

Judicial Council of California • Administrative Office of the Courts

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INVITATION TO COMMENT

SPR11-10

Title	Action Requested
Appellate Procedure: Bringing New Authorities to the Attention of the Court of Appeal	Review and submit comments by Monday, June 20, 2011
Proposed Rules, Forms, Standards, or Statutes Adopt Cal. Rules of Court, rule 8.254	Proposed Effective Date January 1, 2012
Proposed by Appellate Advisory Committee Hon. Kathryn Doi Todd, Chair	Contact Heather Anderson, 415-865-7691, heather.anderson@jud.ca.gov

Discussion

Sometimes, after a party has filed his or her brief, a new case addressing an issue on appeal may be decided or new legislation addressing the issue may be adopted. Rule 8.520(d) of the California Rules of Court establishes a procedure for bringing such new authorities to the attention of the California Supreme Court through supplemental briefing. Currently, however, there is no comparable rule specifying a procedure for bringing new authorities to the Court of Appeal's attention. This creates uncertainty for practitioners about whether and how such new authorities may be presented to the Court of Appeal. It also creates burdens on the court, which may receive requests to present such new authorities in different formats and must determine on an individual basis whether each request can be filed.

This proposal would fill this gap in the rules by establishing a procedure for bringing new authorities to the attention of the Court of Appeal. The proposal combines features of rule 8.520 relating to supplemental authority in the California Supreme Court, local Court of Appeal practices with respect to supplemental authority, and rule 28(j) of the Federal Rule of Appellate Procedure relating to supplemental authority in the federal appellate courts.

Unlike rule 8.520, this proposal would not authorize supplemental briefing. The committee concluded that supplemental briefing would not be necessary in every Court of Appeal case in which new authorities arise and that the rule 8.200(a)(4) already permits a party to ask the presiding justice of the Court of Appeal for permission to file supplemental briefing if needed.

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

Instead, the committee proposes a procedure similar to that established by rule 28(j) of the Federal Rules of Appellate Procedure, under which parties may only submit a letter alerting the court of the new authority. As is the practice in some districts of the California Court of Appeal, however, this proposal limits the letter to providing a citation to the new authority and identifying, by citation to a page or pages in a brief on file, the issue on appeal to which the new authority is relevant. The proposed rule explicitly provides that no argument or other discussion of the authority will be permitted in the letter and does not provide for any response by other parties to the letter. An advisory committee comment would clarify that this rule is not intended to prevent a party from asking the presiding justice for permission to file supplemental briefing under rule 8.200(a)(4).

Because, unlike rule 8.520, this proposed rule only provides for submission of a citation to the new authority, not any argument or discussion, this proposed rule would allow a letter be filed any time before the Court of Appeal issues its opinion. The committee concluded that this proposed timeframe was preferