellant's form for designating the record on appeal (form APP-103). The subcommittee recommends revisions that reorganize, renumber, and expand this section to provide the respondent with more complete information and options, including the option of attaching a certified transcript, expanded information on options for payment, and expanded information on the process of applying to the Court Reporters Board for payment or reimbursement from the Transcript Reimbursement Fund. Newly renumbered section 5a(4) is revised to be consistent with recently amended Code of Civil Procedure section 271.

Item 5b, transcript from official electronic recording

The LASC points out that the form does not provide space for the respondent to designate additional proceedings, but believes this revision would require amending rule 8.835.

Staff advised that the suggested revision to allow the respondent to designate additional proceedings would not require amendment of the rule. Rule 8.835, which governs transcripts from official electronic recordings, provides that "[w]ritten transcripts of official electronic recordings may be prepared under rule 2.952." (Rule 8.835(b).) Rule 2.952, regarding electronic recordings as the official record of the proceedings, provides for an appellant to request preparation of a transcript "within 10 days of filing a notice of appeal in a civil case," designate the portions to be transcribed, and deposit the cost "computed as specified in rule 8.130." Rule 2.952 further provides that "[o]ther steps necessary to complete preparation of the record on appeal must be taken following, as nearly as possible, the procedures in rules 8.120 and 8.130. (Rule 2.952(j)(2).) Rule 8.130, which governs the reporter's transcript in unlimited civil appeals, provides that, if the appellant designates less than all the testimony, the respondent may designate additional proceedings (rule 8.130(a)(3). The subcommittee recommends revising the form to provide space for the respondent to designate additional proceedings.

The LASC also suggests that the form should include a timeframe for paying the clerk for the transcript, but notes that rule 8.835 does not include such a provision. LASC suggests that in the absence of a rule provision, and since the parties have 10 days to pay for reporter's transcripts and 10 days in misdemeanor and infraction appeals to pay for electronic recording transcripts (see rules 8.868(e) and 8.917(e), respectively), the form should be revised to specify that payment is due within 10 days of receipt of the clerk's estimate of the cost of the transcript. However, the rules LASC cites provide timeframes for *appellants* to pay for transcripts; the rules are silent with respect to the time for *respondents* to pay. No revision to include a time for respondents to pay for the transcript is recommended. Amending rule 8.835 would be a future project.

Also in *item 5b*, LASC suggests including the consequence for failing to pay for the transcript and adding a reference to rule 8.818(d) to the provision regarding fee waivers.[2] These revisions are included in the form. For clarity, the provisions in item 5b regarding a copy of the transcript have been renumbered.

Form CR-134, *Notice Regarding Record on Appeal (Misdemeanor)*
Item 1 contains the same proposed revisions as discussed above regarding form CR-132.

LASC suggests revisions to *item 5a* to fully inform appellants regarding their options for obtaining a reporter's transcript, including providing a certified transcript and filing a written waiver of deposit. LASC also suggests rephrasing the last sentence regarding the court deciding

[2] The reference to rule 8.818(d) is also added to *item 4b(2)* regarding fee waivers.

if the appellant is "eligible for a free transcript" to clarify that the transcript is not free; rather, the court would pay for the transcript on the appellant's behalf.

The subcommittee recommends these revisions, with the modification that "a free transcript" be revised to read "a reporter's transcript at no cost to you" in *item 5a(3)(b)*. The same recommended wording change is included in *items 5b(2)(b)* and *5c(2)(b)*.

Finally, LASC suggests a correction to the statement in *item 5d(2)* regarding the consequence of not filing the proposed statement on appeal to conform to rule 8.874. The subcommittee agrees this revision is necessary.

Committee task

The committee's task is to review the proposal and:

- Ask staff or committee members for further information/analysis;
- Recommend to RUPRO that the proposal, as presented or as further revised by the committee, be approved for circulation; or
- Reject the proposal.

Attachments

Draft revised form APP-102
Draft revised form CR-132
Draft revised form CR-142
Draft revised form APP-110
Draft revised form CR-134

APP-102 Notice of Appeal/Cross-Appeal (Limited Civil Case)

Clerk stamps date here when form is filed.

DRAFT

02-09-2018

Not approved by the Judicial Council

Instructions

- This form is only for appealing in a **limited civil case.** You can get other forms for appealing in unlimited civil cases at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- 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*.
- You must serve and file this form **no later than 30 days** after the trial court or a party serves a document called a Notice of Entry of the trial court judgment or a file-stamped copy of the judgment or 90 days after entry of judgment, whichever is earlier (see rule 8.823 of the California Rules of Court for very limited exceptions). **If your notice of appeal is late, your appeal will be dismissed.**
- 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 *What Is Proof of Service?* (form APP-109-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:

The clerk will fill in the number below

Appellate Division Case Number:

1 Your Information

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

☐ *Check here if more than one appellant and attach a separate page or pages listing the other appellants and their contact information. At the top of each page, write "APP-102, item 1a."*

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: _____

2 This is *(check a or b):*

a. ☐ The first appeal in this case.

b. ☐ A cross-appeal (an appeal filed after the first appeal in this case *(complete (1), (2), and (3)).*

(1) The notice of appeal in the first appeal was filed on *(fill in the date that the other party filed its notice of appeal in this case):* _____

(2) The trial court clerk served notice of the first appeal on *(fill in the date that the clerk served the notice of the other party's appeal in this case):* _____

(3) The appellate division case number for the first appeal is *(fill in the appellate division case number of the other party's appeal, if you know it):* _____

3 Judgment or Order You Are Appealing

I am/My client is appealing *(check a or b):*

a. ☐ The final judgment in the trial court case identified in the box on page 1 of this form.
The date the trial court entered this judgment was *(fill in the date):* _____

b. ☐ Other:

(1) ☐ An order made after final judgment in the case.
The date the trial court entered this order was *(fill in the date):* _____

(2) ☐ An order changing or refusing to change the place of trial (venue).
The date the trial court entered this order was *(fill in the date):* _____

(3) ☐ An order granting a motion to quash service of summons.
The date the trial court entered this order was *(fill in the date):* _____

(4) ☐ An order granting a motion to stay or dismiss the action on the ground of inconvenient forum.
The date the trial court entered this order was *(fill in the date):* _____

(5) ☐ An order granting a new trial.
The date the trial court entered this order was *(fill in the date):* _____

(6) ☐ An order denying a motion for judgment notwithstanding the verdict.
The date the trial court entered this order was *(fill in the date):* _____

(7) ☐ An order granting or dissolving an injunction or refusing to grant or dissolve an injunction.
The date the trial court entered this order was *(fill in the date):* _____

3 *(continued)*

(8) ☐ An order appointing a receiver.
The date the trial court entered this order was *(fill in the date):* _____

(9) ☐ Other action *(please describe and indicate the date the trial court took the action you are appealing):*

_____
_____
_____
_____
_____

4 Record Preparation Election

Complete this section only if you are filing the first appeal in this case. If you are filing a cross-appeal, skip this section and go to the signature line.

If you are filing the first appeal in this case, you must complete Appellant's Notice Designating Record on Appeal (Limited Civil Case)*(form APP-103). Check a or b:*

a. ☐ I will serve and file *Appellant's Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103) together with this notice of appeal.

b. ☐ I will serve and file *Appellant's Notice Designating Record on Appeal (Limited Civil Case)* (form APP-103) later. I understand that I must file this notice in the trial court within 10 days of the date I file this notice of appeal, and that if I do not file the notice designating the record on time, the court may dismiss my appeal.

REMINDER: Except in the very limited circumstances listed in rule 8.823, you must serve and file this form no later than (1) 30 days after the trial court clerk or a party serves either a document called a Notice of Entry of the trial court judgment or a file-stamped copy of the judgment or (2) within 90 days after entry of judgment, whichever is earlier. If your notice of appeal is late, your appeal will be dismissed.

Date: _____

_____ ▶ _____
Type or print your name *Signature of appellant/cross-appellant or attorney*

CR-132 Notice of Appeal (Misdemeanor)

Clerk stamps date here when form is filed.

DRAFT

2018-02-13

Not approved by the Judicial Council

Instructions

- This form is only for appealing in a **misdemeanor case.** You can get other forms for appealing in a civil or infraction case at any courthouse or county law library or online at *www.courts.ca.gov/forms.*
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- **You must file this form no later than 30 days after the trial court issued the judgment or order you are appealing** (see rule 8.853(b) of the California Rules of Court for very limited exceptions). **If your notice of appeal is late, the court will not take your appeal.**
- Fill out this form and make a copy of the completed form for your records.
- Take or mail the completed form to the clerk's office for the same trial 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 (required):

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

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

Phone: _____ E-mail: _____

c. Appellant's lawyer in the trial court proceedings:

The lawyer filling out this form ☐ is ☐ is not representing the appellant in this appeal.

(If court-appointed counsel on appeal is being requested, see item **4** *.)*

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:

2 Judgment or Order You Are Appealing

I am/My client is appealing *(check one):*

a. ☐ The final judgment of conviction in this case (Penal Code section 1466(b)(1)).
   ☐ I am/My client is contesting only the conditions of the probation.

b. ☐ The following order made after the judgment in this case that affects an important right of mine/my client (for example, an order after a probation violation) (Penal Code section 1466(b)(1)).
   ☐ An order modifying the conditions of probation.
   ☐ Other*(describe the action you are appealing and give the date the trial court took the action):*
   _____

c. ☐ The trial court has not yet issued a final judgment in this case. I am appealing before final judgment an order that denied a motion to suppress evidence in this case (Penal Code section 1538.5(j)).

d. ☐ Other action *(describe the action you are appealing and give the date the trial court took the action):*
   _____
   _____
   _____

3 Record on Appeal

(See form CR-131-INFO for information about the record on appeal.)

a. ☐ I have attached a completed *Notice Regarding Record on Appeal (Misdemeanor)* (form CR-134).

b. ☐ I have **not** attached a *Notice Regarding Record on Appeal (Misdemeanor)* (form CR-134). I understand that I must file this notice in the trial court within either: (1) 20 days after I file this notice of appeal; or, if it is later, (2) 10 days after the court appoints a lawyer for me (if I file a request for a court-appointed lawyer within 20 days after I file my notice of appeal). I also understand that if I do not file the notice on time, the court will not be able to consider what was said in the trial court in deciding whether an error was made in the trial court proceedings. In addition, if I do not file the notice on time, the court may appoint new counsel or dismiss my appeal.

4 Court-Appointed Lawyer

a. Do you/does your client want to be represented by a court-appointed lawyer in this appeal? *(Answer yes or no.)*
   ☐ Yes. Complete and attach *Request for Court-Appointed Lawyer in Misdemeanor Appeal* (form CR-133).
   ☐ No.

b. Were you/was your client represented by the public defender or other court-appointed lawyer in the trial court? *(Answer yes or no.)*
   ☐ Yes.
   ☐ No. If you answered yes to 4a, complete and attach *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210).

REMINDER—Except in the very limited circumstances listed in rule 8.853, you must file this form no later than 30 days after the trial court issued the judgment or order you are appealing in your case. If your notice of appeal is late, the court will not take your appeal.

Date: _____

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

CR-142 Notice of Appeal and Record on Appeal (Infraction)

Clerk stamps date here when form is filed.

DRAFT

2018-02-13

Not approved by the Judicial Council

Instructions

- This form is only for appealing in an **infraction** case, such as a case about a traffic ticket. You can get other forms for appealing in a civil or misdemeanor case at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- Before you fill out this form, read *Information on Appeal Procedures for Infractions* (form CR-141-INFO) to know your rights and responsibilities. You can get form CR-141-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- You must file this form **no later than 30 days after the trial court issued the judgment or order you are appealing** (see rule 8.902(b) of the California Rules of Court for very limited exceptions). **If your notice of appeal is late, the court will not take your appeal.**
- Fill out this form and make a copy of the completed form for your records.
- Take or mail the completed form to the clerk's office for the same trial 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:

The clerk will fill in the number below:

Appellate Division Case Number:

1 Your Information

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

Name: _____

b. Appellant's contact information (required):

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

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

Phone: _____ E-mail: _____

c. Appellant's lawyer in the trial court proceedings:

The lawyer filling out this form ☐ is ☐ is not representing the appellant in this appeal.

Name: _____ State Bar number: _____

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

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

Phone: _____ E-mail: _____

Fax: _____

(2) Judgment or Order You Are Appealing

I am/My client is appealing *(check a, b, or c):*

a. ☐ the final judgment of conviction in the case (Pen. Code § 1466(2)(A)).
The trial court issued (rendered) this judgment on *(fill in the date):*

b. ☐ an order made by the trial court after judgment that affects an important (substantial) right of mine/my client (Pen. Code § 1466(20(B)).
The trial court issued (rendered) this order on *(fill in the date):*

c. ☐ Other (Describe the action you are appealing and indicate the date the trial court took the action.):

_____
_____
_____
_____

Your Choices About the Record on Appeal

Stipulation for Limited Record

(3) ☐ The respondent and I/my client have agreed ("stipulated") under rule 8.910 that parts of the normal record on appeal are not required for proper determination of this appeal. A copy of our stipulation identifying those parts of the record that are not required is attached. *At the top of each page write "CR-142, item 3."*

Record of Oral Proceedings

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 an error was made in those proceedings.

(4) 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 (5); sign and date this form*). 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 a legal error was made.

(Write initials here): _____

b. ☐ WITH a record of the oral proceedings in the trial court *(complete item (5) 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.

(Write initials here): _____

(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–a, b, c, or d):*

a. ☐ **Statement on Appeal.** *A statement on appeal is a summary of the trial court proceedings approved by the trial court. See form CR-141-INFO for information about preparing a proposed statement. (Check and complete (1) or (2).):*

5 *(continued)*

(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 (Infraction) *(form CR-143) to prepare and file this proposed statement. You can get form CR-143 at any courthouse or county law library or online at* www.courts.ca.gov/forms.)

(2) ☐ I have NOT attached my proposed statement on appeal to this notice. I understand that I must serve the prosecuting attorney if the prosecuting attorney appeared in the case 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 proceed on the clerk's transcript only.

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. Some courts also have local rules that establish procedures for determining whether only a portion of a transcript or a different form of the record will be sufficient for an effective appeal. Check with the trial court to see if it has such a local rule. (Check and (1) or (2).):*

(1) ☐ I will pay the trial court clerk's office for this transcript myself. I understand that if I do not pay for this transcript, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that this transcript be provided at no cost to me because I cannot afford to pay this cost. I have completed and attached *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210). *(You can get form MC-210 at any courthouse or county law library or online at* www.courts.ca.gov/forms. *The court will review this form to decide if you are eligible for a free transcript.)*

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 court proceedings, and you and the respondent (the prosecuting agency) have agreed (stipulated) that you want to use the recording itself as the record of what was said in your 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 respondent to this notice. (Check and complete (1) or (2).):*

(1) ☐ I will pay the trial court clerk's office for this official electronic recording myself. I understand that if I do not pay for this recording, it will not be provided to the appellate division.

(2) ☐ I am asking that this official electronic recording be provided at no cost to me because I cannot afford to pay this cost. I have completed and attached *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210). *(You can get form MC-210 at any courthouse or county law library or online at* www.courts.ca.gov/forms. *The court will review this form to decide if you are eligible for a free copy of the official electronic recording.)*

5 *(continued)*

OR

d. ☐ **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. Some courts also have local rules that establish procedures for determining whether only a portion of the reporter's transcript or a different form of the record will be sufficient for an effective appeal. Check with the trial court to see if it has such a local rule. (Check and complete one of the following):*

(1) ☐ Payment for reporter's transcript. Within 10 days of receiving the court reporter's estimate of the cost of preparing the reporter's transcript, I will:

(A) ☐ Pay for the transcript myself by depositing with the trial court an amount equal to the estimated cost of the transcript.

(B) ☐ Pay the reporter directly and file with the trial court a written waiver of the deposit that is signed by the reporter.

(C) ☐ Request a reporter's transcript at no cost. I am asking that this transcript be provided a no cost to me because I cannot afford to pay this cost. I have completed and attached *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210). *(You can get form MC-210 at any courthouse or county law library or online at www.courts.ca.gov/forms. The court will review this form to decide if you are eligible for a reporter's transcript at no cost to you.)*

I understand that if I do not pay for this transcript and I am not eligible for a reporter's transcript at no cost, the reporter's transcript will not be prepared and provided to the appellate division.

(2) ☐ Certified transcript. Within 10 days of receiving the court reporter's estimate of the cost of preparing the reporter's transcript, I will file with the trial court a certified transcript of all the proceedings required by rule 8.918.

Date: _____

_____ ▶ _____

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

APP-110 Respondent's Notice Designating Record on Appeal (Limited Civil Case)

Clerk stamps date here when form is filed.

DRAFT

2018-02-13

Not approved by the Judicial Council

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*.
- 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 *What Is Proof of Service?* (form APP-109-INFO) or 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 that is being appealed. 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 respondent (the party who is responding to an appeal filed by another party):

Name: _____

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

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

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

Phone: _____ E-mail: _____

c. Respondent's lawyer *(skip this if the respondent 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 the Appeal

2 On *(fill in the date):* _____ another party 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):* _____ the appellant filed an appellant's notice designating the record on appeal.

Record of the Documents Filed in the Trial Court

4 The appellant elected (chose) to use a clerk's transcript under rule 8.832 as the record of the documents filed in the trial court.

a. ☐ **Additional documents or exhibits.** *If you want any documents or exhibits in addition to those designated by the appellant to be included in the clerk's transcript, you must identify those documents here.*

(1) **Documents**

☐ In addition to the documents designated by the appellant, 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)	

☐ *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-110, item 4a(1)."*

(2) **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

☐ *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-110, item 4a(2)."*

4 (continued)

b. ☐ **Copy of clerk's transcript.** I request a copy of the clerk's transcript. *(Check (1) or (2).)*

(1) ☐ I will pay the trial court clerk for this transcript myself when I receive the clerk's estimate of the costs of the transcript.

(2) ☐ I am asking that a copy of 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 (a) or (b) and submit the checked 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.)*

Record of Oral Proceedings in the Trial Court

5 The appellant elected to use the following record of what was said in the trial court proceedings *(check and complete **only one** of the following below—a, b, or c):*

a. ☐ **Reporter's Transcript.** The appellant elected to use a reporter's transcript under rule 8.834 as the record of the oral proceedings in the trial court.

(1) ☐ **Designation of additional proceedings to be included in the reporter's transcript.** *(If you want any proceedings in addition to the proceedings designated by the appellant to be included in the reporter's transcript, you must identify those proceedings here.)*

In addition to the proceedings designated by the appellant, 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-110, item 5a(1)."*

5 a. (continued)

(2) ☐ **Certified transcripts.** I have attached to this Respondent's Notice Designating the Record on 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 of the California Rules of Court.

(3) **Copy of reporter's transcript.** I request a copy of the reporter's transcript.

(a) ☐ I will pay for the reporter's transcript. Within 10 days of receiving the reporter's estimate of the cost of the transcript, I will:

(i) ☐ Deposit an amount equal to the estimated cost of the transcript with the trial court, and a fee of $50 for the trial court to hold this deposit in trust. I understand that if I do not comply with this requirement, I will not receive a copy of the transcript.

(ii) ☐ Pay the reporter directly and file with the trial court a copy of the written waiver of deposit signed by the reporter. I understand that if I do not comply with this requirement, I will not receive a copy of the transcript.

(b) ☐ I am unable to afford the cost of the reporter's transcript and am therefore applying to the Transcript Reimbursement Fund to pay for this transcript. Within 10 days of receiving the reporter's estimate of the cost of the transcript, 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 of filing my application, I must file with the trial court a copy of the provisional approval of my application or pay for the reporter's transcript as provided in (a). I understand that if I do not comply, I will not receive a copy of the transcript.

(4) **Format of reporter's transcript.** I request that the reporter provide my copy of the transcript in:

(a) ☐ Electronic format only.

(b) ☐ Paper format only.

(c) ☐ Electronic format and a second copy of the reporter's transcript in paper format.

OR

b. ☐ **Transcript From Official Electronic Recording.** The appellant elected to use the transcript from an official electronic recording as the record of the oral proceedings in the trial court under rule 8.835(b).

(1) ☐ **Designation of additional proceedings to be included in the transcript.** *(If you want any proceedings in addition to the proceedings designated by the appellant to be included in the transcript, you must identify those proceedings here.)*

In addition to the proceedings designated by the appellant, I request that the following proceedings in the trial court be included in the transcript. (*You must 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.)*

5 b. (1) (continued)

Date	Department	Description	Electronic Monitor's Name
(a)			
(b)			
(c)			

☐ *Check here if you need more space to describe any proceeding or to list other proceedings and attach a separate page describing or listing those proceedings. At the top of each page, write "APP-110, item 5b(1)."*

(2) **Copy of the transcript**. *(Check and complete (a) or (b).)*

(a) ☐ I will pay the trial court clerk for this transcript myself when I receive the clerk's estimate of the cost of the transcript. I understand that if I do not pay for the transcript, I will not receive a copy.

(b) ☐ I am asking that the 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 (a) or (b) and submit the appropriate 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

c. ☐ **Copy of Official Electronic Recording.** The appellant and I have agreed to use the official electronic recording itself as the record of the oral proceedings in the trial court under rule 8.835(a). I request a copy of this recording. *(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.

(2) ☐ I am asking that the 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 (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.)*

Date: _____

_____ ▶ _____

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

CR-134 Notice Regarding Record on Appeal (Misdemeanor)

Clerk stamps date here when form is filed.

DRAFT

2018-02-13

Not approved by the Judicial Council

Instructions

- This form is only for giving the court notice about the record on appeal in a **misdemeanor case.**
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- This form can be filed with your notice of appeal. If it is not filed with your notice of appeal, this form must be filed within either:
  (1) 20 days after you file your notice of appeal, or, if it is later
  (2) 10 days after the court appoints a lawyer to represent you on appeal (if you file a request for a court-appointed lawyer within 20 days after you file your notice of appeal).
- Fill out this form and make a copy of the completed form for your records.
- Take or mail the completed form to the clerk's office for the same trial court where you filed your notice of appeal. 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 (required):

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

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

Phone: _____ E-mail: _____

c. Appellant's lawyer in the trial court proceedings:

The lawyer filling out this form ☐ is ☐ is not representing the appellant in 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.

Your Choices About the Record on Appeal

Stipulation for Limited Record

(3) ☐ The respondent and I/my client have agreed ("stipulated") under rule 8.860 that parts of the normal record on appeal are not required for proper determination of this appeal. A copy of our stipulation identifying those parts of the record that are not required is attached.

Record of Oral Proceedings

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.

(4) 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 (5) ; sign and date this form*). 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 a legal error was made.

(Write initials here): _____

b. ☐ WITH a record of the oral proceedings in the trial court *(complete item (5) below).* I understand that if I elect (choose) to proceed WITH a record of the oral proceeding 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.

(Write initials here): _____

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–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. Some courts also have local rules that establish procedures for determining whether only a portion of a reporter's transcript or a different form of the record will be sufficient for an effective appeal. Check with the trial court to see if it has such a local rule. (Check and complete (1), (2) or (3)):*

(1) ☐ Certified transcript. Within 10 days of when I receive the court reporter's estimate of the cost of this transcript, I will file a certified transcript of all the proceedings required by rule 8.865 and that complies with rule 8.144.

(2) ☐ I will pay the trial court clerk's office for the reporter's transcript myself within 10 days of when I receive the court reporter's estimate of the costs of this transcript. Alternatively, I will pay the reporter directly and file with the trial court a written waiver of deposit signed by the reporter. I understand that if I do not pay for this transcript, it will not be prepared and provided to the appellate division.

(3) ☐ I am asking that the reporter's transcript be prepared at no cost to me because I cannot afford to pay this cost.

(a) ☐ I was represented by the public defender or another court-appointed lawyer in the trial court proceedings in this case.

(b) ☐ I was not represented by the public defender or another court-appointed lawyer in the trial court proceedings in this case, but I have completed and attached *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210). *(You can get form MC-210 at any courthouse or county law library or online at* www.courts.ca.gov/forms. *The court will review this form to decide if you are eligible for a reporter's transcript at no cost to you.)*

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. Some courts also have local rules that establish procedures for determining whether only a portion of a transcript or a different form of the record will be sufficient for an effective appeal. Check with the trial court to see if it has such a local rule. (Check and complete (1) or (2).):*

(1) ☐ I will pay the trial court clerk's office for this transcript myself. I understand that if I do not pay for this transcript, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that this transcript be provided at no cost to me because I cannot afford to pay this cost.

(a) ☐ I was represented by the public defender or another court-appointed lawyer in the trial court proceedings in this case.

(b) ☐ I was not represented by the public defender or another court-appointed lawyer in the trial court proceedings in this case, but I have completed and attached *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210). *(You can get form MC-210 at any courthouse or county law library or online at* www.courts.ca.gov/forms. *The court will review this form to decide if you are eligible for a reporter's transcript at no cost to you.)*

OR

5 *(continued)*

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 court proceedings, and you and the respondent (the prosecuting agency) have agreed (stipulated) that you want to use the recording itself as the record of what was said in your 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 respondent to this notice. (Check and complete (1) or (2).):*

(1) ☐ I will pay the trial court clerk's office for this official electronic recording myself. I understand that if I do not pay for this recording, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that this official electronic recording be provided at no cost to me because I cannot afford to pay this cost.

(a) ☐ I was represented by the public defender or another court-appointed lawyer in the trial court proceedings in this case.

(b) ☐ I was not represented by the public defender or another court-appointed lawyer in the trial court proceedings in this case, but I have completed and attached *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210). *(You can get form MC-210 at any courthouse or county law library or online at* www.courts.ca.gov/forms. *The court will review this form to decide if you are eligible for a copy of the official electronic recording at no cost to you.)*

OR

d. ☐ **Statement on Appeal.** A statement on appeal is a summary of the trial court proceedings approved by the trial court. See form CR-131-INFO for information about preparing a proposed statement. *(Check and complete (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 (Misdemeanor) *(form CR-135) to prepare and file this proposed statement. You can get form CR-135 at any courthouse or county law library or online at* www.courts.ca.gov/forms.)

(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 appoint new counsel or dismiss my appeal.

Date: _____

_____ ▶ _____

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

Item 07

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
February 20, 2018

To
Members of the Appellate Advisory Committee

From
Christy Simons,
Attorney, Legal Services

Subject
Rules modernization: bookmarking and volumes for exhibits

Action Requested
Please review before committee meeting on February 27

Deadline
February 27, 2018

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

Introduction

Item 5 on the Appellate Advisory Committee's annual agenda, Modernize Appellate Court Rules for E-filing and E-business, includes considering whether to recommend rules for bookmarking electronic exhibits and for submitting electronic exhibits in electronic volumes. This is a priority 2 project with a completion date of January 1, 2019. The Joint Appellate Technology Subcommittee (JATS) recommends deferring this proposal and expanding the scope to address the formatting of electronic documents generally. This memo discusses the proposal and JATS' recommendation.

Background

Back in 2016, JATS decided to set aside the issue of bookmarking electronic exhibits to give those courts new to e-filing (or not yet on e-filing) a chance to gain some experience with it before participating in a decision as to what to require. In light of the developments outlined below, JATS concluded that it may now be appropriate to consider rules regarding electronic exhibits. A project to consider this was therefore included on the committee's annual agenda.

Electronic bookmarks for exhibits

Appellate court local rules

Pursuant to e-filing rules 8.72(a) and 8.74(b),[1] the Supreme Court and the District Courts of Appeal have now adopted local rules to set forth their electronic filing requirements. All of these local rules include recommendations or requirements for electronic bookmarks. These rules are compiled in an attachment to this memorandum.

Trial court rules

The trial court rules now also address bookmarking of exhibits. In 2016, ITAC began Phase II of the rules modernization project. This included amending trial court rules for civil proceedings to require electronic bookmarks for electronic exhibits unless they are submitted by a self-represented litigant. As of January 1, 2017, rule 3.1110(f)(4), regarding the format of motion papers, provides, with respect to exhibits, that, "[u]nless they are submitted by a self-represented party, electronic exhibits must include electronic bookmarks with links to the first page of each exhibit and with bookmark titles that identify the exhibit number or letter and briefly describe the exhibit.

The Phase II project also amended rule 3.1113, which sets forth the requirements for a memorandum in support of a motion, to require electronic bookmarking where authorities or cases are lodged in electronic form as provided in rule 3.1110(f)(4).

Submission of electronic exhibits in electronic volumes

The committee received a suggestion from D'vora Tirschwell, a writ attorney at the First District Court of Appeal, regarding the format for electronic exhibits. In commenting on the 2016 appellate e-filing rules proposal, Ms. Tirschwell suggested creating a requirement that exhibits submitted in electronic form be submitted in electronic volumes rather than individually. Note that, at this time, the First District is considering amendments to its local rule on electronic filing. The amendments under consideration include an advisement that exhibits should be submitted in a single volume, if possible.

[1] Rule 8.72(a) provides: "The court will publish, in both electronic and print formats, the court's electronic filing requirements." Rule 8.74(b) provides: "A document that is filed electronically with the court must be in a format specified by the court unless it cannot be created in that format," and contains minimum requirements for those specifications.

JATS Discussion and Recommendation

At the JATS meeting on February 5, staff presented possible rule amendments to address bookmarking of electronic exhibits and submission of electronic exhibits in volumes (see attached). Staff also raised additional questions such as whether bookmarking should be limited to exhibits, whether new requirements should apply to electronic exhibits generally or be limited to certain contexts, whether exhibit volumes should be required for all exhibits or be limited, and whether other aspects of formatting, such as indexes, covers, and pagination, should be considered.

JATS agreed that more uniformity in the rules regarding formatting of exhibits would be helpful and that courts were now ready for such guidance. JATS discussed both suggestions and obtained additional information on procedure from several members.

Justice Mauro suggested that, rather than limit this effort to proposing rules for electronic exhibits, JATS consider expanding the scope of the project to include formatting requirements for electronic documents generally in appellate proceedings. The subcommittee agreed with this approach and would like to work on the expanded project in the near future.

Committee Task

In light of JATS' recommendation that the proposal not go forward at this time, no draft invitation to comment is included in these materials. The committee's task is to review this proposal and the subcommittee's recommendation and:
(1) ask staff or committee members for further information/analysis;
(2) approve deferring the proposal as recommended by JATS; or
(3) reject the subcommittee's recommendation and direct staff to prepare an invitation to comment.

Attachments

Proposed amended rule 8.74
Supreme Court and District Courts of Appeal local rules regarding electronic filing

Title 8. Appellate Rules

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

Chapter 1. General Provisions

Article 35. E-filing

Rule 8.74. Responsibilities of electronic filer

(a) Conditions of filing

Each electronic filer must:

(1) Comply with any court requirements designed to ensure the integrity of electronic filing and to protect sensitive personal information;

(2) Furnish information that the court requires for case processing;

(3) Take all reasonable steps to ensure that the filing does not contain computer code, including viruses, that might be harmful to the court's electronic filing system and to other users of that system;

(4) Furnish one or more electronic service addresses, in the manner specified by the court, at which the electronic filer agrees to accept service; and

(5) Immediately provide the court and all parties with any change to the electronic filer's electronic service address.

(Subd (a) amended effective January 1, 2011.)

(b) Format of documents to be filed electronically

(1) A document that is filed electronically with the court must be in a format specified by the court unless it cannot be created in that format.

(2) The format adopted by a court must meet the following minimum requirements:

(A) The format must be text-searchable while maintaining original document formatting.

(B) The software for creating and reading documents must be in the public domain or generally available at a reasonable cost.

(C) The printing of documents must not result in the loss of document text, format, or appearance.

(3) The page numbering of a document filed electronically must begin with the first page or cover page as page 1 and use only Arabic numerals (e.g., 1, 2, 3). The page number may be suppressed and need not appear on the cover page.

(4) Exhibits submitted electronically with the court must be in the following format:

(A) All exhibits must include an electronic bookmark to the first page of the exhibit, with the exhibit number or letter and a brief description of the exhibit included in the bookmark.

(B) All exhibits must be submitted in a single volume if possible, with multiple volumes permitted only to the extent necessary to meet file size limitations stated in the court's electronic filing requirements published pursuant to rule 8.72(a). Each volume of exhibits must have a cover stating the volume number and the page numbers included within that volume. Each volume of exhibits must include an index of contents with an electronic bookmark as set forth in (A).

~~(4)~~*(5)* If a document is filed electronically under the rules in this article and cannot be formatted to be consistent with a formatting rule elsewhere in the California Rules of Court, the rules in this article prevail.

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

Rule 8.74 amended and renumbered effective January 1, 2017; adopted as rule 8.76 effective July 1, 2010; previously amended effective January 1, 2011.

Supreme Court Rules Regarding Electronic Filing

Amended and effective February 1, 2018

Rule 1. Application; electronic filing system.

These rules govern electronic filing in the Supreme Court under California Rules of Court, rules 8.70 – 8.79. The court's electronic filing system (EFS) is operated by ImageSoft TrueFiling (TrueFiling).

Rule 2. Documents subject to electronic filing

Rules 3 and 4 identify the documents that must or may be filed electronically in the Supreme Court. No document other than those identified in rules 3 and 4 may be filed electronically in the Supreme Court.

Rule 3. Mandatory electronic filing

(a) Documents that attorneys must file electronically

Pursuant to California Rules of Court, rule 8.71, effective September 1, 2017, unless the court grants a motion for an excuse under rule 6, all attorneys representing a party in a matter before the court must file the documents listed in this subdivision electronically through the court's EFS.

(1) *Documents in proceedings under rules 8.500-8.508*

All documents filed before the court issues its decision to grant or deny review, including:

(A) Petitions for review; answers, replies;

(B) Applications to permit the filing of a petition, answer, reply, or attachment that exceeds the length limits set by California Rules of Court, rule 8.504(d);

(C) Applications to extend the time to file an answer or reply;

(D) Motions for relief from default for failure to timely file a petition, answer, or reply;

(E) All other applications and motions in these proceedings filed before the court issues its decision to grant or deny review; and

(F) Any correspondence filed in connection with the documents in (A) – (E).

(G) Amicus curiae letters under California Rules of Court, rule 8.500(g) and requests for depublication and related documents under California Rules of Court, rule 8.1125. may be filed electronically on a voluntary basis. (See Rule 4.)

(2) *Documents in proceedings under rules 8.380-8.385*

All documents filed before the court issues an order to show cause or its ruling on the petition, including:

(A) Petitions for writ of habeas corpus; informal responses, replies;

(B) Applications to permit the filing of a petition, informal response, reply, or attachment that exceeds the length limits set by California Rules of Court, rule 8.204(c);

(C) Applications to extend the time to file an informal response or reply;

(D) Motions for relief from default for failure to timely file an informal response, or reply;

(E) All other applications and motions in these proceedings filed before the court issues an order to show cause or its ruling on the petition; and

(F) Any correspondence filed in connection with the documents in (A) – (E).

(3) *Documents in matters arising from a judgment of death*
All documents filed in these matters. For purposes of this subdivision:

(A) Matters arising from a judgment of death include:

(i) Automatic appeals under California Rules of Court, rules 8.600-8.642;

(ii) Habeas corpus proceedings in the court under California Rules of Court, rules 8.380-8.388 that involve a challenge to the validity of the petitioner's death judgment, including proceedings before any referee appointed by the court to conduct a hearing following the court's issuance of an order to show cause; and;

(ii) Other original writ proceedings in the court under California Rules of Court, rules 8.485-8.493 that relate to an automatic appeal or a habeas corpus proceeding challenging the validity of the death judgment, including proceedings on petitions for a writ of mandate under Penal Code section 1405, subdivision (k).

(B) Matters arising from a judgment of death do not include:

(i) Habeas corpus proceedings on petitions challenging only a capital inmate's conditions of confinement; and

(ii) Proceedings under California Rules of Court, rules 8.500-8.552 that relate to an automatic appeal or a habeas corpus proceeding challenging the validity of the death judgment, including petitions for review from lower court decisions regarding Penal Code section 1054.9 motions. These proceedings are governed by subdivision (a)(1) of this rule.

(C) A superior court judge who is appointed by the court as a referee in a proceeding under (A)(ii) is not considered a trial court for purposes of exemption from mandatory e-filing under California Rules of Court, rule 8.71(c).

(3) *Other documents on order of the court*
Any other document on order of the court.

(b) Application to new and pending cases
Electronic filing of the documents listed in (a) is mandatory as of September 1, 2017, including documents filed in cases commenced before that date.

Rule 4. Voluntary electronic filing

(a) Individuals or entities exempt from mandatory electronic filing
Pursuant to California Rules of Court, rule 8.71(b) and (c), electronic filing is voluntary for:

(1) Self-represented litigants; and

(2) Trial courts.

(b) Amicus curiae letters and requests for depublication
Amicus curiae letters under California Rules of Court, rule 8.500(g) and requests for depublication and related documents under California Rules of Court, rule 8.1125 may be filed electronically on a voluntary basis.

Rule 5. Submission of paper copies of electronically filed documents

(a) Documents in proceedings under rules 8.500-8.552
Unless otherwise ordered by the court:

(1) For each electronically filed document in these proceedings, the filer must also submit to the court one unbound paper copy of the document.

(2) The paper copy must be mailed, delivered to a common carrier, or delivered to the court within two court days after the document is filed electronically with the court. If the filing requests an immediate stay, the paper copy must be delivered to court by the close of business the next court day after the document is filed electronically.

(b) Documents in matters arising from a judgment of death
Unless otherwise ordered by the court:

(1) For each electronically filed document in these matters, the filer must also submit to the court one unbound paper copy of the document.

(2) The paper copy must be mailed, delivered to a common carrier, or delivered to the court within two court days after the document is filed electronically with the court.

Rule 6. Excuse from electronic filing

(a) Motion requesting excuse
A party wanting to be excused from the requirement to file a document electronically must file a motion in the court requesting to be excused. The motion must comply with California Rules of Court, rule 8.54 and must specify whether the party is requesting to be excused from electronically filing all documents or only a particular document or documents.

(b) Grounds for excuse

Pursuant to California Rules of Court, rule 8.71(d), the court will grant an excuse on a satisfactory showing that:

(1) The party will suffer undue hardship if required to file electronically;

(2) The party will suffer significant prejudice if required to file electronically; or

(3) It is not feasible for the party to convert a particular document to electronic form by scanning, imaging, or another means.

Rule 7. Registration of electronic filers

(a) Obligation to register

Unless the court excuses the filer from this obligation under rule 6, every filer who is required or voluntarily chooses to file a document electronically under these rules must register as a TrueFiling user and obtain a username and password for access to TrueFiling. Registration with and access to the EFS is through the TrueFiling website at https://www.truefiling.com.

(b) Registered users' responsibilities

A registered TrueFiling user is responsible for all documents filed under the user's registered username and password. The registered user must also comply with the requirements of California Rules of Court, rule 8.32 regarding the duty to provide address and other contact information, and notice of any changes.

Rule 8. Signatures

Use of a registered TrueFiling user's username and password to electronically file a document is the equivalent of placing the registered user's electronic signature on the document.

Rule 9. Service

(a) Electronic service

In addition to the ways identified in California Rules of Court, rule 8.78 that a recipient may agree to accept electronic service, a recipient is deemed to have agreed to electronic service in a matter before this court if the recipient agreed to electronic service in the same matter in the Court of Appeal.

(b) Service by the court

Documents prepared by the court will be served on EFS users through the EFS or by electronic notification.

(c) Service of paper copies

When service of a document is required to be made on a person or entity that has not consented to electronic service, the server must comply with California Rules of Court, rule 8.25 regarding service of paper copies.

Rule 10. Format and size of electronically filed documents

(a) Format

(1) *Text searchable format*

All documents filed electronically must be in text-searchable PDF (portable document format), or other searchable format approved by the court, while maintaining original document formatting. If an electronic filer must file a document the filer possesses only in paper format, the filer must convert the document to an electronic document that complies with this rule by scanning or other means. It is the filer's responsibility to ensure that any document filed is complete and readable. Except as otherwise specified in this rule, electronically filed documents must comply with the content and form requirements of the California Rules of Court applicable to the particular document, with the exception of those provisions dealing exclusively with requirements for paper documents.

(2) *Pagination*

The page numbering of document filed electronically must comply with California Rules of Court, rule 8.74(b)(3).

(3) *Electronic Bookmarks*

Each document must include in the bookmarks panel of the electronic document a descriptive link (hereafter referred to as an electronic bookmark), to each heading, subheading and to the first page of any component of the document, including any table of contents, table of authorities, petition, verification, points and authorities, declaration, certificate of word count, certificate of interested entities or persons, proof of service, tab, exhibit, or attachment. Each electronic bookmark to a tab, exhibit, or attachment must include the letter or number of the tab, exhibit, or attachment and a description of the tab, exhibit, or attachment.

(b) Size

(1) An electronic filing may not be larger than 25 megabytes. This rule does not change the length limitations established by the California Rules of Court for petitions, answers, replies, briefs or any other document filed in the court.

(2) If a document exceeds the size limitation in (1), a party must submit the document in multiple files.

(A) These files must be paginated consecutively across all files in the document, including the cover pages required by (B).

(B) Each file must have a cover page that includes the following information:

(i) The total number of files constituting document;

(ii) The number of this file within the document;

(iii) The total number of pages in the document; and

(iv) The page numbers of the document contained in this file.

(C) The cover pages required by (B) must be included in the paper copies of the document submitted to the court under rule 5.

Rule 11. Privacy Protection

(a) Personal Identifiers

Electronic filers must comply with California Rules of Court, rule 1.201 regarding exclusion or redaction of personal identifiers from all documents filed with the court. Neither TrueFiling nor the Clerk of the Court has any responsibility to review documents for compliance with these requirements.

(b) Sealed and Confidential Records

Electronic filers must comply with California Rules of Court, rules 8.45-8.47 regarding sealed and confidential records, with the exception of those requirments exclusively applicable to paper filings.

Rule 12. Fees

(a) Collection of filing fees

For electronic filings, TrueFiling is designated as the court's agent for collection of filing fees required by law and any associated credit card or bank charges or convenience fees.

(b) Vendor fees

Pursuant to California Rules of Court, rule 8.73 and TrueFiling's contract with the court, in addition the filing fees required by law, TrueFiling will assess fees for each electronic filing in accordance with the schedule posted on the TrueFiling Web site, as approved by the court. These fees will be considered recoverable costs under rule 8.278(d)(1)(D).

(c) Exemption from vendor fees

The following are exempt from the fees charged for electronic filing under (b):

(1) *Parties with fee waivers*
A party who has been granted a fee waiver by the court who chooses to file documents electronically.

(2) *Government officers and entities*
The persons and entities identified in Government Code section 6103.

Rule 13. Technical Failure of Electronic Filing System

The court is not responsible for malfunctions or errors occurring in the electronic transmission or receipt of electronically filed documents. The initial point of contact for anyone experiencing difficulty with TrueFiling is the toll-free telephone number posted on the TrueFiling Web site. California Rules of Court, rule 8.77, governs if a filer fails to meet a filing deadline imposed by court order, rule, or statute because of a failure at any point

in the electronic transmission and receipt of a document. A motion under California Rules of Court, rule 8.77(d) to accept the document as timely filed must comply with rule 8.54.

LOCAL RULES OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT

Published pursuant to California Rules of Court, rule 10.1030

As amended effective May 1, 2015

Rule 16. Electronic Filing

Pursuant to California Rules of Court, rule 8.70, the Court will require all filings in this District, effective March 17, 2014, for all civil filings and effective April 14, 2014, for all criminal and juvenile filings, to be made through the Court's electronic filing system (EFS) operated by ImageSoft TrueFiling (TrueFiling). Use of the EFS system is mandatory for all attorneys filing in this District, unless an exemption is granted, and is voluntary for all self-represented litigants. A filing in electronic format will be accepted in lieu of any paper copies otherwise required under California Rules of Court, rule 8.44 and constitutes the official record of the Court.

(a) [Registration]

(1) Obligation to Register. Each attorney of record in any proceeding in this District is obligated to become an EFS user and obtain a user ID and password for access to the TrueFiling system. Self-represented litigants must register if they wish to e-file. Attorneys and self-represented litigants may register at: <https://www.truefiling.com/_layouts/ElectronicFile.Main/SignUp.aspx>

(2) Obligation to Keep Account Information Current. An EFS user is responsible for all documents filed under the user's registered ID and password. Registered users are required to keep their e-mail address current and may update their e-mail address online via the TrueFiling Web site.

(b) [Format]

(1) Documents filed electronically must be in PDF format, or readily capable of conversion to PDF format while maintaining original document formatting by TrueFiling to permit text searches and to facilitate transmission and retrieval. If the filer possesses only a paper copy of a document, it may be scanned to convert it to a searchable PDF format. It is the filer's responsibility to ensure that any document filed is complete and readable. No single document shall exceed a total file size of 25 MB.

(2) Electronic briefs must comply with the content and form requirements of California Rules of Court, rule 8.204, with the exception of those provisions

dealing exclusively with requirements for paper. Electronic bookmarks to each topic heading in the text (as listed in the table of contents) in briefs are recommended, and required for all briefs exceeding forty (40) pages.

(3) Motions and Original Proceedings. All motions and original proceedings must include electronic bookmarks to each section heading in the text (as listed in the table of contents), and to the first page of any exhibit(s), with the exhibit number or letter and a description of the exhibit included in the bookmark.

Pleadings and exhibits not properly formatted may be rejected.

(c) [Signatures] A TrueFiling user ID and password is the equivalent of an electronic signature for a registered attorney or party. Any document displaying the symbol "/s/" with the attorney's or party's printed name shall be deemed signed by that attorney/party.

(d) [Trial Court Record]

(1) Appendices, Agreed Statements, and Settled Statements. Parties must submit any appendix filed pursuant to California Rules of Court, rule 8.124, any agreed statement filed pursuant to California Rules of Court, rule 8.134, or any settled statement filed pursuant to California Rules of Court, rule 8.137 in electronic form. Appendices exceeding ten volumes may be delivered to the court on machine readable optical media in lieu of e-filing. Each part of the record submitted in any appendix or exhibit volume shall clearly state the volume and page numbers included within that part and include an index of contents, with a descriptive electronic bookmark including exhibit number or letter, to the first page of each indexed document (e.g., Exhibit 1 – First Amended Complaint).

(2) Administrative Records. In addition to any administrative record provided by the trial court pursuant to California Rules of Court, rule 8.123, the party or parties seeking review must submit a copy of the administrative record in electronic form. An administrative record may be delivered to the court on machine readable optical media in lieu of e-filing.

(3) Reporter's Transcripts. Any party who orders a reporter's transcript of proceedings pursuant to California Rules of Court, rule 8.130 must also request a copy of the transcript in computer-readable format, as provided in California Rules of Court, rule 8.130(f)(4), and submit an electronic copy to the Court.

Should the record of trial court proceedings exceed the TrueFiling size limitations, a party must either (a) submit the record in multiple parts, or

(b) provide the Court with the record in digital format on machine readable optical media.

(4) Submissions by the Trial Court. The trial court is encouraged, but is not required to, submit the clerk's transcript and/or the reporter's transcript(s) in searchable PDF format, either through the TrueFiling system or a court provided portal, in lieu of paper copies otherwise required under the California Rules of Court, and to make electronic versions available to parties willing to accept them in lieu of paper copies. Digital copies of clerk's transcripts and reporter's transcripts must comply with the content and form requirements set forth in the California Rules of Court with the exception of those provisions dealing exclusively with requirements for paper.

(e) [Personal Identifiers and Privacy Issues] To protect personal privacy, parties and their attorneys must not include, or must redact where inclusion is necessary, personal identifiers such as social security numbers, driver's license numbers, and financial account numbers from all pleadings and other papers filed in the Court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the Court. (California Rules of Court, rule 1.20(b).) If an individual's social security number is required in a pleading or other paper filed in the public file, only the last four digits of that number shall be used. If financial account numbers are required in a pleading or other paper filed in the public file, only the last four digits of these numbers shall be used. Particularly sensitive confidential information such as medical records and proprietary or trade secret information should be filed only under seal as required by law or authorized pursuant to the California Rules of Court.

The responsibility for excluding or redacting identifiers from all documents filed with the Court rests solely with the parties and their attorneys. (California Rules of Court, rule 1.20(b)(3).) Neither TrueFiling nor the Clerk of the Court has any responsibility to review pleadings or other papers for compliance.

(f) [Filing Deadlines] Filing documents electronically does not alter any filing deadlines. In order to be timely filed on the day they are due, all electronic transmissions of documents must be completed (i.e., received completely by the Clerk of the Court) prior to midnight. Where a specific time of day is set for filing by Court order or stipulation, the electronic filing shall be completed by that time. Although EFS permits parties to submit documents electronically 24 hours a day, users should be aware that telephone or online assistance may not be available outside of normal Court business hours.

(g) [Completion of Filing] Electronic transmission of a document through TrueFiling in compliance with the California Rules of Court shall, upon confirmed

receipt of the entire document by the Clerk of the Court, constitute filing of the document for all purposes.

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

The Clerk of the Court shall deem the EFS system to be subject to a technical failure whenever the system is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 12:00 noon that day. Filings due on the day of a technical failure which were not filed solely due to such technical failure shall be due the next court day. Such delayed filings shall be accompanied by a declaration or affidavit attesting to at least two attempts by the filer to file electronically after 12:00 noon with each attempt at least one hour apart on each day of delay due to such technical failure. The initial point of contact for any practitioner experiencing difficulty filing a document into the EFS system shall be the toll-free number posted on the TrueFiling Web site.

The Court shall not be responsible for malfunction or errors occurring in electronic transmission or receipt of electronically filed documents.

(i) [Manual Filing] An EFS user may be excused from filing a particular document electronically if (1) it is not available in electronic format; (2) it must therefore be scanned to PDF; *and* (3) the file size of the scanned document exceeds the limit specified on the EFS Web site. Such a document instead shall be manually filed with the Clerk of Court and served upon the parties in accordance with the statutory requirements and the California Rules of Court applicable to service of paper documents. Parties manually filing a document shall file electronically a manual filing notification setting forth the reason why the document cannot be filed electronically.

(j) [Service] An attorney's registration with TrueFiling to participate in EFS constitutes consent to service or delivery of all documents by any other party in a case through the system. (California Rules of Court, rule 8.71.) Orders or other documents generated by the Court will be served only through the EFS or by e-mailed notification. Only self-represented litigants who are not registered EFS users will receive manual service or notification by other means.

(k) [Filing fees] TrueFiling is a private vendor under contract with the Court. TrueFiling will assess vendor fees for each filing in accordance with the schedule posted

on its Web site, as approved by the Court. E-filing fees will be considered recoverable costs under California Rules of Court, rule 8.278(d)(1)(D). TrueFiling is designated as the Court's agent for collection of Court imposed fees where required for any filing, and any associated credit card or bank charges or convenience fees (California Rules of Court, rule 8.78; Gov. Code, § 6159).

Self-represented parties are exempt from the requirement of electronic filing. However, should a self-represented party with a fee waiver opt to file documents electronically, that party is exempt from the fees and costs associated with electronic filing. The persons and entities identified in Government Code section 6103 also are exempt from the fees and costs associated with e-filing.

(*l*) [Exemptions] Self-represented parties may, but are not required to register for electronic filing, but must comply with this rule and the requirements of TrueFiling if they elect to register.

If this rule causes undue hardship or significant prejudice to any party, the party shall lodge the number of paper copies required by the California Rules of Court without regard to electronic filing, plus an additional unbound paper copy in lieu of the electronic copy, accompanied by a declaration setting forth facts that support the claim of hardship. Acceptance of the lodged papers for filing will be subject to further order of the Court. When it is not otherwise feasible for a party to convert a document to electronic form by scanning, imaging or other means, the document may be filed in paper form (California Rules of Court, rule 8.73(c)), together with a declaration setting forth the reasons that electronic filing was not feasible.

(m) [Sanctions for Noncompliance] Failure of counsel to timely register or otherwise comply with EFS filing requirements, unless exempted, shall subject counsel to sanctions as may be imposed by the Court.

(n) [Posting and Publication] The Clerk of the Court is directed to post a copy of this rule on the Court's Web site pursuant to California Rules of Court, rule 8.74(a), and to submit a copy to the Reporter of Decisions for publication pursuant to California Rules of Court, rule 10.1030(a).

Electronic Formatting Requirements and Guidelines of the Second District

Pursuant to California Rules of Court rules 8.72(a) and 8.74(b)

Effective October 30, 2017

Formatting Requirements

1. **Text-searchable format**
   All documents must be text-searchable, in PDF (portable document format) while maintaining the original document formatting.

2. **Pagination**
   The page numbering of a document filed electronically must begin with the first page or cover as page 1 and use only Arabic numerals (e.g., 1, 2, 3). Documents consisting of multiple files must be paginated consecutively across all files. The Adobe Page Counter number must match the consecutive page numbering.

3. **Electronic Bookmarks**
   All briefs, original proceedings, motions and applications with attachments must include electronic bookmarks to each heading, subheading and component of the document. This includes such items as the table of contents, table of authorities, petition, verification, points and authorities, declaration, certificate of word count, certificate of interested entities or persons, and proof of service. Each bookmark to a tab, exhibit, or attachment must include the letter or number of the tab, exhibit or attachment and a description of the tab, exhibit or attachment. The required setting for all bookmarks is "Inherit Zoom" which retains the user's currently selected zoom setting.

Any appendix filed electronically must have a separate electronic bookmark to the indexes and to the first page of each separate exhibit and attachment. Exhibits or attachments included within an exhibit or attachment must be separately bookmarked.

4. **Size**
   No single PDF file may exceed 25 megabytes. Notwithstanding provisions to the contrary in the California Rules of Court, electronically filed documents may exceed the 300 page limit as long as the file size is 25 megabytes or smaller. If submitting multiple files in TrueFiling would cause undue hardship, any registered user may file an application in TrueFiling, requesting permission to provide the court with the filing in electronic format (e.g. on a flash drive, or alternatively on CD or DVD), explaining the reason for the manual filing. Please note any audio files must be submitted in .wav or mp3 format and any video files must be submitted in .avi or mp4 format.

5. **Documents consisting of multiple files**
   A document consisting of multiple files must include on the cover page of each file, (i) the file number, (ii) the total number of files, (iii) the page numbers contained in that file, and (iv) the total number of pages for all the files. The first file must include a master chronological and alphabetical index stating the contents for all files. The remaining files must include a cover page, but an individual index is not required.

6. **Privacy Protection**
   Electronic filers must comply with California Rules of Court, rule 1.201 regarding exclusion or redaction of personal identifiers from all documents filed with the court. Neither TrueFiling nor the Clerk of the Court has any responsibility
   to review documents for compliance with these requirements.

Formatting Guidelines

Filers are encouraged, but not required, to follow these guidelines which are designed to improve the functionality and readability of documents filed with the court. (See ***The Leap from E-Filing to E-Briefing,*** *Recommendations and Options for Appellate Courts to Improve the Functionality and Readability of E-Briefs* (2017).)

1. **Font Style**
   A proportionally spaced serif face, such as Century School Book, Century, Bookman Old Style, Book Antiqua, etc. Do not use Times New Roman.

2. **Font size**
   13 pt. text (including footnotes).

3. **Spacing**
   1.2 (currently 1.5). In terms of readability, ideal line spacing is closer to single spacing than double spacing. In Microsoft Word and WordPerfect, setting line spacing at 1.2x closely approximates the standard that is used in professionally published books and scholarly journals, as well as generally required for U.S. Supreme Court briefs, which is 2 points of leading between each line of text. *See* Sup. Ct. R. 33(1)(b). By contrast, so-called "double spacing" in Microsoft Word is equivalent to 2.23 spacing, and in WordPerfect is similar, which is almost twice the professional standard. (See Matthew Butterick, *Typography for Lawyers*, at 137-38 (2d ed. 2015).)
   [footnotes and quotations may be single spaced]

4. **Margins**

   1.5" on all sides. An 8½" by 11" page is very large for a publication intended to be read, as distinguished from a reference book or the like that is typically not read for an extended period. Only the economy and convenience of using standard letter-size paper justifies such an oversized page. Letter-size paper avoids the complexities of booklet format, such as laying out signatures, trimming pages, saddle stitching the booklet, etc. *See* U.S. Government Printing Office Style Manual (30th ed. 2008).

5. **Alignment**

   Left Aligned. Left aligned text is easier to read than justified text. Like double spacing, justification is a relic of typesetting days, but many legal writers continue to use it out of habit, without thinking about the fact that it is less readable.

6. **Miscellaneous**

   Use "curly" or "smart" quotation marks and apostrophes (rather than "straight") Boldface and Italics to be used instead of underlining. Do not use ALL CAPS. Emphasis is an effective tool when used well. In terms of readability, most experts prefer **boldface** and *italics*, and strongly disfavor <u>underlining.</u>

7. **File Formatting**

   Whenever possible **do not scan** documents. Convert to PDF format in a word processing program. Compile documents, e.g. appendices, using E-Copies rather than scanned copies with OCR.

8. **Hyperlink**

   Hyperlinked Briefs. Filers are encouraged to hyperlink their briefs and writs to legal citations and appendices or exhibits.

LOCAL RULES OF THE COURT OF APPEAL
THIRD APPELLATE DISTRICT

Published pursuant to California Rules of Court, rule 10.1030

Effective September 14, 2015
Amended effective September 26, 2016
Amended effective December 11, 2017

Rule 5. Electronic Filing

(a) Definitions

As used in this local rule, unless the context otherwise requires:

(1) "Court" means the Court of Appeal for the Third Appellate District.

(2) "Electronic filing" is the electronic transmission to the court of a document in electronic form.

(3) A "document" is:

(A) Any filing submitted to the court, including but not limited to a brief, a petition, an appendix, or a motion;

(B) Any document transmitted by a trial court to the court, including but not limited to a notice or a clerk's or reporter's transcript; or

(C) Any writing prepared by the court, including but not limited to an opinion, an order, or a notice.

(4) A "file" is a unit of electronic information with a filename.

(5) "TrueFiling" is the court's electronic filing portal for registered users.

(6) "Registered user" and "registered users" refer to a person or persons registered to use TrueFiling.

(7) "EFS" means the court's electronic filing system, which includes, but is not limited to, TrueFiling and the court's file transfer protocol (FTP) server.

(8) "EFS user" and "EFS users" refer to a user or users of the court's electronic filing system.

(b) Mandatory electronic filing

Pursuant to the California Rules of Court, the court requires the electronic filing of all documents with the court unless this local rule provides otherwise. Electronic filing is mandatory for all attorneys filing with the court unless an exemption is granted; electronic filing is voluntary for all non-attorney self-represented litigants. This local rule applies in all cases, including pending cases in which paper documents have been filed before the effective date of this local rule. Except as provided in this local rule, an electronic filing will be accepted in lieu of any paper copies otherwise required by the California Rules of Court, and constitutes the official record of the court.

(c) Registration

(1) *Obligation to Register*. Each attorney in any proceeding in this court is obligated to become a registered user and obtain a username and password for access to TrueFiling unless an exemption is granted. Non-attorney self-represented litigants must become registered users if they wish to file electronically. Attorneys and non-attorney self-represented litigants may become registered users by registering at <http://www.truefiling.com>.

(2) *Responsibility; Obligation to Keep Account Information Current*. A registered user is responsible for all documents filed under the user's registered username and password. The registered user must comply with the requirements of the California Rules of Court.

(d) File Size Limitation; Documents Exceeding Limitation

(1) *File Size Limitation.* The file size limitation is 25 megabytes.

(2) *Documents Exceeding File Size Limitation.* Any electronic document larger than 25 megabytes must be filed in multiple files, each less than 25 megabytes.

(3) *Filing of Document Consisting of More Than Five Files.*

(A) *Manual Filing.* When a registered user files an electronic document consisting of more than five files, the document shall not be filed through TrueFiling, but instead shall be filed with the court in electronic format on flash drive, or alternatively on CD (compact disc) or DVD. When a registered user files a flash drive, CD, or DVD with the court, the registered user shall also file, on the same day, a "manual filing notification" in TrueFiling notifying the court and the parties that one or more documents have been filed on flash drive, CD or DVD and explaining the reason for the manual filing.

(B) *Naming Convention and Format for Files on Flash Drive, CD, or DVD.* Each file on a flash drive, CD, or DVD shall be separately named so the court and the parties can see the following identifying information without opening the file: (1) the case number, (2) the type of partial document on the file, (3) the page numbers included in the file, and (4) the last

name of the filing party. In addition, each file must comply with the format requirements of this local rule.

(C) *Manual Service.* The flash drive, CD, or DVD shall be served on the parties in accordance with the applicable requirements and procedures for service of paper documents.

(e) Format

(1) *Text Searchable Format*. All electronic documents must be in electronic text-searchable PDF (portable document format), or other searchable format approved by the court, while maintaining original document formatting. If an EFS user possesses only a paper document, the user must scan the document and convert it to an electronic document complying with this local rule. It is the EFS user's responsibility to ensure that any document filed is complete and readable. Electronically filed documents must comply with the content and form requirements of the California Rules of Court, with the exception of those provisions dealing exclusively with requirements for paper or as otherwise specified in this local rule.

(2) *Pagination*. The page numbering of an electronic document must begin with the first page or cover page as page 1 and use only Arabic numerals (e.g., 1, 2, 3) throughout the document. The page number need not appear on the cover page. Briefs may not contain more than one numbering system, e.g., they may not contain Roman numerals for the table of contents and Arabic numerals for the body of the brief. When a document, transcript, or record is filed in both paper format and electronic format, the pagination in both versions must comply with this subparagraph or the party must accurately cite to the correct page for both versions.

(3) *Documents Consisting of Multiple Files*. A document consisting of multiple files shall:

(A) Include on the cover page of each file (i) the file number for that file, (ii) the total number of files for that document, (iii) the page numbers contained in that file, and (iv) the total number of pages for that document. (Example: File 1 of 4, pp. 1-299 of 1198.)

(B) Contain its own table(s) and index stating the contents of that file.

(C) Be paginated consecutively across all files (e.g., if the first file ends on page 300, the cover of the second file shall be page 301).

(4) *Tabs*. Documents shall include tabs to the extent required by the California Rules of Court. A tab shall be a separate page identifying the content following the tab (such as a page stating "Exhibit A").

(5) *Electronic Bookmarks*. An electronic bookmark is a text link that appears in the bookmarks panel of an electronic document. An electronic bookmark is different from a hyperlink. Each document shall include an electronic bookmark to each heading, subheading and component of the document (such as a table of contents, table of authorities, petition, verification, points and authorities, declaration, certificate of word count, certificate of interested

entities or persons, or a proof of service if included within the document). Each document shall also include an electronic bookmark to the first page of each tab, exhibit, or attachment, if any. Each bookmark to a tab, exhibit, or attachment shall include the letter or number of the tab, exhibit, or attachment and a description of the tab, exhibit, or attachment.

(6) *Hyperlinks.* Hyperlinks are not required. However, if an EFS user elects to include hyperlinks in a document, the hyperlink may be active and should be formatted to standard citation format as provided in the California Rules of Court.

(7) *No Color*. Notwithstanding provisions to the contrary in the California Rules of Court, electronic documents shall not have color covers, color signatures, or other color components absent leave of court. This requirement does not apply to the auto-color feature of hyperlinks.

(f) Signatures

For registered users, a registered username and password is the equivalent of an electronic signature.

(g) Superior Court Record

(1) *Record of Administrative Proceedings*. In addition to any administrative record provided by the trial court pursuant to the California Rules of Court, registered users seeking review of an administrative determination must submit an electronic copy of the administrative record to the court in compliance with this local rule.

(2) *Appendix*. Any appendix filed pursuant to the California Rules of Court must be filed by EFS users in electronic format in compliance with this local rule.

(3) *Reporter's Transcript*. A registered user who orders a reporter's transcript of proceedings must also request a copy of the transcript in electronic format and must submit an electronic copy to the court in compliance with this local rule.

(4) *Transmissions by the Superior Court*. The court authorizes and encourages the superior courts within the Third Appellate District to engage in the electronic service and electronic filing of documents, including, but not limited to, the clerk's transcript and reporter's transcripts. If a superior court transmits electronic documents to the court in lieu of paper, the court will accept electronic documents complying with the California Rules of Court and this local rule. A superior court shall transmit electronic documents to the court through the court's FTP server using credentials provided by the court. If a superior court transmits electronic documents to the court, it shall also make the electronic documents available to the parties.

(h) Personal Identifiers and Privacy Issues

To protect personal privacy and other legitimate interests, parties and their attorneys must not include, or must redact where inclusion is necessary, personal identifiers such as Social

Security numbers, driver's license numbers, and financial account numbers from all documents filed as part of the court's public record, whether filed in paper or electronic format, unless otherwise provided by law or ordered by the court. If an individual's Social Security number or financial account number is required in a document filed as part of the court's public record, only the last four digits of the number shall be used.

The responsibility for excluding or redacting identifiers from all documents filed with the court rests solely with the parties and their attorneys. Neither TrueFiling nor the Clerk of the Court has any responsibility to review documents for compliance.

(i) Sealed or Confidential Material

Sealed or confidential material may be filed electronically. EFS users must comply with the California Rules of Court pertaining to sealed and confidential material, with the exception of those provisions pertaining exclusively with requirements for paper or as otherwise specified in this local rule.

(j) Filing Deadlines

Electronic filing does not alter any filing deadlines. An electronic filing not completely received by the court by 11:59 p.m. will be deemed to have been received on the next court day. If a specific time of day is set for filing by court order or stipulation, the electronic filing shall be completed by that time. Although the EFS permits users to transmit electronic documents 24 hours a day, EFS users should be aware that telephone or online assistance may not be available outside of normal court business hours, and requests for immediate relief made after the close of the court's normal business hours may not be addressed until the next court day.

(k) Motion to Accept Filing as Timely Following TrueFiling Technical Failure

If a registered user fails to meet a filing deadline imposed by court order, rule or law because of a TrueFiling failure, the registered user may file the document in electronic or paper format as soon thereafter as practicable and accompany the filing with a motion to accept the document as timely filed. A late submission that missed a jurisdictional deadline will be accepted for filing pursuant to this subparagraph only if the deadline was missed due to a TrueFiling failure. The initial point of contact for anyone experiencing difficulty with TrueFiling shall be the toll-free telephone number posted on the TrueFiling Web site.

The court is not responsible for malfunctions or errors occurring in the electronic transmission or receipt of electronically filed documents.

(*l*) Service

Registration with TrueFiling constitutes consent to receive service through the EFS. Documents prepared by the court will be served on EFS users through the EFS or by electronic notification.

Submission of a petition for review through TrueFiling that is accepted for filing by the Supreme Court constitutes service of a copy of the petition on this court in accordance with the California Rules of Court.

(m) Filing Fees

TrueFiling is operated by a vendor pursuant to a contract with the court. The vendor will assess fees for each electronic filing via TrueFiling in accordance with the schedule posted on the TrueFiling Web site, as approved by the court. TrueFiling fees will be considered recoverable costs under the California Rules of Court. The vendor is designated as the court's agent for collection of court-imposed fees where required for any electronic filing made by registered users, and any associated credit card or bank charges or convenience fees.

If a non-attorney self-represented litigant with a fee waiver chooses to file documents electronically, that litigant is exempt from the fees and costs associated with electronic filing. The persons and entities identified in Government Code section 6103 are also exempt from the fees and costs associated with the EFS.

(n) Exemptions

(1) Non-attorney self-represented litigants may, but are not required to, register for electronic filing. Non-attorney self-represented litigants who opt to register for electronic filing must comply with this local rule and the requirements of the EFS.

(2) When it is not feasible for a registered user to convert a document to electronic format by scanning, imaging or other means, the document may be filed in paper format with a declaration setting forth the reason that electronic filing was not feasible.

(3) If the requirements of this local rule cause undue hardship or significant prejudice to any registered user, the registered user may file a motion for an exemption from the requirements of this local rule.

(o) Rejection of an Electronic Filing for Noncompliance

The court will reject an electronic filing if it does not comply with the requirements of this local rule.

(p) Sanctions for Noncompliance

Failure of counsel to timely register, and failure of any registered user to comply with electronic filing requirements, unless exempted, may be subject to sanctions imposed by the court.

(q) Original Documents

The court may scan any paper document into an electronic format, in which case the electronic document will be deemed the original for purposes of the court record.

(r) Posting and Publication

The Clerk of the Court is directed to post a copy of this local rule on the court's Web site and submit a copy to the Reporter of Decisions for publication.

Dated: September 27, 2017

Presiding Justice

Formatting Guidelines for Exhibits to Petition

To ensure that your exhibits to your petition are not rejected by the court, please comply with the following guidelines.

Pagination:

Number pages consecutively beginning with the cover (first) page of the exhibits to the final page of the exhibits, using only the Arabic numbering system, as in 1, 2, 3. Do *not* use Roman Numerals or any other pagination method for tables or anywhere else within the exhibits.

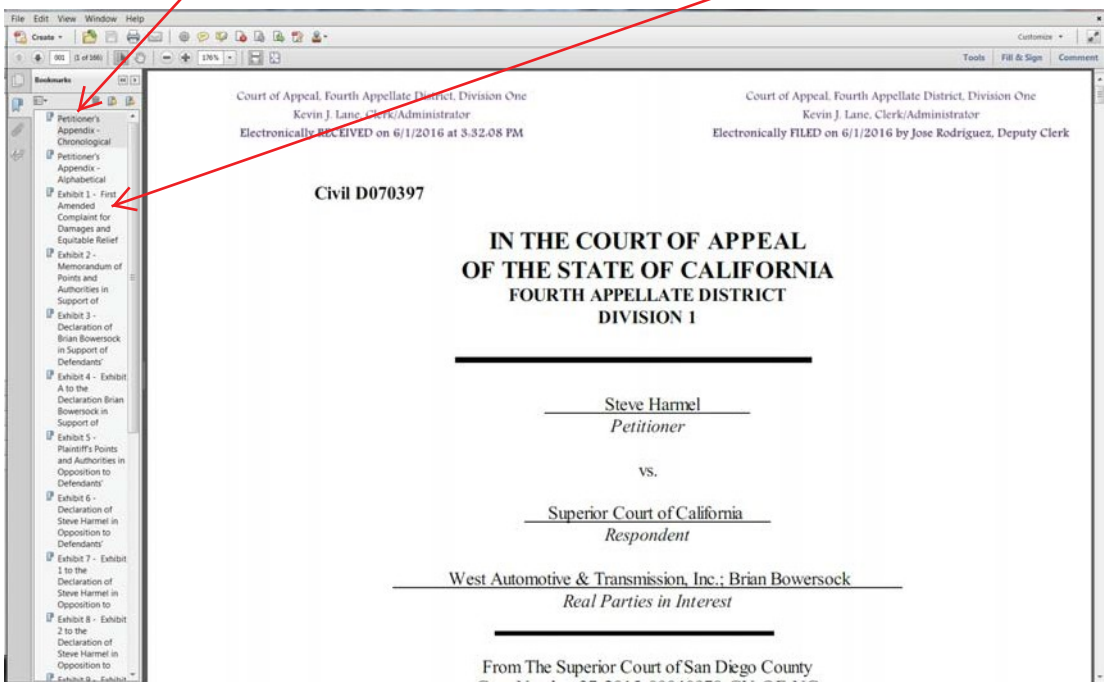
Ensure that page numbers listed in the Table of Contents or Indices match both the pages within the exhibits and the Adobe page counter. This allows the court and the parties to accurately locate the cited pages and ensures that page citations are consistent throughout the exhibits.

Notwithstanding California Rules of Court, rules 8.144(c)(1) and 8.486(c)(1)(A), electronically filed documents may exceed the 300-page limit as long as the file size is 25 megabytes or smaller. Exhibits that exceed 25 megabytes must be submitted in volumes of 25 megabytes or less. Each volume must be numbered consecutively from the first page of the first volume to the last page of the last volume, using only the Arabic numbering system, as in 1, 2, 3. Each volume must contain a cover page indicating the volume number and a table of contents.

Bookmarks:

The Table of Contents or Index must include an electronic bookmark for each heading corresponding to the heading in the text, including the heading "Table of Contents" or "Index."

A bookmark is a text link that appears in the **Bookmarks Panel** of Adobe Reader and Adobe Acrobat. In this example, clicking on "Exhibit 1" would take the reader to that part of the document.



LOCAL RULES OF THE COURT OF APPEAL FIFTH APPELLATE DISTRICT

Local Rule 8. Electronic Filing

Pursuant to California Rules of Court, rule 8.70, the Court will require all filings in this District be made through the Court's electronic filing system (EFS) operated by ImageSoft TrueFiling (TrueFiling). Use of the EFS system is mandatory for all attorneys filing in this District, unless an exemption is granted, and is voluntary for all self-represented litigants. A filing in electronic format will be accepted in lieu of any paper copies otherwise required under California Rules of Court, rule 8.44 and constitutes the official record of the Court.

(a) [Registration]

(1) Obligation to Register. Each attorney of record in any proceeding in this District is obligated to become an EFS user and obtain a user ID and password for access to the TrueFiling system. Self-represented litigants must register if they wish to e-file. Attorneys and self-represented litigants may register at: https://www.truefiling.com/_layouts/ElectronicFile.Main/SignUp.aspx

(2) Obligation to Keep Account Information Current. An EFS user is responsible for all documents filed under the user's registered ID and password. Registered users are required to keep their e-mail address current and may update their e-mail address online via the TrueFiling Web site. The user also must comply with the requirements of California Rules of Court, rule 8.32.

(b) [Format]
Documents filed electronically must be in PDF format, or readily capable of conversion to PDF format while maintaining original document formatting by TrueFiling to permit text searches and to facilitate transmission and retrieval. If the filer possesses only a paper copy of a document, it may be scanned to convert it to a searchable PDF format. It is the filer's responsibility to ensure that any document filed is complete and readable. No single document shall exceed a total file size of 25 MB. Document pages must be consecutively numbered beginning from the cover page of the document and using only the Arabic numbering system, as in 1, 2, 3.

Briefs must comply with the content and form requirements of California Rules of Court, rule 8.204, with the exception of those provisions dealing exclusively with requirements for paper. Notwithstanding rule 8.204(b)(7), briefs may not have different numbering systems. The table of contents for each brief shall include electronic bookmarks to each heading in the text. All original proceedings must include electronic bookmarks from the table of contents for each heading in the text, and to the first page of any exhibit(s), with a description of the exhibit included in the bookmark.

(c) [Signatures]
A TrueFiling user ID and password is the equivalent of an electronic signature for a registered attorney or party. Any document displaying the symbol "/s/" with the attorney's or party's printed name shall be deemed signed by that attorney/party.

(d) [Trial Court Record]

(1) Appendices, Agreed Statements, and Settled Statements. Parties must submit any appendix filed pursuant to California Rules of Court, rule 8.124, any agreed statement

filed pursuant to California Rules of Court, rule 8.134, or any settled statement filed pursuant to California Rules of Court, rule 8.137 in electronic form. Each part of the record submitted in any appendix shall clearly state the volume and page numbers included within that part and include an index of contents, with a descriptive electronic bookmark to the first page of each indexed document.

(2) Administrative Records. In addition to any administrative record provided by the trial court pursuant to California Rules of Court, rule 8.123, the party or parties seeking review of a board case under California Rules of Court, rule 8.498(b) must submit a copy of the administrative record in electronic form.

(3) Reporter's Transcripts. Any party who orders a reporter's transcript of proceedings pursuant to California Rules of Court, rule 8.130 must also request a copy of the transcript in computer-readable format, as provided in California Rules of Court, rule 8.130(f)(4), and submit an electronic copy to the Court.

(e) [Personal Identifiers and Privacy Issues]
To protect personal privacy, parties and their attorneys must not include, or must redact where inclusion is necessary, personal identifiers such as social security numbers, driver's license numbers, and financial account numbers from all pleadings and other papers filed in the Court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the Court. (California Rules of Court, rule 1.20(b).) If an individual's social security number is required in a pleading or other paper filed in the public file, only the last four digits of that number shall be used. If financial account numbers are required in a pleading or other paper filed in the public file, only the last four digits of these numbers shall be used.

The responsibility for excluding or redacting identifiers from all documents filed with the Court rests solely with the parties and their attorneys. (California Rules of Court, rule 1.20(b)(3).) Neither TrueFiling nor the Clerk of the Court has any responsibility to review pleadings or other papers for compliance.

(f) [Sealed or Confidential Material]
All filers must comply with California Rules of Court, rules 8.46 and 8.47 pertaining to sealed and confidential material.

(g) [Filing Deadlines]
Filing documents electronically does not alter any filing deadlines. In order to be timely filed on the day they are due, all electronic transmissions of documents must be completed (i.e., received completely by the Clerk of the Court) prior to midnight. Where a specific time of day is set for filing by Court order or stipulation, the electronic filing shall be completed by that time. Although EFS permits parties to submit documents electronically 24 hours a day, users should be aware that telephone or online EFS assistance may not be available outside of normal Court business hours.

(h) [Technical Failure/Motions for Late Filing]
If a filer fails to meet a filing deadline imposed by Court order, rule, or statute because of a failure at any point in the electronic transmission and receipt of a document, the filer may file the document as soon thereafter as practicable and accompany the filing with a motion to accept the document as timely filed. (See Cal. Rules of Court, rule 8.54(a)(1)&(2).)

The Clerk of the Court shall deem the EFS system to be subject to a technical failure whenever the system is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 12:00 noon that day. Filings due on the day of a technical failure which were not filed solely due to

such technical failure shall be due the next court day. The initial point of contact for any practitioner experiencing difficulty filing a document into the EFS system shall be the toll-free number posted on the TrueFiling Web site.

The Court shall not be responsible for malfunction or errors occurring in electronic transmission or receipt of electronically filed documents.

(i) [Service]
An attorney's registration with TrueFiling to participate in EFS constitutes consent to service or delivery of all documents by any other party in a case through the system. (California Rules of Court, rule 8.71.)

(j) [Filing Fees]
TrueFiling is a private vendor under contract with the Court. TrueFiling will assess vendor fees for each filing in accordance with the schedule posted on its Web site, as approved by the Court. E-Filing fees will be considered recoverable costs under California Rules of Court, rule 8.278(d)(1)(D). TrueFiling is designated as the Court's agent for collection of Court imposed fees where required for any filing, and any associated credit card or bank charges or convenience fees (California Rules of Court, rule 8.78; Gov. Code, § 6159).

Should a self-represented party with a fee waiver opt to file documents electronically, that party is exempt from the fees and costs associated with electronic filing. The persons and entities identified in Government Code section 6103 also are exempt from the fees and costs associated with e-Filing.

(k) [Exemptions]
Self-represented parties may, but are not required to register for electronic filing, but must comply with this rule and the requirements of TrueFiling if they elect to register.

If electronic filing and/or service causes undue hardship or significant prejudice to any party, the party may file a motion for an exemption from the requirements of this rule. (See Cal. Rules of Court, rule 8.54(a)(1)&(2).) When it is not otherwise feasible for a party to convert a document to electronic form by scanning, imaging or other means, the document may be filed in paper form (California Rules of Court, rule 8.73(c)), together with a declaration setting forth the reasons that electronic filing was not feasible.

(l) [Sanctions for Noncompliance]
Failure of counsel to timely register or otherwise comply with EFS filing requirements, unless exempted, shall subject counsel to sanctions as may be imposed by the Court.

(Effective May 11, 2015)

Formatting Guidelines

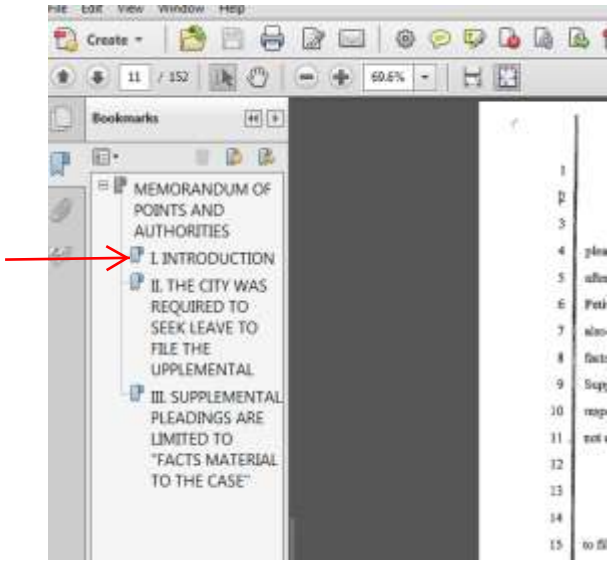
The Court encourages all electronic filers to comply with the following guidelines for briefs, motions, appendices, writ petitions and other documents filed in connection with appeals or original proceedings.

Pagination:

Number pages consecutively *beginning with the cover page of the document*, using only the Arabic numbering system, as in 1, 2, 3. Do *not* use a separate pagination system for tables within the document. The page number does not need to appear on the cover page.

Bookmarks:

Briefs, motions and petitions: In any document that contains a table of contents, the table should include an electronic bookmark for each heading to the corresponding heading in the text.
A bookmark is a text link that appears in the **Bookmarks Panel** of Adobe Reader and Adobe Acrobat. In this example, clicking on "INTRODUCTION" would take the reader to that part of the brief.



Appendices and exhibits: In any document that contains an index, including appendices and exhibits in support of writ petitions, the index should include an electronic bookmark from each descriptive document title to the first page of the corresponding document in the appendix or exhibits.

Where appendices or exhibits are submitted in multi-part electronic files, each separate file should have a table or index stating the contents of that file. The table or index should include the bookmarks as noted above.[34]

Date
January 31, 2018

To
Members of the Joint Appellate Technology Subcommittee

From
Ingrid Leverett
Attorney, Legal Services

Subject
Rules modernization: sealed and confidential records, lodged records

Action Requested
Please read before February 5 subcommittee conference call

Deadline
February 5

Contact
Ingrid Leverett
(415) 865-8031 phone
Ingrid.Leverett@jud.ca.gov

Introduction

Item 5 on the Appellate Advisory Committee's annual agenda, Modernize Appellate Court Rules for E-filing and E-business, includes considering whether to recommend rule amendments to the rules governing sealed and confidential records to establish procedures for handling materials that are submitted electronically, including the return of lodged electronic records. This is a priority 2 project with a completion date of January 1, 2019. This memo discusses recent modernization of parallel rules in the trial courts and presents options for the subcommittee to consider.

Background

The Rules Modernization Project is a collaborative effort led by the Information Technology Advisory Committee, working together with several advisory committees with subject matter expertise, to comprehensively review and modernize the California Rules of Court to be consistent with and foster modern e-business practices. Over a two-year period, this work resulted in technical rule amendments to address language in the rules that was incompatible

with statutes and rules governing electronic filing and service, and substantive rule amendments to promote electronic filing, electronic service, and modern e-business practices. These rule amendments took effect January 1, 2016, and January 1, 2017.

The Appellate Advisory Committee is continuing the work of modernizing the appellate court rules by considering suggestions to amend rules to establish or improve procedures relating to electronically submitted materials.

Trial court rules

Rules 2.550 and 2.551 govern sealed records in the trial court. Amendments that took effect January 1, 2016 included:[1]

- Amending the rule regarding sealed records to define "record" to apply to records filed or lodged electronically (see rule 2.550(b)(1));
- Amending the rule for filing records under seal to accommodate records and notices that are transmitted electronically and kept by the court in electronic form (see rule 2.551; see also rule 3.1302 [regarding lodged material in law and motion proceedings]); and
- Amending rule 2.551 to provide for the return of materials lodged in electronic form.[2]

During the next year,[3] responding to concerns that the new rule language providing for the return of materials lodged in electronic form did not necessarily require deletion of electronic records maintained in a court's document management system, the committees took up these rules again.

The committees revised rule 2.551(b)(6) to provide that, unless otherwise ordered, the moving party has 10 days following an order denying a motion or application to seal to notify the court that the lodged record is to be filed unsealed. The clerk must unseal and file the record upon receiving the notification. If the clerk does not receive notification within 10 days of the order, the clerk must return the lodged records if in paper form or permanently delete the lodged records if in electronic form. Based on comments received in response to the invitation to comment, the committees decided not to require that courts send a separate notice of destruction

[1] The Judicial Council report dated September 16, 2015 describes the phase I rule amendments. The report is available at: https://jcc.legistar.com/View.ashx?M=F&ID=4103509&GUID=4234BC37-DBCC-4795-A932-0DC9EEF95AFF

[3] The phase II amendments are described in the Judicial Council report dated October 27, 2016. The report is available at: https://jcc.legistar.com/View.ashx?M=F&ID=4103509&GUID=4234BC37-DBCC-4795-A932-0DC9EEF95AFF

before destroying electronic lodged records. The court order denying the sealing motion was thought to provide sufficient notice to the moving party.[4]

The committees also revised rule 3.1302(b) to provide that courts may continue to maintain other lodged materials; however, if the court elects not to maintain them, they must be returned by mail if in paper form or permanently deleted after notifying the party lodging the material if in electronic form. The committees decided to require that a notice be sent before destruction of any electronic lodged records under rule 3.1302 because the submitting party would not otherwise have notice of the destruction.

The phase II proposal also involved technical amendments that had not been identified during phase I. These included:

- Amending rule 2.551(b)(3)(B) to replace language related to paper documents with language that is inclusive of electronic documents;
- Amending rule 2.551(f) to provide that if sealed records are in electronic form, the court must establish appropriate access controls to ensure that only authorized persons may access them.

Appellate court rules modernization

The phase I rules modernization proposal included amendments to the appellate rules. As relevant here, the amendments:

- Added definitions of "attach or attachment," "copy or copies," "cover," and "written or writing" to clarify their application to electronically filed documents (see renumbered and amended rule 8.803 and amended rule 8.10);
- Added new rule 8.11 and amended rule 8.800(b) to clarify that the rules are intended to apply to documents filed and served electronically;
- Replaced references to "mail" with "send" throughout;
- Replaced references to "file-stamped" with "filed-endorsed" throughout;
- Added language requiring that all confidential or sealed documents that are transmitted electronically must be transmitted in a secure manner (see amended rules 8.45(c), 8.46(d), 8.47(b) and (c), and 8.482(g)).

[4] These amendments were also made to rule 2.577, which governs procedures for filing confidential name change records under seal.

Discussion

In reviewing the appellate rules on sealed and confidential records, staff focused on differences between these rules and the trial court rules. The substantive amendments for the subcommittee's consideration are based on those differences and are intended to conform the appellate court rules to the trial court rules where appropriate. Attached to this memo is a document setting forth rules 8.46 and 8.47 with possible amendments highlighted. Rule 8.45 is also included for context; there are no proposed amendments to this rule.

The proposed amendments are discussed here, with issues or questions identified for the subcommittee.

Procedure for returning a lodged record

The current procedure for returning a lodged record when the court denies a motion or application to seal fails to provide for lodged records in electronic form. The trial court rules account for this situation. (See rule 2.551(b)(6).)

Proposed amendment to rule 8.46(d)(7):

> If the court denies the motion or application, ~~the clerk must not place the lodged record in the case file but must return it to the submitting party unless that party notifies the clerk in writing that the record is to be filed. Unless otherwise ordered by the court, the submitting party must notify the clerk within 10 days after the order denying the motion or application~~ the moving party may notify the court that the lodged record is to be filed unsealed. This notification must be received within 10 days of the order denying the motion or application to seal, unless otherwise ordered by the court. On receipt of this notification, the clerk must unseal and file the record. If the moving party does not notify the court within 10 days of the order, the clerk must (1) return the lodged record to the moving party if it is in paper form, or (2) permanently delete the lodged record if it is in electronic form.

The same amendment is also proposed for rule 8.46(f)(3)(D) and rule 8.47(b)(3)(D) and (c)(2)(D). (See attached draft amended rules.) The subcommittee should review and consider the language of each of these four amendments. Differences in the motions or applications being addressed result in differences in the language of the amendments.

Transmission of lodged records

Where it is necessary to disclose material contained in a conditionally sealed record in a filing (such as a brief or petition) in the reviewing court, the rules require that a public redacted version

be filed and that an unredacted version be lodged. Trial court rules include the requirement that the filing "must be transmitted in a secure manner that preserves the confidentiality of the filing being lodged." (See rule 2.551(d)(1).)

The subcommittee should consider whether to include this requirement in rule 8.46(f)(3)(B). (See attached draft amended rule.) Note that this language is already included in rule 8.47(b)(3)(C)(ii) and (c)(2)(C)(ii).

Identify conditionally sealed material

Rule 8.47(c)(2)(C)(ii) includes the requirement, for a lodged unredacted version of a filing, that conditionally sealed material disclosed in that version must be identified. This requirement is not included in rule 8.47(b)(3)(D). The subcommittee should consider whether to add this language.

Other amendments

Other proposed amendments are minor changes in language and punctuation intended to clarify the rules. The subcommittee should review these suggestions and decide whether to recommend any of them.

Question for subcommittee

Staff would like the subcommittee's feedback on whether to add a section on lodged material to rule 8.54 which governs motions in the appellate courts. Rule 3.1302, which governs the place and manner of filing in support of notice motions, includes requirements for lodged materials:

> (b) Requirements for lodged material
> Material lodged physically with the clerk must be accompanied by an addressed envelope with sufficient postage for mailing the material. Material lodged electronically must clearly specify the electronic address to which a notice of deletion may be sent. After determination of the matter, the clerk may mail or send the material if in paper form back to the party lodging it. If the lodged material is in electronic form, the clerk may permanently delete it after sending notice of the deletion to the party who lodged the material.

Subcommittee's task

The subcommittee's task is to review the draft rules and provide feedback. The subcommittee may choose to:

- Approve the proposal as presented and recommend to the full committees that they seek approval from RUPRO to circulate the proposal for public comment;

- Modify the proposal and recommend to the full committees that they seek approval from RUPRO to circulate the modified proposal for public comment;
- Recommend to the full committees that they reject the proposal; or
- Ask staff or committee members for further information/analysis.

Attachments

Rules 8.45-8.47, with proposed amendments
Rule 8.54, current version

Title 8. Appellate Rules

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

Chapter 1. General Provisions

Article 3. Sealed and Confidential Records

Rule 8.45. General provisions

(a) Application

The rules in this article establish general requirements regarding sealed and confidential records in appeals and original proceedings in the Supreme Court and Courts of Appeal. Where other laws establish specific requirements for particular types of sealed or confidential records that differ from the requirements in this article, those specific requirements supersede the requirements in this article.

(b) Definitions

As used in this article:

(1) "Record" means all or part of a document, paper, exhibit, transcript, or other thing filed or lodged with the court by electronic means or otherwise.

(2) A "lodged" record is a record temporarily deposited with the court but not filed.

(3) A "sealed" record is a record that is closed to inspection by the public or a party by order of a court under rules 2.550–2.551 or rule 8.46.

(4) A "conditionally sealed" record is a record that is filed or lodged subject to a pending application or motion to file it under seal.

(5) A "confidential" record is a record that, in court proceedings, is required by statute, rule of court, or other authority except a court order under rules 2.550–2.551 or rule 8.46 to be closed to inspection by the public or a party.

(6) A "redacted version" is a version of a filing from which all portions that disclose material contained in a sealed, conditionally sealed, or confidential record have been removed.

(7) An "unredacted version" is a version of a filing or a portion of a filing that discloses material contained in a sealed, conditionally sealed, or confidential record.

(Subd (b) amended effective January 1, 2016.)

(c) Format of sealed and confidential records

(1) Unless otherwise provided by law or court order, sealed or confidential records that are part of the record on appeal or the supporting documents or other records accompanying a motion, petition for a writ of habeas corpus, other writ petition, or other filing in the reviewing court must be kept separate from the rest of a clerk's or reporter's transcript, appendix, supporting documents, or other records sent to the reviewing court and in a secure manner that preserves their confidentiality.

(A) If the records are in paper format, they must be placed in a sealed envelope or other appropriate sealed container. This requirement does not apply to a juvenile case file but does apply to any record contained within a juvenile case file that is sealed or confidential under authority other than Welfare and Institutions Code section 827 et seq.

(B) Sealed records, and if applicable the envelope or other container, must be marked as "Sealed by Order of the Court on (*Date)*."

(C) Confidential records, and if applicable the envelope or other container, must be marked as "Confidential (*Basis*)—May Not Be Examined Without Court Order." The basis must be a citation to or other brief description of the statute, rule of court, case, or other authority that establishes that the record must be closed to inspection in the court proceeding.

(D) The superior court clerk or party transmitting sealed or confidential records to the reviewing court must prepare a sealed or confidential index of these materials. If the records include a transcript of any in-camera proceeding, the index must list the date and the names of all parties present at the hearing and their counsel. This index must be transmitted and kept with the sealed or confidential records.

(2) Except as provided in (3) or by court order, the alphabetical and chronological indexes to a clerk's or reporter's transcript, appendix, supporting documents, or other records sent to the reviewing court that are available to the public must list each sealed or confidential record by title, not

disclosing the substance of the record, and must identify it as "Sealed" or "Confidential"—May Not Be Examined Without Court Order."

(3) Records relating to a request for funds under Penal Code section 987.9 or other proceedings the occurrence of which is not to be disclosed under the court order or applicable law must not be bound together with, or electronically transmitted as a single document with, other sealed or confidential records and must not be listed in the index required under (1)(D) or the alphabetical or chronological indexes to a clerk's or reporter's transcript, appendix, supporting documents to a petition, or other records sent to the reviewing court.

(Subd (c) amended effective January 1, 2016.)

(d) Transmission of and access to sealed and confidential records

(1) Unless otherwise provided by (2)–(4) or other law or court order, a sealed or confidential record that is part of the record on appeal or the supporting documents or other records accompanying a motion, petition for a writ of habeas corpus, other writ petition, or other filing in the reviewing court must be transmitted only to the reviewing court and the party or parties who had access to the record in the trial court or other proceedings under review and may be examined only by the reviewing court and that party or parties. If a party's attorney but not the party had access to the record in the trial court or other proceedings under review, only the party's attorney may examine the record.

(2) Except as provided in (3), if the record is a reporter's transcript or any document related to any in-camera hearing from which a party was excluded in the trial court, the record must be transmitted to and examined by only the reviewing court and the party or parties who participated in the in-camera hearing.

(3) A reporter's transcript or any document related to an in-camera hearing concerning a confidential informant under Evidence Code sections 1041–1042 must be transmitted only to the reviewing court.

(4) A probation report must be transmitted only to the reviewing court and to appellate counsel for the People and the defendant who was the subject of the report.

Rule 8.45 amended effective January 1, 2016; adopted effective January 1, 2014.

Advisory Committee Comment

Subdivision (a). Many laws address sealed and confidential records. These laws differ from each other in a variety of respects, including what information is closed to inspection, from whom it is closed, under what circumstances it is closed, and what procedures apply to closing or opening it to inspection. It is very important to determine if any such law applies with respect to a particular record because where other laws establish specific requirements that differ from the requirements in this article, those specific requirements supersede the requirements in this article.

Subdivision (b)(5). Examples of confidential records are records in juvenile proceedings (Welf. & Inst. Code, § 827 and California Rules of Court, rule 8.401), records of the family conciliation court (Fam. Code, § 1818(b)), fee waiver applications (Gov. Code, § 68633(f)), and court-ordered diagnostic reports (Penal Code, § 1203.03). This term also encompasses records closed to inspection by a court order other than an order under rules 2.550–2.551 or 8.46, such as situations in which case law, statute, or rule has established a category of records that must be closed to inspection and a court has found that a particular record falls within that category and has ordered that it be closed to inspection. Examples include discovery material subject to a protective order under Code of Civil Procedure sections 2030.090, 2032.060, or 2033.080 and records closed to inspection by court order under *People v. Marsden* (1970) 2 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. For more examples of confidential records, please see appendix 1 of the *Trial Court Records Manual* at *www.courts.ca.gov/documents/trial-court-records-manual.pdf*.

Subdivisions (c) and (d). The requirements in this rule for format and transmission of and access to sealed and confidential records apply only unless otherwise provided by law. Special requirements that govern transmission of and/or access to particular types of records may supersede the requirements in this rule. For example, rules 8.619(g) and 8.622(e) require copies of reporters' transcripts in capital cases to be sent to the Habeas Corpus Resource Center and the California Appellate Project in San Francisco, and under rules 8.336(g)(2) and 8.409(e)(2), in non-capital felony appeals, if the defendant—or in juvenile appeals, if the appellant or the respondent—is not represented by appellate counsel when the clerk's and reporter's transcripts are certified as correct, the clerk must send that counsel's copy of the transcripts to the district appellate project.

Subdivision (c)(1)(C). For example, for juvenile records, this mark could state "Confidential—Welf. & Inst. Code, § 827" or "Confidential—Juvenile Case File"; for a fee waiver application, this mark could state "Confidential—Gov. Code, § 68633(f)" or "Confidential—Fee Waiver Application"; and for a transcript of an in-camera hearing under *People v. Marsden* (1970) 2 Cal.3d 118, this mark could say "Confidential—*Marsden* Hearing."

Subdivision (c)(2). Subdivision (c)(2) requires that, with certain exceptions, the alphabetical and chronological indexes to the clerk's and reporter's transcripts, appendixes, and supporting documents must list any sealed and confidential records but identify them as sealed or

confidential. The purpose of this provision is to assist the parties in making—and the court in adjudicating—motions to unseal sealed records or to provide confidential records to a party. To protect sealed and confidential records from disclosure until the court issues an order, however, each index must identify sealed and confidential records without disclosing their substance.

Subdivision (c)(3). Under certain circumstances, the Attorney General has a statutory right to request copies of documents filed under Penal Code section 987.9(d). To facilitate compliance with such requests, this subdivision requires that such documents not be bound with other confidential documents.

Subdivision (d). See rule 8.47(b) for special requirements concerning access to certain confidential records.

Subdivision (d)(1) and (2). Because the term "party" includes any attorney of record for that party, under rule 8.10(3), when a party who had access to a record in the trial court or other proceedings under review or who participated in an in-camera hearing—such as a *Marsden* hearing in a criminal or juvenile proceeding—is represented by appellate counsel, the confidential record or transcript must be transmitted to that party's appellate counsel. Under rules 8.336(g)(2) and 8.409(e)(2), in non-capital felony appeals, if the defendant—or in juvenile appeals, if the appellant or the respondent—is not represented by appellate counsel when the clerk's and reporter's transcripts are certified as correct, the clerk must send the copy of the transcripts that would go to appellate counsel, including confidential records such as transcripts of *Marsden* hearings, to the district appellate project.

Subdivision (d)(4). This rule limits to whom a copy of a probation report is transmitted based on the provisions of Penal Code section 1203.05, which limit who may inspect or copy probation reports.

Rule 8.46. Sealed records

(a) Application

This rule applies to sealed records and records proposed to be sealed on appeal and in original proceedings, but does not apply to confidential records.

(Subd (a) amended effective January 1, 2014; previously amended effective January 1, 2006, and January 1, 2007.)

(b) Record sealed by the trial court

If a record sealed by order of the trial court is part of the record on appeal or the supporting documents or other records accompanying a motion, petition for a writ of habeas corpus, other writ petition, or other filing in the reviewing court:

(1) The sealed record must remain sealed unless the reviewing court orders otherwise under (e). Rule 8.45 governs the form and transmission of and access to sealed records.

(2) The record on appeal or supporting documents filed in the reviewing court must also include:

(A) The motion or application to seal filed in the trial court;

(B) All documents filed in the trial court supporting or opposing the motion or application; and

(C) The trial court order sealing the record.

(Subd (b) amended and relettered effective January 1, 2014; adopted as subd (c); previously amended effective January 1, 2004, and January 1, 2007.)

(c) Record not sealed by the trial court

A record filed or lodged publicly in the trial court and not ordered sealed by that court must not be filed under seal in the reviewing court.

(Subd (c) relettered effective January 1, 2014; adopted as subd (d).)

(d) Record not filed in the trial court; motion or application to file under seal

(1) A record not filed in the trial court may be filed under seal in the reviewing court only by order of the reviewing court; it must not be filed under seal solely by stipulation or agreement of the parties.

(2) To obtain an order under (1), a party must serve and file a motion or application in the reviewing court, accompanied by a declaration containing facts sufficient to justify the sealing. At the same time, the party must lodge the record under (3), unless good cause is shown not to lodge it.

(3) To lodge a record, the party must transmit the record to the court in a secure manner that preserves the confidentiality of the record to be lodged. The record must be transmitted separate from the rest of a clerk's or reporter's transcript, appendix, supporting documents, or other records sent to the reviewing court with a cover sheet that complies with rule 8.40(c) and labels the contents as "CONDITIONALLY UNDER SEAL." If the record is in

paper format, it must be placed in a sealed envelope or other appropriate sealed container.

(4) If necessary to prevent disclosure of material contained in a conditionally sealed record, any motion or application, any opposition, and any supporting documents must be filed in a redacted version and lodged in a complete unredacted version conditionally under seal. The cover of the redacted version must identify it as "Public—Redacts material from conditionally sealed record." In juvenile cases, the cover of the redacted version must identify it as "Redacted version—Redacts material from conditionally sealed record." The cover of the unredacted version must identify it as "May Not Be Examined Without Court Order—Contains material from conditionally sealed record." Unless the court orders otherwise, any party that had access to the record in the trial court or other proceedings under review must be served with a complete, unredacted version of all papers as well as a redacted version.

(5) On receiving a lodged record, the clerk must note the date of receipt on the cover sheet and retain but not file the record. The record must remain conditionally under seal pending determination of the motion or application.

(6) The court may order a record filed under seal only if it makes the findings required by rule 2.550(d)–(e).

(7) If the court denies the motion or application, ~~the clerk must not place the lodged record in the case file but must return it to the submitting party unless that party notifies the clerk in writing that the record is to be filed. Unless otherwise ordered by the court, the submitting party must notify the clerk within 10 days after the order denying the motion or application~~ the moving party may notify the court that the lodged record is to be filed unsealed. This notification must be received within 10 days of the order denying the motion or application to seal, unless otherwise ordered by the court. On receipt of this notification, the clerk must unseal and file the record. If the moving party does not notify the court within 10 days of the order, the clerk must (1) return the lodged record to the moving party if it is in paper form, or (2) permanently delete the lodged record if it is in electronic form.

(8) An order sealing the record must direct the sealing of only those documents and pages or, if reasonably practical, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.

(9) Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in anything that is subsequently publicly filed.

(Subd (d) amended effective January 1, 2016; adopted as subd (e); previously amended effective July 1, 2002, January 1, 2004, and January 1, 2007; previously amended and relettered as subd (d) effective January 1, 2014.)

(e) Unsealing a record in the reviewing court

(1) A sealed record must not be unsealed except on order of the reviewing court.

(2) Any person or entity may serve and file a motion, application, or petition in the reviewing court to unseal a record.

(3) If the reviewing court proposes to order a record unsealed on its own motion, the court must send notice to the parties stating the reason for unsealing the record. Unless otherwise ordered by the court, any party may serve and file an opposition within 10 days after the notice is sent, and any other party may serve and file a response within 5 days after an opposition is filed.

(4) If necessary to prevent disclosure of material contained in a sealed record, the motion, application, or petition under (2) and any opposition, response, and supporting documents under (2) or (3) must be filed in both a redacted version and a complete unredacted version. The cover of the redacted version must identify it as "Public—Redacts material from sealed record." In juvenile cases, the cover of the redacted version must identify it as "Redacted version—Redacts material from sealed record." The cover of the unredacted version must identify it as "May Not Be Examined Without Court Order—Contains material from sealed record." Unless the court orders otherwise, any party that had access to the sealed record in the trial court or other proceedings under review must be served with a complete, unredacted version of all papers as well as a redacted version. If a party's attorney but not the party had access to the record in the trial court or other proceedings under review, only the party's attorney may be served with the complete, unredacted version.

(5) In determining whether to unseal a record, the court must consider the matters addressed in rule 2.550(c)–(e).

(6) The order unsealing a record must state whether the record is unsealed entirely or in part. If the order unseals only part of the record or unseals the record only as to certain persons, the order must specify the particular parts

of the records that are unsealed, the particular persons who may have access to the record, or both.

(7) If, in addition to the record that is the subject of the sealing order, a court has previously ordered the sealing order itself, the register of actions, or any other court records relating to the case to be sealed, the unsealing order must state whether these additional records are unsealed.

(Subd (e) amended effective January 1, 2016; adopted as subd (f); previously amended effective January 1, 2004, and January 1, 2007; previously amended and relettered as subd (e) effective January 1, 2014.)

(f) Disclosure of nonpublic material in public filings prohibited

(1) Nothing filed publicly in the reviewing court—including any application, brief, petition, or memorandum—may disclose material contained in a record that is sealed, lodged conditionally under seal, or otherwise subject to a pending motion to file under seal.

(2) If it is necessary to disclose material contained in a sealed record in a filing in the reviewing court, two versions must be filed:

(A) A public redacted version. The cover of this version must identify it as "Public—Redacts material from sealed record." In juvenile cases, the cover of the redacted version must identify it as "Redacted Version—Redacts material from sealed record."

(B) An unredacted version. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of this version, and if applicable the envelope or other container, must identify it as "May Not Be Examined Without Court Order—Contains material from sealed record." Sealed material disclosed in this version must be identified and accompanied by a citation to the court order sealing that material.

(C) Unless the court orders otherwise, any party who had access to the sealed record in the trial court or other proceedings under review must be served with both the unredacted version of all papers as well as the redacted version. Other parties must be served with only the public redacted version. If a party's attorney but not the party had access to the record in the trial court or other proceedings under review, only the party's attorney may be served with the unredacted version.

(3) If it is necessary to disclose material contained in a conditionally sealed record in a filing in the reviewing court:

(A) A public redacted version must be filed. The cover of this version must identify it as "Public—Redacts material from conditionally sealed record." In juvenile cases, the cover of the redacted version must identify it as "Redacted version—Redacts material from conditionally sealed record."

(B) An unredacted version must be lodged. The filing must be transmitted in a secure manner that preserves the confidentiality of the filing being lodged. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of this version, and if applicable the envelope or other container, must identify it as "May Not Be Examined Without Court Order—Contains material from conditionally sealed record." Conditionally sealed material disclosed in this version must be identified.

(C) Unless the court orders otherwise, any party who had access to the conditionally sealed record in the trial court or other proceedings under review must be served with both the unredacted version of all papers as well as the redacted version. Other parties must be served with only the public redacted version.

(D) If the court denies the motion or application to seal the record, ~~the clerk must not place the unredacted version lodged under (B) in the case file but must return it to the party who filed the application or motion to seal unless that party notifies the clerk that the record is to be publicly filed,~~ the party who filed the motion or application to seal may notify the court that the unredacted version lodged under (B) is to be filed unsealed. This notification must be received within 10 days of the order denying the motion or application to seal, unless otherwise ordered by the court. On receipt of this notification, the clerk must unseal and file the lodged unredacted version. If the party who filed the motion or application to seal does not notify the court within 10 days of the order, the clerk must (1) return the lodged unredacted version to the party who filed the motion or application to seal if it is in paper form, or (2) permanently delete the lodged unredacted version if it is in electronic form, as provided in (d)(7).

(Subd (f) amended and relettered effective January 1, 2014; adopted as subd (g); previously amended effective January 1, 2007.)

Rule 8.46 amended effective January 1, 2016; repealed and adopted as rule 12.5 effective January 1, 2002; previously amended and renumbered as rule 8.160 effective January 1, 2007; previously renumbered as rule 8.46 effective January 1, 2010; previously amended effective July 1, 2002, January 1, 2004, January 1, 2006, and January 1, 2014.

Advisory Committee Comment

This rule and rules 2.550–2.551 for the trial courts provide a standard and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. The sealed records rules apply to civil and criminal cases. They recognize the First Amendment right of access to documents used at trial or as a basis of adjudication. Except as otherwise expressly provided in this rule, motions in a reviewing court relating to the sealing or unsealing of a record must follow rule 8.54.

Rule 8.47. Confidential records

(a) Application

This rule applies to confidential records but does not apply to records sealed by court order under rules 2.550–2.551 or rule 8.46 or to conditionally sealed records under rule 8.46. Unless otherwise provided by this rule or other law, rule 8.45 governs the form and transmission of and access to confidential records.

(b) Records of *Marsden* hearings and other in-camera proceedings

(1) This subdivision applies to reporter's transcripts of and documents filed or lodged by a defendant in connection with:

(A) An in-camera hearing conducted by the superior court under *People v. Marsden* (1970) 2 Cal.3d 118; or

(B) Another in-camera hearing at which the defendant was present but from which the People were excluded in order to prevent disclosure of information about defense strategy or other information to which the prosecution was not allowed access at the time of the hearing.

(2) Except as provided in (3), if the defendant raises a *Marsden* issue or an issue related to another in-camera hearing covered by this rule in a brief, petition, or other filing in the reviewing court, the following procedures apply:

(A) The brief, including any portion that discloses matters contained in the transcript of the in-camera hearing, and other documents filed or lodged in connection with the hearing, must be filed publicly. The requirement

to publicly file this brief does not apply in juvenile cases; rule 8.401 governs the format of and access to such briefs in juvenile cases.

(B) The People may serve and file an application requesting a copy of the reporter's transcript of, and documents filed or lodged by a defendant in connection with, the in-camera hearing.

(C) Within 10 days after the application is filed, the defendant may serve and file opposition to this application on the basis that the transcript or documents contain confidential material not relevant to the issues raised by the defendant in the reviewing court. Any such opposition must identify the page and line numbers of the transcript or documents containing this irrelevant material.

(D) If the defendant does not timely serve and file opposition to the application, the reviewing court clerk must send to the People a copy of the reporter's transcript of, and documents filed or lodged by a defendant in connection with, the in-camera hearing.

(3) A defendant may serve and file a motion or application in the reviewing court requesting permission to file under seal a brief, petition, or other filing that raises a *Marsden* issue or an issue related to another in-camera hearing covered by this subdivision, and requesting an order maintaining the confidentiality of the relevant material from the reporter's transcript of, or documents filed or lodged in connection with, the in-camera hearing.

(A) Except as otherwise provided in this rule, rule 8.46(d) governs a motion or application under this subdivision.

(B) The declaration accompanying the motion or application must contain facts sufficient to justify an order maintaining the confidentiality of the relevant material from the reporter's transcript of, or documents filed or lodged in connection with, the in-camera hearing and sealing of the brief, petition, or other filing.

(C) At the time the motion or application is filed, the defendant must:

(i) File a public redacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The cover of this version must identify it as "Public—Redacts material from conditionally sealed record." The requirement to publicly file the redacted version does not apply in juvenile cases; rule 8.401 generally governs access to filings in juvenile cases. In juvenile

cases, the cover of the redacted version must identify it as "Redacted version—Redacts material from conditionally sealed record."

(ii) Lodge an unredacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The filing must be transmitted in a secure manner that preserves the confidentiality of the filing being lodged. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of the unredacted version of the document, and if applicable the envelope or other container, must identify it as "May Not Be Examined Without Court Order—Contains material from conditionally sealed record." Conditionally sealed material disclosed in this version must be identified.

(D) If the court denies the motion or application to file the brief, petition, or other filing under seal, ~~the clerk must not place the unredacted brief, petition, or other filing lodged under (C)(ii) in the case file but must return it to the defendant unless the defendant notifies the clerk in writing that it is to be filed. Unless otherwise ordered by the court, the defendant must notify the clerk within 10 days after the order denying the motion or application~~ the defendant may notify the court that the unredacted brief, petition, or other filing lodged under (C)(ii) is to be filed unsealed. This notification must be received within 10 days of the order denying the motion or application to file the brief, petition, or other filing under seal, unless otherwise ordered by the court. On receipt of this notification, the clerk must unseal and file the lodged unredacted brief, petition, or other filing. If the defendant does not notify the court within 10 days of the order, the clerk must (1) return the lodged unredacted brief, petition, or other filing to the moving party if it is in paper form, or (2) permanently delete the lodged unredacted brief, petition, or other filing if it is in electronic form.

(Subd (b) amended effective January 1, 2016.)

(c) Other confidential records

Except as otherwise provided by law or order of the reviewing court:

(1) Nothing filed publicly in the reviewing court—including any application, brief, petition, or memorandum—may disclose material contained in a confidential record, including a record that, by law, a party may choose be

kept confidential in reviewing court proceedings and that the party has chosen to keep confidential.

(2) To maintain the confidentiality of material contained in a confidential record, if it is necessary to disclose such material in a filing in the reviewing court, a party may serve and file a motion or application in the reviewing court requesting permission for the filing to be under seal.

(A) Except as otherwise provided in this rule, rule 8.46(d) governs a motion or application under this subdivision.

(B) The declaration accompanying the motion or application must contain facts sufficient to establish that the record is required by law to be closed to inspection in the reviewing court and to justify sealing of the brief, petition, or other filing.

(C) At the time the motion or application is filed, the party must:

(i) File a redacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The cover of this version must identify it as "Public—Redacts material from conditionally sealed record," In juvenile cases, the cover of this version must identify it as "Redacted version—Redacts material from conditionally sealed record."

(ii) Lodge an unredacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The filing must be transmitted in a secure manner that preserves the confidentiality of the filing being lodged. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of the unredacted version of the document, and if applicable the envelope or other container, must identify it as "May Not Be Examined Without Court Order—Contains material from conditionally sealed record." Material from a confidential record disclosed in this version must be identified and accompanied by a citation to the statute, rule of court, case, or other authority establishing that the record is required by law to be closed to inspection in the reviewing court.

(D) If the court denies the motion or application to file the brief, petition, or other filing under seal, ~~the clerk must not place the unredacted brief, petition, or other filing lodged under (C)(ii) in the case file but must return it to the lodging party unless the party notifies the clerk in~~

~~writing that it is to be filed. Unless otherwise ordered by the court, the party must notify the clerk within 10 days after the order denying the motion or application~~ the defendant may notify the court that the unredacted brief, petition, or other filing lodged under (C)(ii) is to be filed unsealed. This notification must be received within 10 days of the order denying the motion or application to file the brief, petition, or other filing under seal, unless otherwise ordered by the court. On receipt of this notification, the clerk must unseal and file the lodged unredacted brief, petition, or other filing. If the defendant does not notify the court within 10 days of the order, the clerk must (1) return the lodged unredacted brief, petition, or other filing to the moving party if it is in paper form, or (2) permanently delete the lodged unredacted brief, petition, or other filing if it is in electronic form.

(Subd (c) amended effective January 1, 2016.)

Rule 8.47 amended effective January 1, 2016; adopted effective January 1, 2014.

Advisory Committee Comment

Subdivisions (a) and (c). Note that there are many laws that address the confidentiality of various records. These laws differ from each other in a variety of respects, including what information is closed to inspection, from whom it is closed, under what circumstances it is closed, and what procedures apply to closing or opening it to inspection. It is very important to determine if any such law applies with respect to a particular record because this rule applies only to confidential records as defined in rule 8.45, and the procedures in this rule apply only "unless otherwise provided by law." Thus, where other laws establish specific requirements that differ from the requirements in this rule, those specific requirements supersede the requirements in this rule. For example, although Penal Code section 1203.05 limits who may inspect or copy probation reports, much of the material contained in such reports—such as the factual summary of the offense(s); the evaluations, analyses, calculations, and recommendations of the probation officer; and other nonpersonal information—is not considered confidential under that statute and is routinely discussed in openly filed appellate briefs (see *People v. Connor* (2004) 115 Cal.App.4th 669, 695–696). In addition, this rule does not alter any existing authority for a court to open a confidential record to inspection by the public or another party to a proceeding.

Subdivision (c)(1). The reference in this provision to records that a party may choose be kept confidential in reviewing court proceedings is intended to encompass situations in which a record may be subject to a privilege that a party may choose to maintain or choose to waive.

Subdivision (c)(2). Note that when a record has been sealed by court order, rule 8.46(f)(2) requires a party to file redacted (public) and unredacted (sealed) versions of any filing that discloses material from the sealed record; it does not require the party to make a motion or

application for permission to do so. By contrast, this rule requires court permission before redacted (public) and unredacted (sealed) filings may be made to prevent disclosure of material from confidential records.

Title 8. Appellate Rules

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

Chapter 1. General Provisions

Article 4. Applications and Motions; Extending and Shortening Time

Rule 8.54. Motions

(a) Motion and opposition

(1) Except as these rules provide otherwise, a party wanting to make a motion in a reviewing court must serve and file a written motion stating the grounds and the relief requested and identifying any documents on which the motion is based.

(2) A motion must be accompanied by a memorandum and, if it is based on matters outside the record, by declarations or other supporting evidence.

(3) Any opposition must be served and filed within 15 days after the motion is filed.

(Subd (a) amended effective January 1, 2007.)

(b) Disposition

(1) The court may rule on a motion at any time after an opposition or other response is filed or the time to oppose has expired.

(2) On a party's request or its own motion, the court may place a motion on calendar for a hearing. The clerk must promptly send each party a notice of the date and time of the hearing.

(c) Failure to oppose motion

A failure to oppose a motion may be deemed a consent to the granting of the motion.

Rule 8.54 amended and renumbered effective January 1, 2007; repealed and adopted as rule 41 effective January 1, 2005.

Advisory Committee Comment

Subdivision (a). A party other than the appellant or petitioner who files a motion or opposition to a motion may be required to pay a filing fee under Government Code sections 68926 or 68927 if the motion or opposition is the first document filed in the appeal or writ proceeding in the reviewing court by that party. See rule 8.25(c).

Subdivision (c). Subdivision (c) provides that a "failure to oppose a motion" may be deemed a consent to the granting of the motion. The provision is not intended to indicate a position on the question whether there is an implied right to a hearing to oppose a motion to dismiss an appeal.

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
January 26, 2018

To
Members of the Joint Appellate Technology Subcommittee

From
Patrick O'Donnell, Principal Managing Attorney
Jane Whang, Attorney
Legal Services, Judicial Council

Subject
Privacy Resource Guide: Draft Appellate Provisions

Action Requested
Please review

Deadline
February 5, 2018

Contact
Patrick O'Donnell, 415-865-7665,
patrick,o'donnell@jud.ca.gov

Executive Summary

The Information Technology Committee (ITAC) is in the process of developing a *Privacy Resource Guide* (PRG). This guide is designed to assist the trial and appellate courts in protecting the privacy interests of members of the public who become involved with the California Court system while providing the public with reasonable access to court records.

ITAC's Rules and Policy Subcommittee (R & P Subcommittee), which is leading this initiative, is very interested in receiving input, and if possible some direct assistance, from other advisory bodies in drafting and preparing the PRG. In particular, because the PRG will contain sections focused on the appellate courts, the R & P Subcommittee is asking the Joint Appellate Technology Subcommittee (JATS) to review and provide assistance in developing the PRG. This memorandum explains the purpose and scope of the PRG and identifies some of the specific matters on which the R & P Subcommittee seeks assistance from JATS.

Privacy Resource Guide

The purpose of the *Privacy Resource Guide* is to assist the trial and appellate courts—and more generally the judicial branch— to protect the privacy interests of persons involved with the California court system while providing the public with reasonable access to the courts and the records to which they are entitled. [1]

The resource guide will provide assistance in two ways. First, it will provide information about the legal requirements that guide the courts' activities and operations relating to protecting the privacy of persons involved with the court system. Second, the guide will provide practical advice for courts on the best practices for carrying out their obligations to protect people's privacy.

The creation of the resource guide at this time is important, among other reasons, because of the major transition underway that is transforming the courts from a paper-based physical system to one that relies increasingly on electronic records and other forms of technology to conduct business. With this change, much information in the courts that was practically obscure can now be made available remotely in easily searchable format. It now requires careful analysis and the deliberate institution of new practices to ensure that proper privacy protections are in place.

Table of Contents

The scope of the PRG is quite broad, as indicated in the attached draft Table of Contents.[2] Among the general topics covered are privacy in court records (confidential and sealed records), access to court records, financial privacy in civil and criminal cases, privacy in judicial administrative records, and the privacy of witnesses, jurors, and other non-parties. The discussion of these topics in the PRG focuses on the legal requirements that guide the courts' activities and operations relating to protecting the privacy of persons involved with the court system. Preliminary draft materials on many of these topics have already been prepared and will soon be ready for review.

Other proposed sections of the PRG will focus less on legal requirements and more on best practices that courts might implement to protect the privacy of persons involved with the court system. For example, these sections of the PRG will address issues such as information security, court management of protected private information, privacy protections for users of court websites, and privacy protection in court-related services. These sections are less well developed and will require more work in the future.

[1] See draft Introduction to the Privacy Resource Guide, Attachment 1 to this memorandum.

[2] See draft Table of Contents, Attachment 2 to this memorandum.

Draft Appellate Sections

For JATS review, attached to this memorandum are two sets of preliminary draft materials relating to the appellate courts.[3]

The first of the attachments contains information to be placed in Section 2 of the PRG, Privacy in Court Records. The appellate materials in Section 2 are located in subsection 2.2, Confidential and Sealed Records in the Appellate Courts, and Section 2.3, Privacy in the Opinions of the Court of Appeal. As with much of the other materials in the PRG developed so far, these materials focus on rules of court: the appellate rules on confidentiality and sealed records (rules 8.45, 8.46, and 8.47) and the rules on privacy in appellate opinions (rules 8.90 and 8.401).

The second attachment contains information to be placed in Section 3 of the PRG, Access to Court Records. Section 3.2 is on the rules on public access to records in the appellate courts; it includes a discussion of the public access rules (rules 8.80-8.85).

Next Steps

The present draft materials relating to the appellate courts principally concern legal and policy issues. JATS members are asked to review and comment upon the attached sections of the PRG.

However, these materials do not include any suggested best practices or other similar materials. If the members of JATS have any practical advice on protecting privacy in the appellate courts, they are encouraged to make suggestions and possibly prepare new materials to be added to the PRG.

Attachments

1. Draft Introduction to the Privacy Resource Guide, at pp. 4-6

2. Draft Table of Contents to the Privacy Resource Guide, at pp. 7-14

3. Draft Appellate sections (part 1), at pp. 15-17

4. Draft Appellate sections (part 2), at pp. 18-21

[3] See draft appellate Attachments 3 and 4.

1. Introduction

1.1 Background

Privacy is a fundamental right guaranteed by the California Constitution. (Cal. Const., art I, § 1; see *Westbrook v. County of Los Angeles* (1994) 27 Cal. App 157, 164–166.) To protect people's privacy, numerous law have been enacted that provide for the confidentiality of various kinds of personal information. In adjudicating cases, courts have a major role in enforcing these laws and protecting the privacy rights of citizens. Courts also are involved in protecting people's privacy rights through their own day-to-day operations, including preserving the integrity of confidential and sealed records, ensuring that sensitive data is secure, and protecting private personal information.

On the other hand, access to information concerning the conduct of the public's business is also a fundamental right of every citizen. (Cal. Const., art I, § 3(b); see *NBC Subsidiary (KNBC–TV) v. Superior Court of Los Angeles County* (1999) 20 Cal.4th 1178, 1217–1218 (substantive courtroom proceedings in ordinary civil cases are "presumptively open").) Courts are obligated to conduct their business in an open and transparent manner. (See also Cal. Rules of Court, rule 10.500.) Similarly, court records are presumed to be open and must be made accessible to the public unless made confidential or sealed. (See Cal. Rules of Court, rule 5.550(c).)[1] Openness and accessibility are important to preserve trust and confidence in the judicial system; and they are necessary to carry on the regular, ongoing business of the courts.[2]

1.2 Purpose of the Privacy Resource Guide

The purpose of this resource guide is to assist the trial and appellate courts—and more generally the judicial branch— to protect the privacy interests of persons involved with the California court system while providing the public with reasonable access to the courts and the records to which they are entitled.

The resource guide provides assistance in two ways. First, it provides information about the legal requirements that guide the courts' activities and operations relating to protecting the privacy of persons involved with the court system. Second, the guide provides practical advice for courts on the best practices for carrying out their obligations to protect people's privacy.

The creation of the resource guide at this time is important, among other reasons, because of the major transition underway that is transforming the courts from a paper-based physical system to

[1] All references to rules in this Resource Guide are to the California Rules of Court, unless otherwise indicated.

[2] In recognition of the special role that courts play in conducting the people's business, the Legislature has in some instances exempted the courts from laws enacted to protect personal privacy. (See, e.g., Civ. Code, §1798.3(b)(1) [excluding from the definition of "agency" covered by the Information Privacy Act of 1977 "[a]ny agency established under Article VI of the California Constitution"—that is, the courts]).

one that relies increasingly on electronic records and other forms of technology to conduct business. With this change, much information in the courts that was practically obscure can now be made available remotely in easily searchable format. It requires careful analysis and the deliberate institution of new practices to ensure that proper privacy protections are now in place.

1.3 Key Definitions

As used in this Resource Guide, unless the context or subject matter otherwise requires:

(1) “Court record” means any document, paper, or exhibit filed by the parties to an action or proceeding; any order or judgment of the court; any item listed in Government Code section 68151, excluding any reporter’s transcript for which the reporter is entitled to receive a fee for any copy. The term does not include the personal notes or preliminary memoranda of judges or other judicial branch personnel. (Cal. Rules of Court, rule 2.502.)

(2) “Electronic record” means a court record that requires the use of an electronic device to access. The term includes both a document that has been filed electronically and an electronic copy or version of a record that was filed in paper form. (See, e.g., Cal. Rules of Court, rule 8.82(2).)

(3) "Adjudicative record" means any writing prepared for or filed or used in a court proceeding, the judicial deliberation process, or the assignment or reassignment of cases and of justices, judges (including temporary and assigned judges), and subordinate judicial officers, or of counsel appointed or employed by the court. (Cal. Rules of Court, rule 10.500(c)(1).)

(4) “Confidential record” is a record that based on statute, rule, or case law is not open to inspection by the public.

(5) "Judicial administrative record" means any writing containing information relating to the conduct of the people's business that is prepared, owned, used, or retained by a judicial branch entity regardless of the writing's physical form or characteristics, except an adjudicative record. The term "judicial administrative record" does not include records of a personal nature that are not used in or do not relate to the people's business, such as personal notes, memoranda, electronic mail, calendar entries, and records of Internet use. (Cal. Rules of Court, rule 10.500(c)(2).)

(6) “Protected personal information” or “PPI” means any personal information or characteristics that may be used to distinguish or trace an individual’s identity, such as their name, Social Security Number (SSN), or biometric records. (32 CFR 701.101.)

(7) “Rule” means a rule of the California Rules of Court.

(8) “Sealed record” means a record that by court order is not open to inspection by the public. (See Cal. Rules of Court, rule 2.550(b)(2))

(9) "Writing" means any handwriting, typewriting, printing, photographing, photocopying, electronic mail, fax, and every other means of recording on any tangible thing any form of communication or representation, including letters, words, pictures, sounds, symbols, or combinations, regardless of the manner in which the record has been stored. (Cal. Rules of Court, rule 10.500(c)(6).)

Privacy Resource Guide

Table of Contents

Appendices

2.2 Confidential and Sealed Records in the Appellate Courts

For appeals and original proceedings in the Supreme Court and Courts of Appeal, specific rules have been adopted relating sealed and confidential records: rule 8.45 (general provisions), rule 8.46 (sealed records), and rule 8.47 (confidential records).

2.2.1 General provisions

Rule 8.45 provides general requirements for the handling of sealed and confidential records by a reviewing court. These records must be kept separate from the rest of the records sent to the court and must be kept in a secure manner that preserves their confidentiality. (Rule 8.45(c)(1).) The rule prescribes the format of sealed and confidential records, and states the manner in which these records are to be listed in alphabetical and chronological indexes available to the public. (Rule 8.45(c)(2).) It describes the special treatment required for records relating to a request for funds under Penal Code 987.9. (Rule 8.45(c)(3).)

Rule 8.45 also provides guidance on the transmission of and access to sealed and confidential records. For instance, unless otherwise provided by law, a sealed or confidential record that is part of the record on appeal must be transmitted only to the reviewing court and the party or parties who had access to the record in the trial court and may be examined only by the reviewing court and that party or parties. If a party's attorney but not the party had access to the record in the trial court, only the party's attorney may examine the record. (Rule 8.45(d)(1).)

2.2.2 Sealed records

Rule 8.46 is the basic rule on sealed records in the reviewing court. First, it provides that if a record sealed by order of the trial court is part of the record on appeal, the sealed record must remain sealed unless the reviewing court orders otherwise. The record on appeal or supporting documents must include the motion or application to seal in the trial court, all documents filed in the trial court supporting or opposing the motion or application to seal, and the trial court order sealing the record. (Rule 8.46(b)((1)–(2).)

Second, a record filed or lodged publicly in the trial court and not ordered sealed must not be filed under seal in the reviewing court. (Rule 8.46(c).)

Third, the rule prescribes the procedures for obtaining an order from a reviewing court to seal a record that was not filed in the trial court. (Rule 8.46(d).)

Fourth, a sealed record must not be unsealed except on order of the reviewing court. The rule prescribes the procedures for seeking to unseal a record in the reviewing court. (Rule 8.46(e).)

Fifth, the rule prohibits the public filing in a reviewing court of material that was filed under seal, lodged conditionally under seal, or otherwise subject to a pending motion to file under seal. (Rule 8.46(f).)

2.2.3 Confidential records

Rule 8.47 governs the form and transmission of and access to confidential records (as distinguished from records sealed by court order or filed conditionally sealed) in the appellate courts. (Rule 8.47(a).) The rule includes a subdivision specifically on how to handle reporter's transcripts and documents filed or lodged in *Marsden* hearings and other in-camera proceedings. (Rule 8.47(b).) It also contains general procedures for handling other confidential records. (Rule 8.47(c).)

2.3 Privacy in Opinions of the Courts of Appeal

Based on concerns about the need for privacy protection, two rules of court have been adopted relating to the references to specific individuals in opinions and certain other records.

2.3.1 Privacy in appellate opinions

Rule 8.90, adopted effective January 1, 2017, provides guidance on the use of names in appellate court opinions, except for names in juvenile cases that are covered by rule 8.401 (discussed below). The rule states that, to protect personal privacy interests, the reviewing court should consider referring in opinions to people on the following list by first name and last initial or, if the first name is unusual or other circumstances would defeat the objective of anonymity, by initials only:

(1) Children in all proceedings under the Family Code and protected persons in domestic violence–prevention proceedings;

(2) Wards in guardianship proceedings and conservatees in conservatorship proceedings;

(3) Patients in mental health proceedings;

(4) Victims in criminal proceedings;

(5) Protected persons in civil harassment proceedings under Code of Civil Procedure section 527.6;

(6) Protected persons in workplace violence–prevention proceedings under Code of Civil Procedure section 527.8;

(7) Protected persons in private postsecondary school violence–prevention proceedings under Code of Civil Procedure section 527.85;

(8) Protected persons in elder or dependent adult abuse–prevention proceedings under Welfare and Institutions Code section 15657.03;

(9) Minors or persons with disabilities in proceedings to compromise the claims of a minor or a person with a disability;

(10) Persons in other circumstances in which personal privacy interests support not using the person's name; and

(11) Persons in other circumstances in which use of that person's full name would defeat the objective of anonymity for a person identified in (1)–(10).

2.3.2 Confidentiality in juvenile records and opinions

To protect the anonymity of juveniles involved in juvenile court proceedings, rule 8.401, adopted effective January 1, 2012, provides:

- In all documents filed by the parties in juvenile appeals and writ proceedings, a juvenile must be referred to by first name and last initial; but if the first name is unusual or other circumstances would defeat the objective of anonymity, the initials of the juvenile may be used.

- In opinions that are not certified for publication and in court orders, a juvenile may be referred to either by first name and last initial or by his or her initials. In opinions that are certified for publication, a juvenile must be referred to by first name and last initial; but if the first name is unusual or other circumstances would defeat the objective of anonymity, the initials of the juvenile may be used.

- In all documents filed by the parties and in all court orders and opinions in juvenile appeals and writ proceedings, if use of the full name of a juvenile's relative would defeat the objective of anonymity for the juvenile, the relative must be referred to by first name and last initial; but if the first name is unusual or other circumstances would defeat the objective of anonymity for the juvenile, the initials of the relative may be used.

(Rule 8.401(a).)

Rule 8.401 also contains provisions regarding access to filed documents. In general, the 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. Filed documents that protect anonymity as required by subdivision (a) may be inspected by any person or entity that is considering filing an amicus curiae brief. And access to records that are sealed or confidential under authority other than Welfare and Institutions Code section 827 is governed by rules 8.45–8.47 and the applicable statute, rule, sealing order, or other authority.

Rule 8.401 also allows the court to limit or prohibit admittance to oral argument. (Rule 8.401(c).)

3.2 Public Access to Records in the Courts of Appeal

Appellate court records are assumed to be open unless they are confidential as a matter of law or are sealed by court order. Confidential and sealed records on appeal are described in section 2.2 on rules 8.46 (sealed records) and rule 8.47 (confidential records). This section addresses other rules on access to appellate court records that are intended to protect persons' privacy interests.

3.2.1. The transition to electronic court records in the courts of appeal

Historically, paper records that are not confidential or sealed have been available at the appellate court for public inspection and copying. However, like the trial courts, the appellate courts are increasing relying on records created and maintained in electronic rather than paper form. These electronic records can be made available remotely to the extent feasible and permitted by law.

The paper records used in the past were costly to locate, inspect, and copy. The difficulties and expense involved in obtaining these paper records impeded public access but also provided an added level of privacy. This important practical effect of older business practices was reflected in the doctrine of "practical obscurity," which recognized that obscurity could serve positive purposes with respect to protecting privacy interests. But as the appellate courts are shifting to electronic records, protecting privacy interests is no longer a by-product of paper-based business practices, but rather is the result of deliberate policy choices to provide differential access to electronic records. These policy choices are reflected in the rules of court on remote access to records.

3.2.2 Public access to electronic appellate court records

Public access to appellate court records are governed by rules 8.80─8.85:

- Rule 8.80. Statement of purpose
- Rule 8.81. Application and scope
- Rule 8.82. Definitions
- Rule 8.83. Public access
- Rule 8.84. Limitations and conditions
- Rule 8.85. Fees for copies of electronic records

These rules, adopted effective January 1, 2016, are intended to provide the public with reasonable access to appellate records that are maintained in electronic form while protecting privacy interests. (Rule 8.80(a).)

The rules on remote access to electronic appellate court records are not intended to give the public a right of access to any electronic record that they are not otherwise entitled to access in paper form, and do not create any right of access to records sealed by court order or confidential as a matter of law. (Rule 8.80(c).) These rules apply only to records of the Supreme Court and the Courts of Appeal and only to access to records by the public. They do not prescribe the access to court records by a party to an action or proceeding, by the attorney for a party, or by

other persons or entities that may be entitled to such access by statute or rule. (Rules 8.81(a)–(b).)

3.2.3 General right of access; access to the extent feasible

Rule 8.83 provides that all electronic records must be made reasonably available to the public in some form, whether in electronic or paper form, except sealed or confidential records. (Rule 8.83(a).)

Under rule 8.83(b) to the extent feasible, appellate courts will provide, both remotely and at the courthouse, the following records provided they are not sealed or confidential:

- Dockets or registers of actions
- Calendars
- Opinions
- The following Supreme Court records:
    - Results from the most recent Supreme Court conference
    - Party briefs in cases argued in the Supreme Court in the preceding three years
    - Supreme Court minutes from at least the preceding three years

(Rule 8.83(b(1)).)

If an appellate court maintains records in electronic form in civil cases in addition to the records just listed, electronic access to these records must be provided both at the courthouse and remotely, to the extent feasible, except those records listed in section 3.2.4. (Rule 8.83(b)(2).)

3.2.4 Access by type of record

By rule, access to the electronic records listed below must be provided at the courthouse to the extent it is feasible to do so, but remote electronic access may <u>not</u> be provided to those records:

- Any reporter's transcript for which the reporter is entitled to receive a fee; and

- Records other than those listed in rule 8.83(b)(1) in the following proceedings:

    - Proceedings under the Family Code, including proceedings for dissolution, legal separation, and nullity of marriage; child and spousal support proceedings; child custody proceedings; and domestic violence prevention proceedings;
    - Juvenile court proceedings;
    - Guardianship or conservatorship proceedings;
    - Mental health proceedings;
    - Criminal proceedings;
    - Civil harassment proceedings under Code of Civil Procedure section 527.6;
    - Workplace violence prevention proceedings under Code of Civil Procedure section 527.8;

- Private postsecondary school violence prevention proceedings under Code of Civil Procedure section 527.85;
- Elder or dependent adult abuse prevention proceedings under Welfare and Institutions Code section 15657.03; and
- Proceedings to compromise the claims of a minor or a person with a disability

(Rule 8.83(c).)

3.2.5 Remote electronic access permitted in extraordinary cases

The appellate rules on remote access include a provision that allows the presiding justice, or a justice assigned by the presiding justice, to exercise discretion to permit remote access by the public to all or a portion of the public court records in an individual case if (1) the number of requests for access to documents is extraordinarily high and (2) responding to those requests would significantly burden the operations of the court. Unlike the comparable trial court records rule (see rule 2.503(c)) that is limited to extraordinary *criminal* cases, the appellate rule has no restriction on the type or types of cases to which it applies. (See rule 8.83(d).)

The appellate rule does provide: "An individual determination must be made in each case in which such remote access is provided." (Id.) It also provides guidance on the relevant factors to be considered in exercising the court's discretion to provide remote access, including "[t]he *privacy interests* of parties, victims, witnesses, and court personnel, and the ability to redact *sensitive personal information*. (Rule 8.83(d)(1)(emphasis added).)

In addition, the rule provides a specific list of the information that must be redacted from the records to which the court allows remote access, including driver's license numbers; dates of birth; social security numbers; Criminal Identification and Information and National Crime Information numbers; addresses, e-mail addresses, and phone numbers of parties, victims, witnesses, and court personnel; medical or psychiatric information; financial information; account numbers; and other personal identifying information. (Rule 8.83(d)(2).)

3.2.6 Other limitations on remote access

Like the trial court rules, the appellate rules on remote access have certain additional safeguards that prevent remote access to court records from being used to thwart the privacy interests of individuals whose names appear in those records. Except for calendars, registers of action, and certain Supreme Court records, electronic access to records may be granted only if the record is identified by the number of the case, the caption of the case, the name of a party, the name of the attorney, or the date of oral argument, and only on a case-by-case basis. (Rule 8.83(e).) Also, bulk distribution is not permitted for most court records. (Rule 8.83(f).)

3.2.7 Retention of user access information

[To be added. This might cross-reference website policy.]

3.2.8 Preservation of data security in appellate court records

[To be added. This might cross-reference general sections on data security]

Item 08

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
February 21, 2018

To
Appellate Advisory Committee

From
Christy Simons
Attorney, Legal Services

Subject
Advisement of Appellate Rights in Juvenile Cases

Action Requested
Please review before committee meeting on February 27, 2018

Deadline
February 27, 2018

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

Introduction

Item 10 on the committee's annual agenda this committee year is to consider whether to recommend (1) amending the rule regarding advisement of appellate rights in juvenile cases; and/or (2) developing a notice explaining appellate rights that would accompany juvenile court orders. The rule as currently written provides that the court must advise parents of their appellate rights if they are present at the hearing; the suggestion would delete from the rule the "if present" limitation on providing this notice. This memo discusses the proposal and the Rules Subcommittee's recommendation.

Background

Rule 5.590 of the California Rules of Court governs advisement of the right to review in Welfare and Institutions Code section 300, 601, or 602 cases (i.e., juvenile dependency and delinquency cases). Subdivision (a) of the rule provides: "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:" the right to appeal, if there is one; the steps and timing of an appeal; an indigent appellant's right to appointed counsel; and an indigent appellant's right to a free copy of the transcript.

In 2016, the Fourth District Court of Appeal considered this rule in *In re Albert A.* (2016) 243 Cal.App.4th 1220. The court concluded that a parent does not have a fundamental due process right to be advised of the right to appeal. Rather, the right to an advisement of appellate rights rests in the language of the rule itself.

The suggestion

Following this decision, counsel for mother in *Albert A.*, Rosemary Bishop, contacted the Appellate Advisory Committee (AAC) and the Family and Juvenile Law Advisory Committee (Fam/Juv) later in 2016 and suggested amending rule 5.590(a) to remove the requirement that a parent be present at a hearing in order to receive an advisement of appellate rights:

Rule 5.590. Advisement of right to review in Welfare and Institutions Code section 300, 601, or 602 cases

(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:

(1) The right of the child, parent, and guardian to appeal from the court order if there is a right to appeal;
(2) The necessary steps and time for taking an appeal;
(3) The right of an indigent appellant to have counsel appointed by the reviewing court; and
(4) The right of an indigent appellant to be provided with a free copy of the transcript.

Ms. Bishop explained that the problem with the current rule is that it provides that parents who are not present at hearings in both dependency (§ 300) and delinquency (§§ 601, 602) cases are not entitled to notice of their appeal rights. She states that this is particularly impactful in dependency cases where parents are parties and have appeal rights at all stages of the proceedings. (See Welf. & Inst. Code, § 395.) She also states that the rule does not derive from statute or case law; there is no other authority for denying notice of appeal rights to parents who are not present at a dependency hearing.

Ms. Bishop points out that other rules providing for parental advisement of appellate rights do not limit notice to parents who are present at the hearing. (See rules 5.542(f), 5.590(b) and (c).)[1] She also argues that public policy favors advising a party of the right to appeal a decision that affects a fundamental interest (in dependency cases, the right to parent one's child).

Consideration and Action by the Family and Juvenile Law Advisory Committee in 2017

Fam/Juv considered the suggestion at its January 12, 2017 meeting. (See Daniel Richardson's memo, attached, describing information on the origins and history of rule 5.590 and the changing nature of dependency law since the rule was adopted. This includes a greater recognition of the fundamental rights of families to due process and maintenance of familial bonds, and procedural protections for families in the dependency process.)

Fam/Juv proposed notifying parents that they will not be advised of their appellate rights if they do not attend the court hearing by placing a notice to this effect on certain forms. Staff to Fam/Juv presented this proposal to AAC at its January 30, 2017 meeting. AAC suggested also exploring the option of developing a notice regarding appellate rights that could be served on parents with the trial court's order.

Fam/Juv's proposal circulated for public comment. Following approval by the Judicial Council, certain JV forms were revised effective January 1, 2018, to include the following language in a box at the end of the forms:

> **For Your Information**
>
> You may have a right to appellate review of some or all of the orders made during this hearing. Contact your attorney to discuss your appellate rights. Decisions made at the next hearing may also be subject to appellate review. If you do not attend the next hearing you may not be advised of your appellate rights. Contact your attorney if you miss the next hearing and want to discuss your appellate rights.

Mr. Richardson indicates that Fam/Juv will monitor future opportunities to revise other forms to include this advisement. Fam/Juv does not plan to recommend its inclusion on delinquency forms in light of parents' limited options for appealing in those cases.

[1] See rule 5.542(f) [judge must advise, "either orally or in writing, the child, parent or guardian" of appellate rights following denial of an application for rehearing of a proceeding heard by a referee]; rule 5.590(b) [advisement of requirement for writ petition to preserve appellate rights must be sent by the clerk to any party not present at the hearing within one day of the court's order]; rule 5.590(c) [advisement of appellate rights must be provided orally and in writing to all parties when the court grants a petition transferring a case to tribal court].

Discussion

At the subcommittee meeting on February 1, staff presented the first issue as whether the advisement added to several JV forms was sufficient and thus no further action was required. If the subcommittee wanted to propose further action, the options included:

(1) Proposing to add the same general advisement to additional order forms and information sheets in juvenile proceedings;
(2) Proposing a notice providing specific information on appellate rights that would accompany juvenile court orders;
(3) Proposing to amend rule 5.590(a) as suggested by Ms. Bishop to delete "if present."

Staff recommended that AAC work closely with Fam/Juv on any further action. The issue of advisement of appellate rights in juvenile proceedings implicates the charges of both committees,[2] and Fam/Juv has a much better understanding of process and procedures in juvenile courts. In addition, traditionally, Fam/Juv has taken the lead with respect to modifications to the rules in Title 5 and the forms used in the trial court proceedings while AAC has taken the lead with respect to modification of the rules in Title 8 and forms used in appeals or writ proceedings.

Staff also recommended that, before proposing further action, the committee obtain input from the Trial Court Presiding Judges Advisory Committee.

The subcommittee expressed the strong opinion that it is important for parents to be advised of their appellate rights, particularly in juvenile dependency cases. There are any number of reasons why a parent may not be present at a hearing, including reasons related to the court's dependency jurisdiction, medical issues, transportation issues, etc. The subcommittee agreed that a parent's presence or absence at a hearing should not determine whether the parent learns of his or her right to appeal and other appellate rights, and agreed that further action on the proposal was appropriate.

The subcommittee reached a consensus to recommend amending the rule and providing a written notice to parents, subject to advisement by Fam/Juv that providing such written notice would not impose a burden on the trial court. The subcommittee agreed that Fam/Juv has a much better understanding of process and procedures in juvenile court, and seeks to work together with Fam/Juv to obtain input regarding any impacts on the trial courts and any potential difficulties with drafting a notice; the goal is a proposal that both committees support.

[2] See rule 10.40(a) ("The [Appellate Advisory C]ommittee makes recommendations to the council for improving the administration of justice in appellate proceedings") and rule 10.43(a) ("The [Family and Juvenile Law Advisory C]ommittee makes recommendations to the council for improving the administration of justice in all cases involving marriage, family, or children").

Toward this end, staff for the committees have discussed the Rules Subcommittee's recommendation to take further action. Fam/Juv suggests a small group meeting of members from both committees as a next step. Due to time constraints, no such meeting has yet been scheduled.

Based on all of the foregoing, the Rules Subcommittee recommends deferring this proposal to obtain input from Fam/Juv and draft a proposed notice.

Committee task

In light of the subcommittee's recommendation that the proposal not go forward at this time, no draft invitation to comment is included in these materials. The committee's task is to review this memo (which contains the proposed rule amendment) and the attached memo from Daniel Richardson and:

- Ask staff or committee members for further information or analysis;
- Approve deferring the proposal as recommended by the subcommittee; or
- Reject the subcommittee's recommendation; direct the subcommittee to draft a proposed notice, and direct staff to prepare an invitation to comment.

Attachments

Memo from Daniel Richardson, staff to Family and Juvenile Law Advisory Committee, at pp. 6-10

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
January 26, 2018

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

In 2016, the Family and Juvenile Law Advisory Committee and the Appellate Advisory Committee received a suggestion to amend California Rule of Court 5.590(a),[1] requesting that the council remove the requirement that a parent be present in order to receive an advisement of appellate rights. On January 30, 2017, the Appellate Advisory Committee considered and provided input on the Family and Juvenile Law Advisory Committee's proposed response. This memorandum is intended to inform the Appellate Advisory Committee of the resolution of that proposal.

[1] Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code and all further rule references are to the California Rules of Court.

Background

California Rule of Court 5.590(a), only requires that the advisement of appellate rights be given if the parent is present.[2]

> **(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: ***

A 2016 published opinion found that based on the language in rule 5.590(a), there is no right to the advisement of appellate rights under the rule unless the parent is present at the hearing. *In re Albert A.* (2016) 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 committees consider removing 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: ***

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

- Public policy favors advising a party of the right to appeal a decision that affects a fundamental interest.
- 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.
- 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 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).

[2] 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.

- 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.
- 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 Family and Juvenile Law Advisory Committee considered the origins of the rule and the changing nature of the dependency since 1973 when the rule was adopted. 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.

Over time, the language of the rule has changed little, but the rule's application has expanded to incorporate increased due process rights of parents. Since the rules inception, the rule has been expanded to include an advisement of a parent's appellate rights as well as a child's appellate rights. In addition, since 1973, there has been a substantial evolution towards greater recognition of the fundamental rights of families to due process and the maintenance of familial bonds. [3] When the rule was enacted in 1973, a parent's due process rights in dependency was still in its embryonic stage.

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[3] 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 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.

In addition, with these 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) 46 Cal.4th 529, 532 [citing cases].[4] 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.*

While the appellate and due process rights of parents has expanded, there is no fundamental due process right for a parent to be advised of the right to appeal. 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 to support the argument 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 due process 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 appeals court found that the failure to advise a parent who was present at the hearing 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.

Committee Inquiry and Resolution

At its meeting on January 12, 2017, the Family and Juvenile Law Advisory Committee considered the request to remove the language "if present" from the rule and the historical information above before deciding not to remove this requirement. However, the committee elected to notify parents that they will not be advised of their appellate rights if they do not attend the court hearing by placing a notice on certain court forms. The committee requested the Appellate Advisory Committee review the proposal as well.

The proposal was presented to the Appellate Advisory Committee at its meeting on January 30, 2017. The Appellate Advisory Committee discussed the proposal and supported the option of developing a notice regarding appellate rights that could be served on parents with the trial court's order.

After these committee meetings, the Family and Juvenile Law Advisory Committee proceeded to include an appellate advisement on certain JV forms that were at the time the subject of proposed amendments through a pending RUPRO proposal. In order to provide parents with information

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

about the right to seek appellate review and alert them that they will not be advised of their appellate rights if they fail to appear at a future hearing, the Judicial Council approved the recommended revisions to optional finding and order forms for certain dependency hearings, forms JV-415, JV-430, JV-435, JV-440, and JV-455. [5] The amended forms go into effect on January 1, 2018.

The forms were revised to include the following language in a section titled "For Your Information":

> You may have a right to appellate review of some or all of the orders made during this hearing. Contact your attorney to discuss your appellate rights. Decisions made at the next hearing may also be subject to appellate review. If you do not attend the next hearing you may not be advised of your appellate rights. Contact your attorney if you miss the next hearing and want to discuss your appellate rights.

This additional admonition will help to ensure that parents are aware of their appellate rights and the implications of not attending a hearing. The Family and Juvenile Law Advisory Committee will continue to monitor other opportunities to provide this admonition.[6]

In addition, staff is working on language to add to the script for dependency status review hearings used by judicial officers. This language would indicate that if a parent is not present at their future hearings, they will not be advised of their appellate rights.

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[5] Form JV-415, *Findings and Orders After Dispositional Hearing (Welf., & Inst. Code, § 361 et seq.)*; form JV-430, *Findings and Orders After Six-Month Prepermanency Hearing (Welf. & Inst. Code, § 361.21(e))*; form JV-435, *Findings and Orders After 12-Month Permanency Hearing (Welf. & Inst. Code, § 366.21(f))*; form JV-440, *Findings and Orders After Eighteen-Month Permanency Hearing (Welf. & Inst. Code, § 366.22)*; and form JV-455, *Findings and Orders After 24-Month Permanency Hearing (Welf. & Inst. Code, § 366.25).*

[6] This could include including the advisement in additional forms, including: form JV-050-INFO, *What happens if your child is taken from your home?*; form JV-060, *Juvenile Court—Information for Parents*; form JV-10 and JV-110, *Juvenile Dependency Petition (Version One and Two)*; form JV-320 *Orders under Welfare and Institutions Code Sections 366.24, 366.26, 727.3, 727.31*; form JV-410, *Findings and Orders After Detention Hearing (Welf. & Inst. Code, § 319)*; form JV-425, *Findings and Orders After In-Home Status Review Hearing (Welf. & Inst. Code §§ 364, 366.21);* form JV-426, *Findings and Orders After In-Home Status Review Hearing-Child Placed With Previously Noncustodial Parent (Welf. & Inst. Code, §§ 364, 366.21);* form JV-446, *Findings and Orders After Postpermanency Hearing—Permanent Plan Other Than Adoption (Welf. & Inst. Code, § 366.3);* form JV-505, *Statement Regarding Parentage (Juvenile).* The Family and Juvenile Law Advisory committee is not considering including the notice in delinquency forms, given that parent's have limiting options for appeals in delinquency cases and the focus of the rules history is on dependency.

Item 09

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
February 22, 2018

To
Appellate Advisory Committee

From
Christy Simons
Attorney, Legal Services

Subject
Oral argument in misdemeanor appeals

Action Requested
Please review before the February 27 committee meeting

Deadline
February 27, 2018

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

Introduction

Item 3 on the committee's annual agenda this committee year is to consider whether to amend the rule regarding oral argument in limited civil and misdemeanor appeals to provide that oral argument will not be set when there are no issues and to provide a procedure for waiving oral argument. This is a priority 1 project with a proposed January 1, 2019 completion date. The Appellate Division Subcommittee recommends deferring this proposal to obtain more information regarding oral argument procedures in the different appellate divisions and to further consider the issues and options identified by the subcommittee. This memo discusses the proposal and the subcommittee's recommendation.

Background

Oral argument in limited civil and misdemeanor appeals is governed by rule 8.885. The suggestions would amend subdivisions (a) and (d). Subdivision (a) was last amended in 2009 to change the triggering event for calendaring for oral argument from the filing of the record to completion of briefing/expiration of the time for filing the last brief to reduce the number of

matters in which oral argument had to be rescheduled because of delays in briefing. Also in 2009, subdivision (d), providing "Parties may waive oral argument," was added to rule 8.885.

Suggestions

Judge Helen E. Williams, Superior Court of Santa Clara County, Presiding Judge of the Appellate Division, and Jonathan Grossman, Sixth District Appellate Program and current Appellate Advisory Committee member, have suggested that the committee consider amending rule 8.885 to: (1) provide that oral argument will not be set when no issues are raised on appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738; and (2) specify a procedure for waiving oral argument.

Judge Williams and Mr. Grossman explain that the rule currently requires oral argument to be set in every appeal, "[u]nless otherwise ordered." Taken literally, this would require setting oral argument in appeals that raise no issues, so-called *Wende* cases, unless the court issues an order stating otherwise. Some, but not all, appellate divisions do set oral argument in these appeals. The proponents believe it would helpful to clarify that oral argument will not be set when no issues are raised.

With respect to establishing a procedure for waiving oral argument, Judge Williams and Mr. Grossman explain that this would facilitate waiver in advance, thereby saving time and cost for litigants and the courts. Currently, many litigants appear at argument only to submit the matter. Some defense counsel in misdemeanor appeals inform the district attorney's office that they will not pursue oral argument, and they do not appear. The attorney for the People then informs the court that the appellant wishes to waive oral argument and the People do not oppose the request. In both situations, the judges have still prepared for the oral argument.

Subcommittee Discussion and Recommendation

At the subcommittee meeting on January 31, staff presented the rule amendments suggested by the proponents and alternatives to those amendments. Staff also raised questions including whether to amend another subdivision of the rule, whether the subcommittee wished to require the non-waiving party to respond to a notice of waiver (in essence, to object) in order to keep the appeal on the oral argument calendar, and whether the identical rule for oral argument in infraction cases should be amended.

In discussing the suggestion that oral argument not be set in *Wendes*, subcommittee members discussed the effect of not setting oral argument on the date of submission, and expressed concern about a separate track for these cases. Unlike in the Court of Appeal, the judges of the appellate division often do not work together in the same location and may not see each other or review the cases until the day of oral argument. If *Wendes* are not set for oral argument, the

subcommittee wondered when the appellate division panel would confer on those cases. The subcommittee noted also that different appellate divisions handle *Wende* cases differently.

As to both suggestions, the subcommittee compared rules and procedures in the Courts of Appeal with rules and procedures in the appellate divisions, and wanted to conduct further inquiry regarding best practices for setting and waiving oral argument. The subcommittee concluded that these issues require more information and more consideration, and recommends that the proposal be deferred in order to do this work.

Committee Task

In light of the subcommittee's recommendation that the proposal not go forward at this time, no draft invitation to comment is included in these materials. The committee's task is to review this proposal and the subcommittee's recommendation and:

- Ask staff or committee members for further information/analysis;
- Approve deferring the proposal as recommended by the subcommittee; or
- Reject the subcommittee's recommendation and direct staff to prepare an invitation to comment.

Attachments

Proposed amended rule 8.885, at pp. 4-6

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 8.885. Oral argument

(a) Calendaring and sessions

~~Unless otherwise ordered~~ Except in appeals where no issue is raised, all appeals in which the last reply brief was filed or the time for filing this brief expired 45 or more days before the date of a regular appellate division session must be placed on the calendar for that session by the appellate division clerk. By order of the presiding judge or the division, any appeal may be placed on the calendar for oral argument at any session.

(b) Oral argument by videoconference

(1) Oral argument may be conducted by videoconference if:

(A) It is ordered by the presiding judge of the appellate division or the presiding judge's designee on application of any party or on the court's own motion. An application from a party requesting that oral argument be conducted by videoconference must be filed within 10 days after the court sends notice of oral argument under (c)(1); or

(B) A local rule authorizes oral argument to be conducted by videoconference consistent with these rules.

(2) If oral argument is conducted by videoconference:

(A) Each judge of the appellate division panel assigned to the case must participate in the entire oral argument either in person at the superior court that issued the judgment or order that is being appealed or by videoconference from another court.

(B) Unless otherwise allowed by local rule or ordered by the presiding judge of the appellate division or the presiding judge's designee, all the parties must appear at oral argument in person at the superior court that issued the judgment or order that is being appealed.

(C) The oral argument must be open to the public at the superior court that issued the judgment or order that is being appealed. If provided by local rule or ordered by the presiding judge of the appellate division or the presiding judge's designee, oral argument may also be open to the public at any of the locations from which a judge of the appellate division is participating in oral argument.

(D) The appellate division must ensure that:

(i) During oral argument, the participants in oral argument are visible and their statements are audible to all other participants, court staff, and any members of the public attending the oral argument;

(ii) Participants are identified when they speak; and

(iii) Only persons who are authorized to participate in the proceedings speak.

(E) A party must not be charged any fee to participate in oral argument by videoconference if the party participates from the superior court that issued the judgment or order that is being appealed or from a location from which a judge of the appellate division panel is participating in oral argument.

(Subd (b) adopted effective January 1, 2010.)

(c) Notice of argument

(1) As soon as all parties' briefs are filed or the time for filing these briefs has expired, the appellate division clerk must send a notice of the time and place of oral argument to all parties. The notice must be sent at least 20 days before the date for oral argument. The presiding judge may shorten the notice period for good cause; in that event, the clerk must immediately notify the parties by telephone or other expeditious method.

(2) If oral argument will be conducted by videoconference under (b), the clerk must specify, either in the notice required under (1) or in a supplemental notice sent to all parties at least 5 days before the date for oral argument, the location from which each judge of the appellate division panel assigned to the case will participate in oral argument.

(Subd (c) amended and relettered effective January 1, 2010; adopted as subd (b).)

(d) Waiver of argument

Parties may waive oral argument by filing a notice of waiver of oral argument within 10 days after the notice of oral argument is sent. The other party or parties may object within 10 days after the filing of the notice of waiver. The court may vacate oral argument if no objection is made. The court must send notice to the parties when oral argument is vacated.

(Subd (d) relettered effective January 1, 2010; adopted as subd (c).)

(e) Conduct of argument

Unless the court provides otherwise:

(1) The appellant, petitioner, or moving party has the right to open and close. If there are two or more such parties, the court must set the sequence of argument.

(2) Each side is allowed 10 minutes for argument. The appellant may reserve part of this time for reply argument. If multiple parties are represented by separate counsel, or if an amicus curiae—on written request—is granted permission to argue, the court may apportion or expand the time.

(3) Only one counsel may argue for each separately represented party.

(Subd (e) amended and relettered effective January 1, 2010; adopted as subd (d).)

Rule 8.885 amended effective January 1, 2010; adopted effective January 1, 2009.

Advisory Committee Comment

Subdivision (a). Under rule 10.1108, the appellate division must hold a session at least once each quarter, unless no matters are set for oral argument that quarter, but may choose to hold sessions more frequently.

Item 10

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
February 21, 2018

To
Appellate Advisory Committee

From
Christy Simons
Attorney, Legal Services

Subject
Appointment of counsel in misdemeanor appeals

Action Requested
Please review before February 27 committee meeting

Deadline
February 27, 2018

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

Introduction

Item 11 on the committee's annual agenda this committee year is to consider whether to recommend (1) amending the rule regarding appointment of counsel in misdemeanor appeal to encompass preconviction appeals; and/or (2) revising Request for Court-Appointed Lawyer in Misdemeanor Appeal (form CR-133) to allow for its use generally by defendants, not limited solely to appellants. The Appellate Division Subcommittee recommends deferring this proposal to allow time to gather information from the courts on the cost and other potential impacts of amending the rule and because a petition for review of a Court of Appeal opinion addressing the rule is pending in the Supreme Court. This memo discusses the proposal and the subcommittee's recommendation.

Background

Rule 8.851

Rule 8.851 of the California Rules of Court authorizes the appellate division to appoint counsel only for defendants who have been convicted of a misdemeanor. "On application, the appellate division must appoint appellate counsel for a defendant *convicted of a misdemeanor* who" is subject to certain penalties or likely to suffer "significant adverse collateral consequences" and was represented by appointed counsel in the trial court or establishes indigency. (Rule 8.851(a)(1), emphasis added.) "On application, the appellate division may appoint counsel for any other indigent defendant *convicted of a misdemeanor*." (Rule 8.851(a)(2), emphasis added.)

Case law

In November 2017, Division Two of the Fourth Appellate District denied a petition for writ of mandate in *Morris v. Superior Court* (2017) 17 Cal.App.5th 636, 640 (*Morris*), holding that rule 8.851 does not require the appointment of counsel for respondents in the appellate division, and that such appointment is not constitutionally mandated. (A copy of the opinion is attached to this memo.) Representing a defendant charged with two misdemeanors, Morris (the Public Defender for San Bernardino County) successfully moved to suppress evidence under Penal Code section 1538.5, and the case was dismissed. The People appealed, and petitioner's office filed a request with the court to appoint counsel on appeal. The appellate division refused on the basis that the respondent on a misdemeanor appeal is not entitled to appointed counsel. (*Id*., at pp. 640-641.)

Petitioner challenged rule 8.851 on its face, arguing that it violated both due process and equal protection. (*Id*., at pp. 642, 649.) From its review of case law, the appellate court derived the rule that "the due process clause allows a legislative body to limit the right to appointment of counsel to only those defendants who have been sentenced to actual imprisonment." (*Id*., at pp. 649-650.) The court also found unpersuasive petitioner's equal protection arguments: "While we agree that [defendant] might fare better as the respondent on appeal to the appellate division if she had counsel, the petition has failed to show that appointment of counsel for [defendant] or any other respondent on appeal is mandated by the Sixth or Fourteenth Amendments." (*Id*., at p. 653.)

A petition for review is pending in the Supreme Court.

Suggestions

Amend rule 8.851

The suggestion to amend rule 8.851 to broaden the circumstances under which the appellate division is authorized to appoint counsel came to the committee from Ann Salisbury, Senior Research Attorney at the Superior Court of Orange County and a former member of the appellate

division subcommittee. Ms. Salisbury notes that although statute allows a pre-trial appeal from an order granting or denying a motion to suppress evidence (Pen. Code, § 1538.5), rule 8.851 does not allow appointment of counsel in that situation because there has been no conviction.

Ms. Salisbury acknowledges that an order denying a defendant's motion to suppress may be reviewed in a post-conviction appeal, but contends that indigent defendants should not be deprived of the ability to pursue pre-trial appeals. Further, she argues that "any pre-trial appellate decision would be law of the case for trial and any post-conviction appeal," and thus, without appointed counsel, it appears that "an indigent defendant might be without counsel at a critical stage of the defendant's case."

Revise form CR-133, *Request for Court Appointed Lawyer in Misdemeanor Appeal*

The suggestion to revise form CR-133, which currently refers only to "appellant" and "appellant's lawyer," to expand its use to respondents by replacing references to appellant with "defendant," was received by the committee from Milica Novakovic, a staff attorney at the Superior Court of San Diego. Ms. Novakovic points out that rule 8.851 refers to "defendant." She suggests replacing "appellant" with "defendant" to account for the situation in which the defendant is the respondent in an appeal by the People.

Discussion

At its meeting on January 31, the subcommittee discussed whether courts should be authorized to appoint counsel for defendants involved in appeals before suffering a conviction, and expressed support for the concept of providing counsel to indigent defendants involved in both pre- and post-conviction appeals, as both appellants and respondents.

The subcommittee also discussed potential effects the proposed rule amendment might have on the courts, policy implications, and the pending petition for review in *Morris*. The subcommittee determined that it would like additional information regarding the courts' current practices in appointing counsel in misdemeanor appeals, how the courts fund appointed counsel, and other potential impacts on courts, counsel, and litigants of such a rule change. In addition, the subcommittee was mindful that if the Supreme Court accepts review in *Morris*, a subsequent opinion would inform the work on this proposal. For these reasons, the subcommittee recommends that the proposal be deferred for further consideration and to allow time for a decision on the petition for review.[1]

[1] Form CR-133 is based on rule 8.851. The proposed revision of form CR-133 would require amending the rule to expand the right to appointed counsel in misdemeanor appeals beyond the limitation to defendants convicted of a misdemeanor.

Committee Task

In light of the Appellate Division Subcommittee's recommendation that consideration of the proposal be deferred, no draft invitation to comment is included in these materials. The committee's task is to review this proposal and the subcommittee's recommendation and:

- Ask staff or committee members for further information/analysis;
- Approve deferring the proposal as recommended by the subcommittee; or
- Reject the subcommittee's recommendation and direct staff to prepare an invitation to comment.

Attachments

Draft amended rule 8.851, at pp. 5-6
Draft revised form CR-133, at pp. 7-8
The opinion in *Morris v. Superior Court* (2017) 17 Cal.App.5th 636, at pp. 9-19

Title 8. Appellate Rules

Division 2. Rules Relating to the Superior Court Appellate Division

Chapter 3. Appeals and Records in Misdemeanor Cases

Article 1. Taking Appeals in Misdemeanor Cases

Rule 8.851. Appointment of appellate counsel

(a) Standards for appointment

(1) On application, the appellate division must appoint appellate counsel for a defendant accused or convicted of a misdemeanor who:

(A) Is subject to incarceration or a fine of more than $500 (including penalty and other assessments), or who is or may be likely to suffer significant adverse collateral consequences as a result of being convicted of the misdemeanor allegations ~~the conviction~~; and

(B) Is or w~~W~~as represented by appointed counsel in the trial court or establishes indigency.

(2) On application, the appellate division may appoint counsel for any other indigent defendant accused or convicted of a misdemeanor.

(3) A defendant is subject to incarceration or a fine if the incarceration or fine is alleged, is in a sentence, is a condition of probation, or may be ordered if the defendant violates probation.

(b) Application; duties of trial counsel and clerk

(1) If defense trial counsel has reason to believe that the client is indigent and will file or be a party to an appeal, counsel must prepare and file in the trial court an application to the appellate division for appointment of counsel.

(2) If the defendant was represented by appointed counsel in the trial court, the application must include trial counsel's declaration to that effect. If the defendant was not represented by appointed counsel in the trial court, the application must include a declaration of indigency in the form required by the Judicial Council.

(3) Within 15 court days after an application is filed in the trial court, the clerk must send it to the appellate division. A defendant may, however, apply directly to the appellate division for appointment of counsel at any time after filing the notice of appeal.

(4) The appellate division must grant or deny a defendant's application for appointment of counsel within 30 days after the application is filed.

(Subd (b) amended effective March 1, 2014.)

(c) Defendant found able to pay in trial court

(1) If a defendant was represented by appointed counsel in the trial court and was found able to pay all or part of the cost of counsel in proceedings under Penal Code section 987.8 or 987.81, the findings in those proceedings must be included in the record or, if the findings were made after the record is sent to the appellate division, must be sent as an augmentation of the record.

(2) In cases under (1), the appellate division may determine the defendant's ability to pay all or part of the cost of counsel on appeal, and if it finds the defendant able, may order the defendant to pay all or part of that cost.

Rule 8.851 amended effective March 1, 2014; adopted effective January 1, 2009.

Advisory Committee Comment

Request for Court-Appointed Lawyer in Misdemeanor Appeal (form CR-133) may be used to request that appellate counsel be appointed in a misdemeanor case. If the ~~appellant~~ defendant was not represented by the public defender or other appointed counsel in the trial court, the ~~appellant~~ defendant must use *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210) to show indigency. These forms are available at any courthouse or county law library or online at *www.courts.ca.gov/forms*.

CR-133 Request for Court-Appointed Lawyer in Misdemeanor Appeal

Clerk stamps date here when form is filed.

Instructions

- This form is only for requesting that the court appoint a lawyer to represent a ~~person appealing~~ defendant in an appeal in a **misdemeanor** case.
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- The court is required to appoint a lawyer to represent you on appeal only if you cannot afford to hire a lawyer and
  (1) your punishment includes/or may include going to jail or paying a fine of more than $500 (including penalty and other assessments), or
  (2) you are/or may be likely to suffer other significant harm as a result of being convicted.
- This form can be filed at the same time as your notice of appeal.
- Fill out this form and make a copy of the completed form for your records.
- Take or mail the completed form to the clerk's office for the same trial court where you filed your notice of appeal. 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~~ Defendant requesting a court-appointed lawyer (the party who is ~~filing this appeal~~):

Name: _____

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

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

Phone: _____ E-mail: _____

b. ~~Appellant~~ Defendant's lawyer *(skip this if the ~~appellant~~ defendant is filling out this form)*:

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 Case

2 Were you/was your client represented by the public defender or another court-appointed lawyer in the trial court proceedings in this case? *(Check a or b.)*

a. ☐ Yes

b. ☐ No *(Complete and attach* Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense *(form MC-210) showing that you/your client cannot afford to hire a lawyer. You can get form MC-210 at any courthouse or county law library or online at* www.courts.ca.gov/forms.*)*

3 Describe the punishment the trial court gave or might give you/your client in this case *(check all that apply and fill in any required information):*

a. ☐ Jail time

b. ☐ A fine (including penalty and other assessments) *(fill in the amount of the fine)*: $ _____

c. ☐ Restitution *(fill in the amount of the restitution)*: $ _____

d. ☐ Probation *(fill in the amount of time on probation):* _____

e. ☐ Other punishment *(describe any other punishment that the trial court gave you/your client in this case):*

_____

_____

_____

4 *Describe any significant harm that you are/your client is or may be likely to suffer because of ~~this conviction~~ being convicted of the misdemeanor allegations:*

_____

_____

_____

_____

_____

Notice to ~~Appellant~~ Defendant: If you were represented by appointed counsel in the trial court and the trial court finds that you are able to pay all or part of the cost of that counsel, at the conclusion of the proceedings, the court may also determine after a hearing whether you are able to pay all or a portion of the cost of any attorney appointed to represent you in this appeal. If the court determines that you are at that time able to pay, the court will order you to pay all or part of such cost. Such orders will have the same force and effect as a judgment in a civil action and will be subject to enforcement.

Date: _____

_____ ▶ _____

Type or print name *Signature of ~~appellant~~ defendant or attorney*

17 Cal.App.5th 636
Court of Appeal,
Fourth District, Division 2, California.

Phyllis K. MORRIS, as Public Defender for the County of San Bernardino, Petitioner,
v.
The SUPERIOR COURT of San Bernardino County, Respondent;
The People, Real Party in Interest.

E066330
|
Filed 11/21/2017

Synopsis

Background: Public defender brought petition for writ of mandate, seeking to compel Superior Court to appoint counsel for indigent defendant acting as respondent in appellate division of that court.

Holdings: The Court of Appeal, Ramirez, P.J., held that:

[1] court rule requiring appointment of appellate counsel for certain defendants convicted of a misdemeanor did not require appointment of counsel for defendant at issue;

[2] construction of court rule in such a way did not violate due process; and

[3] construction of court rule in such a way did not violate equal protection.

Petition denied.

West Headnotes (6)

[1] Courts
Construction and application of rules in general

The usual rules of statutory construction are applicable to the interpretation of the state's rules of court. Cal. R. Ct. 1.1 et seq.

Cases that cite this headnote

[2] Criminal Law
Appeal or certiorari;further appeal; proceedings on remand

Court rule requiring appointment of appellate counsel for certain defendants convicted of a misdemeanor did not require appointment of counsel for indigent defendant who was acting as respondent, on State's appeal of trial court decision granting suppression motion in a case alleging that defendant committed two misdemeanors; defendant had not been convicted of any offense. Cal. R. Ct. 8.851(a)(1).

Cases that cite this headnote

[3] Criminal Law
Appeal or certiorari;further appeal; proceedings on remand

The Sixth Amendment does not apply to appellate proceedings. U.S. Const. Amend. 6.

Cases that cite this headnote

[4] Constitutional Law
Necessity;right to counsel in general
Criminal Law
Penalty, potential or actual

What the Sixth and Fourteenth Amendments guarantee is not so much counsel, but the right to be free from uncounseled imprisonment. U.S. Const. Amends. 6, 14.

Cases that cite this headnote

[5] Constitutional Law
Appellate counsel
Criminal Law
Statutory Provisions
Criminal Law
Appeal or certiorari;further appeal; proceedings on remand

Construction of court rule to limit the right to appointed counsel in appellate division

of Superior Court to those defendants were had been convicted of a misdemeanor, rather than to include defendants who had not been convicted and were acting as respondents on appeal, did not violate due process; due process allowed for a legislative body to limit right to appointed counsel to only those defendants who were sentenced to actual imprisonment. U.S. Const. Amend. 14; Cal. R. Ct. 8.851(a)(1).

Cases that cite this headnote

[6] **Constitutional Law**
Appellate counsel
Criminal Law
Statutory Provisions
Criminal Law
Appeal or certiorari;further appeal; proceedings on remand

Construction of court rule to limit the right to appointed counsel in appellate division of Superior Court to those defendants were had been convicted of a misdemeanor, rather than to include defendants who had not been convicted and were acting as respondents on appeal, did not facially violate equal protection; limiting right in such a way was not an unreasoned distinction, as it applied only to defendants who faced uncounseled imprisonment. U.S. Const. Amend. 14.

Cases that cite this headnote

****750** ORIGINAL PROCEEDINGS; petition for writ of mandate. Michael A. Knish, Annemarie G. Pace and Carlos M. Cabrera, Judges. Petition denied. (Super.Ct.Nos. CIVDS1610302 & ACRAS1600028)

Attorneys and Law Firms

Phyllis K. Morris, Public Defender, Stephan J. Willms, Deputy Public Defender, for Petitioner.

Robert L. Driessen for Respondent.

No appearance for Real Party in Interest.

OPINION

RAMIREZ, P. J.

***640** California Rules of Court, rule 8.851(a) (rule 8.851), which applies in the appellate division of a superior court, only authorizes appointment of counsel on appeal for defendants who have been "convicted of a misdemeanor." Consequently, it does not require the appellate division to appoint counsel for a defendant who is acting as the respondent on an appeal by the People from an order suppressing evidence under Penal Code section 1538.5.

In this petition, Phyllis K. Morris, in her capacity as the Public Defender for the County of San Bernardino, argues the United States Constitution obligates respondent, the Superior Court of San Bernardino County, to appoint counsel for all indigent defendants in the appellate division. While we agree that a defendant acting as respondent in the appellate division would likely [1] fare better with an attorney than without one, we stress that showing that something might be procedurally better is not the same as showing that the state is obligated to provide it. (See, e.g., *Ross v. Moffitt* (1974) 417 U.S. 600, 616, 94 S.Ct. 2437, 41 L.Ed.2d 341 (*Ross*) ["[T]he fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required."].) Petitioner has failed to show why appointment of counsel for respondents in the appellate division, as much as it might conceivably benefit those respondents, is constitutionally mandated. Consequently, we deny the petition. [2]

****751** FACTUAL AND PROCEDURAL BACKGROUND

Petitioner's office represented Ruth Zapata Lopez, a nonparty to this petition, in a case alleging she committed two misdemeanors by driving while under the influence of alcohol and/or drugs. (Veh. Code, § 23152, subds. (a), ***641** (b).) Acting on Lopez's behalf, petitioner's office successfully moved to suppress evidence supporting the People's case. (Pen. Code, § 1538.5.) On March 14, 2016, both counts were dismissed in the interest of justice. The

People filed a notice of appeal from the granting of the suppression motion on the same day.

On May 11, 2016, a deputy public defender filed a request with the Appellate Division of the Superior Court of San Bernardino County (appellate division) to appoint counsel for Lopez on appeal. Court clerks informed counsel that Lopez was not eligible for appointment of counsel on appeal. According to the deputy public defender, the reason provided was that Lopez "was the respondent, and the respondent on a misdemeanor appeal is not entitled to appointed counsel." In an e-mail attached to the petition, the same deputy public defender asserts a court clerk told him the appellate division's position was that petitioner's office still represented Lopez.

Petitioner filed an earlier petition (case No. **E066181**) challenging this policy. On June 28, 2016, we summarily denied that petition "without prejudice to petitioner's ability to petition the appellate division for the relief she seeks." The following day, petitioner filed, in the appellate division, a petition for writ of mandate raising the same issue presented here. The appellate division summarily denied the petition on July 5, 2016. The instant petition to this court followed.

DISCUSSION

In this court, petitioner primarily asserts that the Sixth and Fourteenth Amendments to the United States Constitution require the appellate division to "appoint counsel for all indigent appellees in all misdemeanor criminal appeals, including [Lopez]." Then, turning instead to California statutory authority, petitioner contends the trial court lacks statutory authority to compel her office, specifically, to represent Lopez as a respondent in the appellate division. (Gov. Code, § 27706, subd. (a).) We disagree with her first assertion and, finding no evidence the second has occurred, decline to weigh in on whether a public defender's office may be compelled to represent a respondent in the appellate division.

Before explaining our reasons for drawing these conclusions, we comment on what is and what is not at issue on this petition. The petition purports to challenge "[t]he system in place in San Bernardino County, at least as suggested by Appellate Division staff," as if this "system" derived from a policy created by the appellate division in San Bernardino County. As the return notes, however, the rule the appellate division appears to be enforcing ***642** in this case is simply rule 8.851, which we mentioned at the outset. What we consider in this opinion, then, is petitioner's assertion ****752** that rule 8.851 is facially invalid. [3] We find that it is not, at least under the authorities petitioner has cited.

Rule 8.851(a)(1) provides that an appellate division "must appoint appellate counsel for a defendant *convicted of a misdemeanor* who" is both: (1) subject to incarceration, a fine of more than $500, or "significant adverse collateral consequences as a result of the conviction"; and (2) indigent (which will be assumed if the defendant was "represented by appointed counsel in the trial court"). (Italics added.) Rule 8.851 further provides that "the appellate division may appoint counsel for any other indigent defendant *convicted of a misdemeanor*." (Rule 8.851(a)(2), italics added.) The parties agree that Lopez does not qualify for appointment of counsel under rule 8.851 because she has not been "convicted of a misdemeanor."

As we construe the petition and traverse, petitioner suggests we could order that Lopez receive appointed counsel despite rule 8.851 in one of two ways: we could interpret rule 8.851 to require appointment of counsel for respondents who have not been convicted of a misdemeanor by finding an inadvertent omission by the rulemaking body, or we could find rule 8.851 constitutionally infirm as written and remake the rule to require appointment of counsel for even those respondents in the appellate division who have not been convicted of a misdemeanor. For the reasons to which we now turn, neither position has merit.

A. We may not interpret rule 8.851 to require appointment of counsel for any criminal defendant who has not been convicted of a misdemeanor

[1] **[2]** " 'The usual rules of statutory construction are applicable to the interpretation of the California Rules of Court.' [Citation.] This means our primary object is to determine the drafters' intent. 'The words of the statute are the starting point. "Words used in a statute ... should be given the meaning they bear in ordinary use. [Citations.] If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature ...." ' " (*Kahn v. Lasorda's*

Dugout, Inc. (2003) 109 Cal.App.4th 1118, 1122-1123, 135 Cal.Rptr.2d 790.)

We agree with the return that rule 8.851 "is expressed in plain, simple language." There is therefore no need to look to sources extrinsic to the rule ***643** itself to determine that the rule's drafters intended to provide appointed counsel only to misdemeanor defendants who have been convicted of a misdemeanor, and not to those who, like Lopez, have not. At bottom, then, petitioner's request that we look to the history of rule 8.851 fails, because we have no reason to consult these materials to interpret the text of the rule.

Still, even if we could properly consider petitioner's arguments regarding the history and purpose of rule 8.851 on the merits,[4] the inferences we draw from the materials ****753** presented are different from the ones petitioner draws. According to petitioner, the proposed rule on which the Judicial Council sought comment originally gave an appellate division discretion to appoint counsel, not just for "any other indigent misdemeanor defendant convicted of a misdemeanor" as under the version of rule 8.851(a)(2) that became operative, but for "any other indigent misdemeanor defendant." The traverse continues: "If this version of Rule 8.851(a)(2) remained as written, this matter would not be before this court, because this language would have included indigent respondents. But for reasons unexplained, the ... language noted above did not remain, and Rule 8.851(a)(2) now reads '[o]n application, the Appellate Division may appoint counsel for any other indigent defendant *convicted of a misdemeanor.*' (Italics added.) The addition of this italicized language, *i.e.* '*convicted of a misdemeanor*,' took indigent respondents out of the realm of those entitled to appointed counsel in any Appellate Division proceeding."

As petitioner sees it, the omission of respondents on appeal must have been inadvertent, because California Rules of Court, rule 8.850, states that ***644** rules in the chapter containing it and rule 8.851 apply to both preconviction and postconviction appeals. However, the conclusion that an inadvertent omission occurred assumes that appointment of counsel for defendants who have not been convicted of a misdemeanor is somehow required, either because the rulemaking body intended to include such a benefit or because some extrinsic authority requires appointment of counsel even for misdemeanor pretrial respondents. It therefore begs the question. We do not have a record from which we could conclude that the rulemaking body intended to offer appointment of counsel to respondents on appeal such as Lopez, who have not been convicted; what petitioner has shown us is that the rulemaking body considered but rejected an option that would have given counsel to Lopez and others like her. We therefore interpret rule 8.851 to mean exactly what it says, which is that only misdemeanor defendants who have actually been convicted are entitled to appointed counsel in the appellate division.

Moreover, we explain in the next section why we find, at least under the authorities petitioner has cited, that the United States Constitution does not require appointment of counsel for all misdemeanor defendants on appeal. Petitioner gives us no reason to find that the rulemaking body must necessarily have intended to offer more than is constitutionally necessary, and we have already intimated that the law is otherwise, because not all services that are "of benefit" ****754** to a litigant must be provided at government expense. (*Ross*, *supra*, 417 U.S. at p. 616, 94 S.Ct. 2437.) Petitioner's legislative intent argument fails. There is no indication in the record that the rulemaking body decided to offer appointed counsel only to those criminal defendants in the appellate division who have been convicted of a misdemeanor because of an omission instead of because the body concluded, as we do, that no more is required under the Constitution.

B. Rule 8.851 does not violate the Sixth or Fourteenth Amendments to the United States Constitution as alleged by the petitioner

The United States Supreme Court has recognized "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 462-463, 58 S.Ct. 1019, 82 L.Ed. 1461.) In that court's view, this is why the Sixth Amendment to the United States Constitution "withholds from federal courts,[5] in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." (***645** *Johnson v. Zerbst*, at p. 463, fn., 58 S.Ct. 1019omitted.) The rule that has developed under the Sixth Amendment is that "in our adversary system of criminal justice, any person haled into

court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." (*Gideon*, *supra*, 372 U.S. at p. 344, 83 S.Ct. 792.) This is the rule on which the petition chiefly relies for its Sixth Amendment claim.

[3] However, "the Sixth Amendment does not apply to appellate proceedings." (*Martinez v. Court of Appeal* (2000) 528 U.S. 152, 161, 120 S.Ct. 684, 145 L.Ed.2d 597 (*Martinez*).) Therefore, petitioner's challenge to Rule 8.851 as violating the Sixth Amendment to the United States Constitution fails.

Petitioner cites to both *Gideon*'s statement that the Sixth Amendment requires appointment of counsel whenever a person is "haled into" criminal court (as purportedly happened to Lopez when the People appealed (*Gideon*, *supra*, 372 U.S. at p. 344, 83 S.Ct. 792)), and to *Anders v. California* (1967) 386 U.S. 738, 742, 87 S.Ct. 1396, 18 L.Ed.2d 493, for the same proposition, presumably because *Anders* quoted the above referenced rule from *Gideon* in a case examining the role of counsel on appeal from a conviction. Nonetheless, *Anders* does not support a conclusion that the Sixth Amendment applies on appeal, because *Anders* resolved these questions not based on the Sixth Amendment, but instead on "[t]he constitutional requirement of substantial equality and fair process." (*Anders*, at p. 744, 87 S.Ct. 1396.) As *Martinez* instructs, the Sixth Amendment is not an applicable source of authority when it comes to appointment of counsel on appeal. (*Martinez*, *supra*, 528 U.S. at p. 161, 120 S.Ct. 684.)

Because the Sixth Amendment does not apply, courts have looked to the Fourteenth Amendment when analyzing claims regarding entitlement to counsel on appeal. (See, e.g., *Ross*, *supra*, 417 U.S. at pp. 608-609, 94 S.Ct. 2437.) Even though the Sixth Amendment does not require the ****755** right to appeal at all, a state that provides the right to appeal must, to remain consistent with the Fourteenth Amendment guarantees of due process and equal protection, make that right equally available to the rich and the poor. (*Griffin v. Illinois* (1956) 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 [requiring states to furnish transcripts at no cost to indigent defendants on appeal].) In this context, " 'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." (*Ross*, at p. 609, 94 S.Ct. 2437.)

We look, then, to see whether the due process and/or equal protection clauses of the Fourteenth Amendment require the appointment of counsel when the People appeal the granting of a Penal Code section 1538.5 motion ***646** to the appellate division in a misdemeanor case. In order to evaluate the petition on the merits, as directed by the Supreme Court, we look largely to United States Supreme Court jurisprudence regarding the right to appointed counsel as a freestanding due process right. We find these authorities quite helpful in explaining why we think the state acted constitutionally when it drew the line for who gets appointed counsel in the appellate division at misdemeanor defendants who have been convicted of a misdemeanor. (*Lassiter v. Dept. of Social Services* (1981) 452 U.S. 18, 24, 101 S.Ct. 2153, 68 L.Ed.2d 640 (*Lassiter*) ["Applying the Due Process Clause is ... an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation."].)

We begin by noting that, if petitioner's core premise that the usefulness of counsel is sufficient to create a due process right to counsel, it is difficult to see any case in which appointment of counsel is not required. And yet that is resoundingly not the law. Rather, "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel." (*Lassiter*, *supra*, 452 U.S. at p. 26, 101 S.Ct. 2153.) For example, in *Scott v. Illinois* (1979) 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (*Scott*), the court affirmed the misdemeanor theft conviction of a defendant who was subject to imprisonment but only sentenced to a $50 fine even though the defendant had requested and been refused counsel in the trial court. The court has also rejected an argument that each state "is under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases" in favor of a system allowing the government entities charged with administering probation and parole to decide entitlement to counsel on a case-by-case basis. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 787, 93 S.Ct. 1756, 36 L.Ed.2d 656.) Similarly, in *Lassiter*, the court held that parents in proceedings to terminate parental rights would only be entitled to appointed counsel on a case-by-case basis. (*Lassiter*, at p. 32, 101 S.Ct. 2153.)

Although the Sixth Amendment does not guarantee the right to counsel on appeal from a conviction, cases that construe the rights guaranteed therein are instructive on the issue of what due process under the Fourteenth Amendment requires since "[t]he Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685, 104 S.Ct. 2052, 80 L.Ed.2d 674; see *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 146, 126 S.Ct. 2557, 165 L.Ed.2d 409 [same].) Having independently researched the issue, ****756** we emphasize that the United States Supreme Court has repeatedly held that the risk of actual imprisonment marks the line at which counsel must be appointed for purposes of the Sixth Amendment. (See, e.g., *Alabama v. Shelton* (2002) 535 U.S. 654, 662, 122 S.Ct. 1764, 152 L.Ed.2d 888; *Scott*, *supra*, 440 U.S. at pp. 373-374, 99 S.Ct. 1158; ***647** *Argersinger v. Hamlin* (1972) 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530.) "In sum, the Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured." (*Lassiter*, *supra*, 452 U.S. at pp. 26-27, 101 S.Ct. 2153.)

Since the petition does not mention this presumption, petitioner has not rebutted it. Rather, she argues the appeal forces Lopez to face imprisonment because the People's prosecution of Lopez will resume if the appeal is successful, and Lopez faces imprisonment if convicted. We reject this contention. To begin with, it is inconsistent with *Lassiter*'s command that counsel need only be appointed for a litigant "when, if he loses, he may be deprived of his physical liberty." (*Lassiter*, *supra*, 452 U.S. at pp. 26-27, 101 S.Ct. 2153.) While we realize Lopez may be more likely to become imprisoned if the People prevail on appeal, the cases discussed *ante* require more than mere likelihood. In fact, and as we have explained, they require actual imprisonment as a direct consequence of losing the action before the right to appointed counsel must attach. (*Scott*, *supra*, 440 U.S. at pp. 373-374, 99 S.Ct. 1158 ["We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."].)

[4] Phrased differently, what the Sixth and Fourteenth Amendments guarantee is not so much counsel, but the right to be free from uncounseled imprisonment. (*Lassiter*, *supra*, 452 U.S. at p. 26, 101 S.Ct. 2153 ["the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."].) The petition has given us no reason to set the line in a different place for a respondent in the appellate division. If the right Lopez has is the right to be free from uncounseled imprisonment, she faces no diminution of that right on appeal, since she will be represented at trial even if the People prevail in the appellate division.

Again, we take no issue with the idea that Lopez's respondent's brief, and perhaps her chances of an affirmance on appeal, might well be better if she had counsel than if she did not. (See, e.g., *Johnson v. Zerbst*, *supra*, 304 U.S. at p. 463, 58 S.Ct. 1019 ["The '... right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' "].) Where we part ways with petitioner is in what we make of the fact that Lopez would fare ***648** better on appeal with counsel. She appears to assume it means she has a federal due process right to counsel. As we have explained, she does not.

The petition in this case does not address the framework of cases cited *ante* and instead cites broad rules from *Griffin* and ****757** *Douglas v. California* (1963) 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (*Douglas*) without analyzing why they require appointment of counsel in the appellate division in California. In her challenge based upon the Fourteenth Amendment, petitioner relies heavily on *Douglas*. There, the court invalidated "a California rule of criminal procedure which provides that state appellate courts, upon the request of an indigent for counsel, may make 'an independent investigation of the record and determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed. ... After such investigation, appellate courts should appoint counsel if in their opinion it would be helpful to the defendant or the court, and should deny

the appointment of counsel only if in their judgment such appointment would be of no value to either the defendant or the court.' " (*Id.* at p. 355, 83 S.Ct. 814.) The *Douglas* court opined: "When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." (*Id.* at p. 357, 83 S.Ct. 814.)

Petitioner does not explain whether she cites *Douglas* on due process or on equal protection grounds, but the *Ross* court noted the *Douglas* court relied on both principles. (*Ross*, *supra*, 417 U.S. at p. 610, 94 S.Ct. 2437.) It then explained that with respect to due process, "there are significant differences between the trial and appellate stages of a criminal proceeding," since the purpose of the trial court portion of the action is to give the state a forum in which to attempt to overcome the presumption of innocence, while an appeal is usually initiated by a convicted defendant who needs counsel not to protect against being haled into court but to overturn a determination of guilt. (*Ibid.*) The court concluded: "This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane v. Durston*, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867 (1894). The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. *Douglas v. California*, *supra*. Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty. That question is more profitably considered under an equal protection analysis." (*Ross*, *supra* at p. 611, 94 S.Ct. 2437.)

We also find *Douglas* distinguishable. Because the California rule the *Douglas* court invalidated asked a Court of Appeal to conduct "an ex parte ***649** examination of the record" and decide whether appointment of counsel would be helpful, it required a "preliminary showing of merit" before the appellant could know whether he or she would have a more effective appeal with counsel or a less effective one without. (*Douglas*, *supra*, 372 U.S. at pp. 356-357, 83 S.Ct. 814.) In other words, the California procedure affected "the right to appeal" itself. (*Ibid.*) Here, the right to appeal has not been affected, and there can be no prejudging of the merits of the appeal at an early stage by the court that is to assess the validity of the trial court's act. In addition, Lopez's interest in retaining the dismissal she obtained after the trial court granted her suppression motion is undoubtedly less weighty than that of a defendant who has been "convicted of a misdemeanor" (rule 8.851(a)(1), (a)(2)) and is trying to overturn the sentence.

[5] **[6]** In sum, then, the rule we deduce is that the due process clause allows a legislative body to limit the right to appointment ****758** of counsel to only those defendants who have been sentenced to actual imprisonment. As discussed *ante*, petitioner herself admits the legislative body that drafted rule 8.851 deliberately chose to limit the right to appointed counsel in the appellate division to those defendants who had been convicted of a misdemeanor. We now turn to whether that decision violates the equal protection clause.

As previously described, petitioner challenges rule 8.851 on its face and asks us to find that the appellate division may not refuse to appoint counsel for an indigent defendant acting as respondent on appeal because otherwise "all [such a defendant] can do is hope the appeals court will find anything in the record to justify affirming her judgment while the rich man has the opportunity to have counsel fully and effectively defend his judgment." In other words, on the equal protection issue petitioner primarily points to an alleged "disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." (*Ross*, *supra*, 417 U.S. at p. 609, 94 S.Ct. 2437.)

As we discussed at oral argument, the paucity of equal protection analysis petitioner provided in her briefs greatly complicates this court's task. At times, she appears to complain about disparate treatment between appellants and respondents, and at other times she argues an equal protection violation has occurred because indigent litigants are being treated less favorably than wealthy ones. Petitioner does not discuss to what extent either of these pairs of classes is similarly situated, and she does not explain whether we should look for a rational basis or for something weightier when deciding whether rule 8.851's differentiation between misdemeanor defendants who have been convicted and those who have not passes constitutional muster.

***650** We find the following passage from *Ross* particularly instructive: "Despite the tendency of all

rights 'to declare themselves absolute to their logical extreme,' there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages,' [citation], nor does it require the State to 'equalize economic conditions.' [Citation.] It does require that the state appellate system be 'free of unreasoned distinctions,' [citation], and that indigents have an adequate opportunity to present their claims fairly within the adversary system. [Citations.] The State cannot adopt procedures which leave an indigent defendant 'entirely cut off from any appeal at all,' by virtue of his indigency, [citation], or extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.' [Citation.] The question is not one of absolutes, but one of degrees." (*Ross*, *supra*, 417 U.S. at p. 612, 94 S.Ct. 2437, fn. omitted.)

In this case, limiting the right to appointed counsel in the appellate division to only those defendants who have been convicted of a misdemeanor is not an "unreasoned distinction." (*Ross*, *supra*, 417 U.S. at p. 612, 94 S.Ct. 2437.) As the previous discussion explains, appointed counsel does not become matter of right until a defendant faces uncounseled imprisonment.

We again emphasize that deciding whether to offer more than the Constitution requires with respect to the right to appointed counsel is a legislative act. (*Ross*, *supra*, 417 U.S. at p. 618, 94 S.Ct. 2437 ["We do not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to convicted defendants ****759** at all stages of judicial review."].) To our knowledge, the only way a litigant in the appellate division can be subjected to actual imprisonment is if he or she has been convicted of a misdemeanor. (See Pen. Code, §§ 19.6 [no imprisonment in infraction cases], 1466 [appellate division hears appeals in misdemeanor and infraction cases].) Limiting the right to appointed counsel on appeal in the appellate division to only those misdemeanor defendants who have suffered a conviction provides counsel to those with the best likelihood of having a clearly established right to it under the due process clause, while denying it to those who possess no such right. These two classes are therefore not "arguably indistinguishable." (*Ross*, at p. 609, 94 S.Ct. 2437.)

This limitation also recognizes that the interest a convicted defendant seeks to protect on appeal is weightier than the interest of a party like Lopez, who faces no uncounseled imprisonment even if the appeal results in a reversal and the People resume prosecution. Rule 8.851 does not deprive Lopez of the right to appeal, and we have explained why the petition fails to show that the appeal in her case would be a "meaningless ritual" unless she is appointed ***651** counsel. (*Ross*, *supra*, 417 U.S. at p. 612, 94 S.Ct. 2437.) It therefore appears to pass muster under the rules discussed herein.

In choosing to mount only a facial attack on rule 8.851, petitioner has not asked us to find that counsel is appropriate for Lopez, in particular, because of unique facts of her case. While we note the petition mentions in passing that Lopez is not fluent in English, our information on this topic is scant. It is, in fact, limited to a statement in the petition that Lopez does "not have any legal training," "does not speak English," and, "other than being able to perform rudimentary tasks such as dating documents and printing her name, she does not read or write English." From this, petitioner asks us to conclude that, "If a stay is not granted [Lopez] will have no choice but to sit back and hope that the government's opening brief, which will be prepared by experienced government lawyers, will not be enough to persuade this court that the lower court judgment should be reversed."

The record does not show that Lopez's appeal will be a "meaningless ritual" (*Douglas*, *supra*, 372 U.S. at p. 358, 83 S.Ct. 814) because of her difficulties with the English language. First, in a California appeal, unlike in the trial court, Lopez will reap the benefit of standards of review and other procedural tools that are designed to protect the ruling the trial court has already made.[6] For example, "[a] judgment ****760** or order of a lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Hernandez v. Superior Court* (1992) 9 Cal.App.4th 1183, 1190, 12 Cal.Rptr.2d 55.) Although an appellate court independently reviews whether the trial court properly applied the law regarding search and seizure under the Fourth Amendment, it still defers to any factual findings that are supported by ***652** substantial evidence. (*People v. Ayala* (2000) 24 Cal.4th 243, 279, 99 Cal.Rptr.2d 532, 6 P.3d 193.) We assume our

colleagues in the appellate division perform their official duty in accordance with these rules of law. (Evid. Code, § 664.) Petitioner has not addressed why safeguards such as these do not protect, or at least affect, the extent of her Fourteenth Amendment rights. (Cf. *Ross*, *supra*, 417 U.S. at p. 616, 94 S.Ct. 2437 [noting "the nature of discretionary review in the Supreme Court of North Carolina" helped decrease the burden to an appellant seeking such review without counsel].)

Second, the record fails to support the suggestion that Lopez will be unable to file a brief at all, such that the appellate division will decide the People's appeal "based on its review of the Superior Court record ... alone." "In contemporary urban society, the non-English speaking individual has access to a variety of sources for language assistance. Members of his family, friends or neighbors—born or schooled here—may provide aid. Private organizations also exist to aid immigrants." (*Jara v. Municipal Court* (1978) 21 Cal.3d 181, 184, 145 Cal.Rptr. 847, 578 P.2d 94.) Since the record contains so little detail about Lopez's language difficulties, the record does not support any claim that counsel must be appointed for Lopez, individually, because her status as a non-English speaker means the Fourteenth Amendment somehow requires that relief.

At oral argument, petitioner's counsel referred to three cases that had not been briefed. Despite counsel's announcing his intention to discuss these cases in two letters filed on May 15 and May 23, 2017, we are aware of no authority allowing a party to delay mention of cases that were in existence when the briefs were prepared. Even if it applies to a writ petition arising from a misdemeanor case,[7] California Rules of Court, rule 8.254 only allows a party to bring to our attention "significant new authority, including new legislation, *that was not available in time to be included in the last brief that the party filed or could have filed*." (Cal. Rules of Court, rule 8.254(a), italics added.) The three unbriefed cases on which petitioner wants to rely were published in 1992, 1998, and 2008. We are therefore not obligated to consider them.

Even if we do consider petitioner's three cases, which are *Claudio v. Scully* (2d Cir. 1992) 982 F.2d 798 (*Claudio*), *United States ex rel. Thomas v. O'Leary* (7th Cir. 1988) 856 F.2d 1011 (*O'Leary*), and *Commonwealth v. Goewey* (2008) 452 Mass. 399, 894 N.E.2d 1128 (*Goewey*), we find ****761** them unavailing. First, and as counsel acknowledged at oral argument, "lower federal court decisions on federal questions are persuasive authority, but they are not ***653** binding on this court." (*Credit Managers Assn. of California v. Countrywide Home Loans, Inc.* (2006) 144 Cal.App.4th 590, 598, 50 Cal.Rptr.3d 259.) We therefore need not follow *Claudio* or *O'Leary*. The same is true of *Goewey*, which is an out-of-state case. (See, e.g., *Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 786, 11 Cal.Rptr.3d 522 [out-of-state cases can be persuasive authority].)

Second, we find *Claudio*, *O'Leary*, and *Goewey* unpersuasive. *Claudio* and *O'Leary* are both easily distinguishable, as they involve murder charges rather than misdemeanor charges, and as both defendants in those cases were actually sentenced to prison. (*Claudio*, *supra*, 982 F.2d at p. 800; *O'Leary*, *supra*, 856 F.2d at p. 1013.) *Goewey*, which involved an appeal from the pretrial granting of a suppression motion, is potentially more apt. However, the most the *Goewey* court offers us to explain why counsel must be afforded to pretrial respondents on appeal if counsel is afforded to pretrial appellants on appeal is that "the same general principles apply" to appellants and respondents on appeal. (*Goewey*, *supra*, 452 Mass. at p. 403, 894 N.E.2d 1128.) As we have now explained, the matter is much more complicated. *Goewey*'s superficial analysis does not affect our holding.

For the foregoing reasons, we reject petitioner's challenge to rule 8.851 under the Sixth and Fourteenth Amendments to the United States Constitution. While we agree that Lopez might fare better as the respondent on appeal to the appellate division if she had counsel, the petition has failed to show that appointment of counsel for Lopez or any other respondent on appeal is mandated by the Sixth or Fourteenth Amendments.

C. The record does not support the contention that the appellate division is requiring petitioner to represent Lopez on appeal

Petitioner's final contention is that the appellate division is forcing her to represent Lopez on appeal even though Government Code section 27706, which establishes a public defender's duties, allows for no such representation. The petition's prayer asks us to: "Issue a judgment declaring the San Bernardino County Superior Court may not appoint the Public Defender to represent indigent appellees in misdemeanor criminal appeals, or declare the Public Defender to remain appointed in cases where

the Public Defender previously represented an indigent appellee in the Superior Court."

We decline to pass on this issue, as we see no proof that the appellate division is doing either of these things. First, we noted *ante* that the allegation that the appellate division still considers petitioner to represent Lopez came to us in the form of an e-mail from the deputy public defender who tried to arrange for appointment of counsel (other than petitioner) for Lopez. We are ***654** unclear how much evidentiary weight, if any, to assign to this e-mail, the contents of which are neither independently verified nor repeated in any other portion of the record. We note, however, that the e-mail itself is internally inconsistent, as it says both that "the Appellate Department's position is that [petitioner] is still counsel," and that petitioner "can represent M[s]. Lopez if they so choose, or petition the Fourth District for a writ." Even if we find evidentiary worth in this portion of the record, we see in it no proof that the appellate division is denying petitioner ****762** the right to decide whether or not to represent Lopez on the People's appeal.

More fundamentally, the relief petitioner requests sounds more like a declaratory judgment than a writ of mandate. In fact, the cover page indicates petitioner's intent that we consider a "petition for writ of mandate *and declaratory relief*" (italics added), and, as noted *ante*, the prayer asks us to enter "*judgment*" declaring certain things (italics added). We may not do this on a mandamus petition asking us to review the propriety of a judicial order. Here, petitioner presents no evidence that the appellate division has exposed it to sanctions for failing to represent Lopez, refused to accept a brief from Lopez that was not prepared by petitioner's office, or otherwise given effect to the alleged statement by a court clerk that petitioner's office is still counsel of record. "[W]e are asked to direct the trial court to perform an act which, on the record, it has never refused to perform. Ordinarily, mandate would not lie in such a situation." (*Lohman v. Superior Court* (1978) 81 Cal.App.3d 90, 98, 146 Cal.Rptr. 171.)[8]

DISPOSITION

The petition is denied.

We concur:

McKINSTER, J.

CODRINGTON, J.

All Citations

17 Cal.App.5th 636, 225 Cal.Rptr.3d 749, 17 Cal. Daily Op. Serv. 11,181, 2017 Daily Journal D.A.R. 11,061

Footnotes

1 Though the absence of counsel is not always fatal to a claim on appeal; we note the litigant in the landmark case who caused the United States Supreme Court to hold that all indigent criminal defendants have the right to appointed counsel, was himself without counsel for the majority of that proceeding. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 338, 83 S.Ct. 792, 9 L.Ed.2d 799 (*Gideon*).)

2 The petition was first filed in this court on July 7, 2016. On July 13, 2016, we summarily denied that filing. The California Supreme Court stayed the action to facilitate review of a petition for certiorari and then, on September 14, 2016, granted the petition for review, transferred the matter to this court, and directed us to issue an order to show cause why the relief sought in the petition should not be granted. "The Supreme Court's direction that we issue the alternative writ, after our denial, is an expression on the part of the Supreme Court that we examine the contentions raised by petitioner and write an opinion evaluating those contentions." (*Charlton v. Superior Court* (1979) 93 Cal.App.3d 858, 861, 156 Cal.Rptr. 107.) It is not an expression of an opinion that the petition should be granted. (*Ibid.*; see *Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 500, 165 Cal.Rptr. 748; *Krueger v. Superior Court* (1979) 89 Cal.App.3d 934, 939, 152 Cal.Rptr. 870.)

3 Petitioner first made this assertion in the traverse, as the petition neither cited nor mentioned rule 8.851.

4 Even if we disregard the rule that we do not examine extrinsic sources if the legislation is unambiguous and consider petitioner's contentions regarding the history of rule 8.851, we have to take the traverse at face value and trust that petitioner correctly represents the contents of the February 6, 2008 advisory committee report on which she relies. This is because petitioner has not provided us with the legislative history materials she cites; there is no request for judicial notice, and the 2008 report on which petitioner relies has in no way been made part of the record in this court. (See *Kaufman*

& Broad Communities, Inc. v. Performance Plastering, Inc. (2005) 133 Cal.App.4th 26, 34 Cal.Rptr.3d 520 [explaining importance of proper motions for judicial notice of legislative history materials].) Also, "It is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party." (*People v. Tully* (2012) 54 Cal.4th 952, 1075, 145 Cal.Rptr.3d 146, 282 P.3d 173; see, e.g., *People v. Peevy* (1998) 17 Cal.4th 1184, 1206, 73 Cal.Rptr.2d 865, 953 P.2d 1212 ["Normally, a contention may not be raised for the first time in a reply brief."].) Here, we find ourselves in the unexpected position of assessing a main premise (i.e. that rule 8.851(a) is unconstitutional) that was not raised until the traverse because the petition did not cite rule 8.851 and, therefore, did not analyze its legislative history, purpose, or intent. Although the return made some arguments regarding these issues, respondent has had no ability to answer petitioner's specific points, which, though potentially important to her position, were not made known until the traverse. However, since we eventually find petitioner's legislative history materials do not help her case, we see no actual prejudice to respondent in our treating those materials as we have.

5 The same holds true of state courts, since the Sixth Amendment's right to counsel clause is "made obligatory upon the States by the Fourteenth Amendment." (*Gideon*, *supra*, 372 U.S. at p. 342, 83 S.Ct. 792.)

6 The petition cites what purport to be statistics showing that the reversal rate is unusually high when the People appeal from the granting of a suppression motion. Rather than statistics from which we can draw conclusions, however, what petitioner has provided is a list of cases and this statement in the unverified memorandum supporting the petition: "Since January 2010, the government has filed at least twenty-five appeals (including writ petitions) challenging the granting of a suppression motion." We do not know how many times the People have sought appellate review (if it was in fact more than 25), in what courts, and how and by whom these data were compiled. Because we have no statistics from which we can draw the comparative inferences petitioner suggests, we assign no evidentiary value to the figures on which the first few pages of the petition's supporting memorandum rely. In addition, even were the petition correct that reviewing courts often or even typically appoint counsel for respondents when the People appeal the granting of a suppression motion, we would find this fact irrelevant to the petition. (See *Ross*, *supra*, 417 U.S. at pp. 618-619, 94 S.Ct. 2437 [encouraging states to offer more in the way of counsel than the federal Constitution requires and entrusting that decision to state legislative bodies].) In fact, rule 8.851 itself offers more than we conclude is required, since it requires appointment of counsel for defendants who have been convicted of misdemeanors but received sentences consisting of nothing but fines or serious collateral consequences instead of only offering appointed counsel to those misdemeanor defendants who have been sentenced to actual imprisonment. (Rule 8.851(a)(1)(A).)

7 California Rules of Court, rule 8.254 allows a party to submit a letter citing new authorities, but that rule appears to only apply to appeals. We see no analogous provision for writ petitions.

8 While the appellate division denied a petition making the same argument petitioner makes here, it did so summarily, and may have done so because it has not, in fact, compelled petitioner to represent Lopez.

Item 11

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
February 20, 2018

To
Members of the Appellate Advisory Committee

From
Patrick O'Donnell, Principal Managing Attorney
Jane Whang, Attorney
Legal Services, Judicial Council

Subject
Privacy Resource Guide: Draft Appellate Provisions

Action Requested
Please review

Deadline
February 27, 2018

Contact
Patrick O'Donnell, 415-865-7665,
patrick,o'donnell@jud.ca.gov

Jane Whang, 415- 865-7585,
jane.whang@jud.ca.gov

Executive Summary

The Information Technology Committee (ITAC) is in the process of developing a *Privacy Resource Guide* (PRG). This guide is designed to assist the trial and appellate courts in protecting the privacy interests of members of the public who become involved with the California Court system while providing the public with reasonable access to court records. This memorandum explains the purpose and scope of the PRG and identifies some of the matters on which ITAC's Rules and Policy Subcommittee (R & P Subcommittee) is seeking assistance, including specifically assistance on matters in the PRG relating to the appellate courts.

The R & P Subcommittee is leading this initiative. It is very interested in receiving input, and if possible some direct assistance, from other advisory bodies in drafting and preparing the PRG. In particular, it is interested in receiving from the Appellate Advisory Committee (AAC) input on the sections of the PRG that relate to the appellate courts. Previously, on February 5, 2018, the R

& P Subcommittee presented information about the PRG to the Joint Appellate Technology Subcommittee (JATS), comprised of members from both the AAC and ITAC. The R & P Subcommittee appreciates the input that it has received from JATS and is in the process of incorporating that input into the manual. This memorandum follows up on the JATS meeting, provides information to the full AAC about this privacy initiative, and invites AAC members who have not had an opportunity to review the PRG and make suggestions to do so.

Privacy Resource Guide

The purpose of the *Privacy Resource Guide* is to assist the trial and appellate courts—and more generally the judicial branch— to protect the privacy interests of persons involved with the California court system while providing the public with reasonable access to the courts and the records to which they are entitled.

The resource guide will provide assistance in two ways. First, it will provide information about the legal requirements that guide the courts' activities and operations relating to protecting the privacy of persons involved with the court system. Second, the guide will provide practical advice for courts on the best practices for carrying out their obligations to protect people's privacy.

The creation of the resource guide at this time is important, among other reasons, because of the major transition underway that is transforming the courts from a paper-based physical system to one that relies increasingly on electronic records and other forms of technology to conduct business. With this change, much information in the courts that was practically obscure can now be made available remotely in easily searchable format. It now requires careful analysis and the deliberate institution of new practices to ensure that proper privacy protections are in place.

Table of Contents

The scope of the PRG is quite broad, as indicated in the attached draft Table of Contents.[1] Among the general topics covered are privacy in court records (confidential and sealed records), access to court records, financial privacy in civil and criminal cases, privacy in judicial administrative records, and the privacy of witnesses, jurors, and other non-parties. The discussion of these topics in the current draft of the PRG focuses on the legal requirements that guide the courts' activities and operations relating to protecting the privacy of persons involved with the court system. Preliminary draft materials on many of these topics have already been prepared.

[1] See Draft Table of Contents, Attachment 1 to this memorandum.

Other proposed sections of the PRG will focus less on legal requirements and more on best practices that courts might implement to protect the privacy of persons involved with the court system. For example, these sections of the PRG will address issues such as information security, court management of protected private information, privacy protections for users of court websites, and privacy protection in court-related services. These sections are less well developed and will require more work in the future.

Draft Appellate Sections

For AAC review, attached to this memorandum are 1) the introduction to the PRG,[2] and 2) two sets of preliminary draft materials specifically relating to the courts of appeal.[3]

The introduction to the PRG provides an overview of the manual as a whole and applies to all types of cases in both the trial courts and appellate courts.

The first of the attachments on the appellate courts contains information to be placed in Section 2 of the PRG, Privacy in Court Records. The appellate materials in Section 2 are located in subsection 2.2, Confidential and Sealed Records in the Appellate Courts, and Section 2.3, Privacy in the Opinions of the Court of Appeal. As with much of the other materials in the PRG developed so far, these materials focus on rules of court: the appellate rules on confidentiality and sealed records (rules 8.45, 8.46, and 8.47) and the rules on privacy in appellate opinions (rules 8.90 and 8.401).

The second appellate attachment contains information to be placed in Section 3 of the PRG, Access to Court Records. Section 3.2, on public access to records in the appellate courts; discusses the public access rules (rules 8.80-8.85).

Next Steps

The present draft materials relating to the appellate courts principally concern legal and policy issues. AAC members are asked to review and comment upon the attached sections of the PRG. However, these materials do not include any suggested best practices or other similar materials. If members of the AAC have any practical advice on protecting privacy in the appellate courts, they are encouraged to make suggestions and possibly prepare new materials to be added to the PRG.

[2] See Introduction, Attachment 2 to this memorandum.

[3] See draft appellate Attachments 3 and 4.

Attachments

1. Draft Table of Contents to the Privacy Resource Guide

2. Draft Introduction to the Privacy Resource Guide

3. Draft Appellate sections (part 1)

4. Draft Appellate sections (part 2)

Privacy Resource Guide

Table of Contents

Appendices

Appendix A: List of statutes and rules on confidentiality and sealed records
Appendix B: Model local court privacy guide
Appendix C: Sample privacy statement for court websites
Appendix D: Sample terms of use for court websites
Appendix E: Sample notice of data breach

1. Introduction

1.1 Background

Privacy is a fundamental right guaranteed by the California Constitution. (Cal. Const., art I, § 1; see *Westbrook v. County of Los Angeles* (1994) 27 Cal. App 157, 164–166.) To protect people's privacy, numerous law have been enacted that provide for the confidentiality of various kinds of personal information. In adjudicating cases, courts have a major role in enforcing these laws and protecting the privacy rights of citizens. Courts also are involved in protecting people's privacy rights through their own day-to-day operations, including preserving the integrity of confidential and sealed records, ensuring that sensitive data is secure, and protecting private personal information.

On the other hand, access to information concerning the conduct of the public's business is also a fundamental right of every citizen. (Cal. Const., art I, § 3(b); see *NBC Subsidiary (KNBC–TV) v. Superior Court of Los Angeles County* (1999) 20 Cal.4th 1178, 1217–1218 (substantive courtroom proceedings in ordinary civil cases are "presumptively open").) Courts are obligated to conduct their business in an open and transparent manner. (See also Cal. Rules of Court, rule 10.500.) Similarly, court records are presumed to be open and must be made accessible to the public unless made confidential or sealed. (See Cal. Rules of Court, rule 5.550(c).)[1] Openness and accessibility are important to preserve trust and confidence in the judicial system; and they are necessary to carry on the regular, ongoing business of the courts.[2]

1.2 Purpose of the Privacy Resource Guide

The purpose of this resource guide is to assist the trial and appellate courts—and more generally the judicial branch— to protect the privacy interests of persons involved with the California court system while providing the public with reasonable access to the courts and the records to which they are entitled.

The resource guide provides assistance in two ways. First, it provides information about the legal requirements that guide the courts' activities and operations relating to protecting the privacy of persons involved with the court system. Second, the guide provides practical advice for courts on the best practices for carrying out their obligations to protect people's privacy.

The creation of the resource guide at this time is important, among other reasons, because of the major transition underway that is transforming the courts from a paper-based physical system to

[1] All references to rules in this Resource Guide are to the California Rules of Court, unless otherwise indicated.

[2] In recognition of the special role that courts play in conducting the people's business, the Legislature has in some instances exempted the courts from laws enacted to protect personal privacy. (See, e.g., Civ. Code, §1798.3(b)(1) [excluding from the definition of "agency" covered by the Information Privacy Act of 1977 "[a]ny agency established under Article VI of the California Constitution"—that is, the courts]).

one that relies increasingly on electronic records and other forms of technology to conduct business. With this change, much information in the courts that was practically obscure can now be made available remotely in easily searchable format. It requires careful analysis and the deliberate institution of new practices to ensure that proper privacy protections are now in place.

1.3 Key Definitions

As used in this Resource Guide, unless the context or subject matter otherwise requires:

(1) "Court record" means any document, paper, or exhibit filed by the parties to an action or proceeding; any order or judgment of the court; any item listed in Government Code section 68151, excluding any reporter's transcript for which the reporter is entitled to receive a fee for any copy. The term does not include the personal notes or preliminary memoranda of judges or other judicial branch personnel. (Cal. Rules of Court, rule 2.502.)

(2) "Electronic record" means a court record that requires the use of an electronic device to access. The term includes both a document that has been filed electronically and an electronic copy or version of a record that was filed in paper form. (See, e.g., Cal. Rules of Court, rule 8.82(2).)

(3) "Adjudicative record" means any writing prepared for or filed or used in a court proceeding, the judicial deliberation process, or the assignment or reassignment of cases and of justices, judges (including temporary and assigned judges), and subordinate judicial officers, or of counsel appointed or employed by the court. (Cal. Rules of Court, rule 10.500(c)(1).)

(4) "Confidential record" is a record that based on statute, rule, or case law is not open to inspection by the public.

(5) "Judicial administrative record" means any writing containing information relating to the conduct of the people's business that is prepared, owned, used, or retained by a judicial branch entity regardless of the writing's physical form or characteristics, except an adjudicative record. The term "judicial administrative record" does not include records of a personal nature that are not used in or do not relate to the people's business, such as personal notes, memoranda, electronic mail, calendar entries, and records of Internet use. (Cal. Rules of Court, rule 10.500(c)(2).)

(6) "Protected personal information" or "PPI" means any personal information or characteristics that may be used to distinguish or trace an individual's identity, such as their name, Social Security Number (SSN), or biometric records. (32 CFR 701.101.)

(7) "Rule" means a rule of the California Rules of Court.

(8) “Sealed record” means a record that by court order is not open to inspection by the public. (See Cal. Rules of Court, rule 2.550(b)(2))

(9) "Writing" means any handwriting, typewriting, printing, photographing, photocopying, electronic mail, fax, and every other means of recording on any tangible thing any form of communication or representation, including letters, words, pictures, sounds, symbols, or combinations, regardless of the manner in which the record has been stored. (Cal. Rules of Court, rule 10.500(c)(6).)

2.2 Confidential and Sealed Records in the Appellate Courts

For appeals and original proceedings in the Supreme Court and Courts of Appeal, specific rules have been adopted relating sealed and confidential records: rule 8.45 (general provisions), rule 8.46 (sealed records), and rule 8.47 (confidential records).

2.2.1 General provisions

Rule 8.45 provides general requirements for the handling of sealed and confidential records by a reviewing court. These records must be kept separate from the rest of the records sent to the court and must be kept in a secure manner that preserves their confidentiality. (Rule 8.45(c)(1).) The rule prescribes the format of sealed and confidential records, and states the manner in which these records are to be listed in alphabetical and chronological indexes available to the public. (Rule 8.45(c)(2).) It describes the special treatment required for records relating to a request for funds under Penal Code 987.9. (Rule 8.45(c)(3).)

Rule 8.45 also provides guidance on the transmission of and access to sealed and confidential records. For instance, unless otherwise provided by law, a sealed or confidential record that is part of the record on appeal must be transmitted only to the reviewing court and the party or parties who had access to the record in the trial court and may be examined only by the reviewing court and that party or parties. If a party's attorney but not the party had access to the record in the trial court, only the party's attorney may examine the record. (Rule 8.45(d)(1).)

2.2.2 Sealed records

Rule 8.46 is the basic rule on sealed records in the reviewing court. First, it provides that if a record sealed by order of the trial court is part of the record on appeal, the sealed record must remain sealed unless the reviewing court orders otherwise. The record on appeal or supporting documents must include the motion or application to seal in the trial court, all documents filed in the trial court supporting or opposing the motion or application to seal, and the trial court order sealing the record. (Rule 8.46(b)((1)–(2).)

Second, a record filed or lodged publicly in the trial court and not ordered sealed must not be filed under seal in the reviewing court. (Rule 8.46(c).)

Third, the rule prescribes the procedures for obtaining an order from a reviewing court to seal a record that was not filed in the trial court. (Rule 8.46(d).)

Fourth, a sealed record must not be unsealed except on order of the reviewing court. The rule prescribes the procedures for seeking to unseal a record in the reviewing court. (Rule 8.46(e).)

Fifth, the rule prohibits the public filing in a reviewing court of material that was filed under seal, lodged conditionally under seal, or otherwise subject to a pending motion to file under seal. (Rule 8.46(f).)

2.2.3 Confidential records

Rule 8.47 governs the form and transmission of and access to confidential records (as distinguished from records sealed by court order or filed conditionally sealed) in the appellate courts. (Rule 8.47(a).) The rule includes a subdivision specifically on how to handle reporter's transcripts and documents filed or lodged in *Marsden* hearings and other in-camera proceedings. (Rule 8.47(b).) It also contains general procedures for handling other confidential records. (Rule 8.47(c).)

2.3 Privacy in Opinions of the Courts of Appeal

Based on concerns about the need for privacy protection, two rules of court have been adopted relating to the references to specific individuals in opinions and certain other records.

2.3.1 Privacy in appellate opinions

Rule 8.90, adopted effective January 1, 2017, provides guidance on the use of names in appellate court opinions, except for names in juvenile cases that are covered by rule 8.401 (discussed below). The rule states that, to protect personal privacy interests, the reviewing court should consider referring in opinions to people on the following list by first name and last initial or, if the first name is unusual or other circumstances would defeat the objective of anonymity, by initials only:

(1) Children in all proceedings under the Family Code and protected persons in domestic violence–prevention proceedings;

(2) Wards in guardianship proceedings and conservatees in conservatorship proceedings;

(3) Patients in mental health proceedings;

(4) Victims in criminal proceedings;

(5) Protected persons in civil harassment proceedings under Code of Civil Procedure section 527.6;

(6) Protected persons in workplace violence–prevention proceedings under Code of Civil Procedure section 527.8;

(7) Protected persons in private postsecondary school violence–prevention proceedings under Code of Civil Procedure section 527.85;

(8) Protected persons in elder or dependent adult abuse–prevention proceedings under Welfare and Institutions Code section 15657.03;

(9) Minors or persons with disabilities in proceedings to compromise the claims of a minor or a person with a disability;

(10) Persons in other circumstances in which personal privacy interests support not using the person's name; and

(11) Persons in other circumstances in which use of that person's full name would defeat the objective of anonymity for a person identified in (1)–(10).

2.3.2 Confidentiality in juvenile records and opinions

To protect the anonymity of juveniles involved in juvenile court proceedings, rule 8.401, adopted effective January 1, 2012, provides:

- In all documents filed by the parties in juvenile appeals and writ proceedings, a juvenile must be referred to by first name and last initial; but if the first name is unusual or other circumstances would defeat the objective of anonymity, the initials of the juvenile may be used.

- In opinions that are not certified for publication and in court orders, a juvenile may be referred to either by first name and last initial or by his or her initials. In opinions that are certified for publication, a juvenile must be referred to by first name and last initial; but if the first name is unusual or other circumstances would defeat the objective of anonymity, the initials of the juvenile may be used.

- In all documents filed by the parties and in all court orders and opinions in juvenile appeals and writ proceedings, if use of the full name of a juvenile's relative would defeat the objective of anonymity for the juvenile, the relative must be referred to by first name and last initial; but if the first name is unusual or other circumstances would defeat the objective of anonymity for the juvenile, the initials of the relative may be used.

(Rule 8.401(a).)

Rule 8.401 also contains provisions regarding access to filed documents. In general, the 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. Filed documents that protect anonymity as required by subdivision (a) may be inspected by any person or entity that is considering filing an amicus curiae brief. And access to records that are sealed or confidential under authority other than Welfare and Institutions Code section 827 is governed by rules 8.45–8.47 and the applicable statute, rule, sealing order, or other authority.

Rule 8.401 also allows the court to limit or prohibit admittance to oral argument. (Rule 8.401(c).)

3.2 Public Access to Records in the Courts of Appeal

Appellate court records are assumed to be open unless they are confidential as a matter of law or are sealed by court order. Confidential and sealed records on appeal are described in section 2.2 on rules 8.46 (sealed records) and rule 8.47 (confidential records). This section addresses other rules on access to appellate court records that are intended to protect persons' privacy interests.

3.2.1. The transition to electronic court records in the courts of appeal

Historically, paper records that are not confidential or sealed have been available at the appellate court for public inspection and copying. However, like the trial courts, the appellate courts are increasing relying on records created and maintained in electronic rather than paper form. These electronic records can be made available remotely to the extent feasible and permitted by law.

The paper records used in the past were costly to locate, inspect, and copy. The difficulties and expense involved in obtaining these paper records impeded public access but also provided an added level of privacy. This important practical effect of older business practices was reflected in the doctrine of "practical obscurity," which recognized that obscurity could serve positive purposes with respect to protecting privacy interests. But as the appellate courts are shifting to electronic records, protecting privacy interests is no longer a by-product of paper-based business practices, but rather is the result of deliberate policy choices to provide differential access to electronic records. These policy choices are reflected in the rules of court on remote access to records.

3.2.2 Public access to electronic appellate court records

Public access to appellate court records are governed by rules 8.80─8.85:

- Rule 8.80. Statement of purpose
- Rule 8.81. Application and scope
- Rule 8.82. Definitions
- Rule 8.83. Public access
- Rule 8.84. Limitations and conditions
- Rule 8.85. Fees for copies of electronic records

These rules, adopted effective January 1, 2016, are intended to provide the public with reasonable access to appellate records that are maintained in electronic form while protecting privacy interests. (Rule 8.80(a).)

The rules on remote access to electronic appellate court records are not intended to give the public a right of access to any electronic record that they are not otherwise entitled to access in paper form, and do not create any right of access to records sealed by court order or confidential as a matter of law. (Rule 8.80(c).) These rules apply only to records of the Supreme Court and the Courts of Appeal and only to access to records by the public. They do not prescribe the access to court records by a party to an action or proceeding, by the attorney for a party, or by

other persons or entities that may be entitled to such access by statute or rule. (Rules 8.81(a)–(b).)

3.2.3 General right of access; access to the extent feasible

Rule 8.83 provides that all electronic records must be made reasonably available to the public in some form, whether in electronic or paper form, except sealed or confidential records. (Rule 8.83(a).)

Under rule 8.83(b) to the extent feasible, appellate courts will provide, both remotely and at the courthouse, the following records provided they are not sealed or confidential:

- Dockets or registers of actions
- Calendars
- Opinions
- The following Supreme Court records:
    - Results from the most recent Supreme Court conference
    - Party briefs in cases argued in the Supreme Court in the preceding three years
    - Supreme Court minutes from at least the preceding three years

(Rule 8.83(b(1)).)

If an appellate court maintains records in electronic form in civil cases in addition to the records just listed, electronic access to these records must be provided both at the courthouse and remotely, to the extent feasible, except those records listed in section 3.2.4. (Rule 8.83(b)(2).)

3.2.4 Access by type of record

By rule, access to the electronic records listed below must be provided at the courthouse to the extent it is feasible to do so, but remote electronic access may not be provided to those records:

- Any reporter's transcript for which the reporter is entitled to receive a fee; and

- Records other than those listed in rule 8.83(b)(1) in the following proceedings:

    - Proceedings under the Family Code, including proceedings for dissolution, legal separation, and nullity of marriage; child and spousal support proceedings; child custody proceedings; and domestic violence prevention proceedings;
    - Juvenile court proceedings;
    - Guardianship or conservatorship proceedings;
    - Mental health proceedings;
    - Criminal proceedings;
    - Civil harassment proceedings under Code of Civil Procedure section 527.6;
    - Workplace violence prevention proceedings under Code of Civil Procedure section 527.8;

- Private postsecondary school violence prevention proceedings under Code of Civil Procedure section 527.85;
- Elder or dependent adult abuse prevention proceedings under Welfare and Institutions Code section 15657.03; and
- Proceedings to compromise the claims of a minor or a person with a disability

(Rule 8.83(c).)

3.2.5 Remote electronic access permitted in extraordinary cases

The appellate rules on remote access include a provision that allows the presiding justice, or a justice assigned by the presiding justice, to exercise discretion to permit remote access by the public to all or a portion of the public court records in an individual case if (1) the number of requests for access to documents is extraordinarily high and (2) responding to those requests would significantly burden the operations of the court. Unlike the comparable trial court records rule (see rule 2.503(c)) that is limited to extraordinary *criminal* cases, the appellate rule has no restriction on the type or types of cases to which it applies. (See rule 8.83(d).)

The appellate rule does provide: "An individual determination must be made in each case in which such remote access is provided." (Id.) It also provides guidance on the relevant factors to be considered in exercising the court's discretion to provide remote access, including "[t]he *privacy interests* of parties, victims, witnesses, and court personnel, and the ability to redact *sensitive personal information*. (Rule 8.83(d)(1)(emphasis added).)

In addition, the rule provides a specific list of the information that must be redacted from the records to which the court allows remote access, including driver's license numbers; dates of birth; social security numbers; Criminal Identification and Information and National Crime Information numbers; addresses, e-mail addresses, and phone numbers of parties, victims, witnesses, and court personnel; medical or psychiatric information; financial information; account numbers; and other personal identifying information. (Rule 8.83(d)(2).)

3.2.6 Other limitations on remote access

Like the trial court rules, the appellate rules on remote access have certain additional safeguards that prevent remote access to court records from being used to thwart the privacy interests of individuals whose names appear in those records. Except for calendars, registers of action, and certain Supreme Court records, electronic access to records may be granted only if the record is identified by the number of the case, the caption of the case, the name of a party, the name of the attorney, or the date of oral argument, and only on a case-by-case basis. (Rule 8.83(e).) Also, bulk distribution is not permitted for most court records. (Rule 8.83(f).)

3.2.7 Retention of user access information

[To be added. This might cross-reference website policy.]

3.2.8 Preservation of data security in appellate court records

[To be added. This might cross-reference general sections on data security]

Item

12

Oral presentation provided at the meeting.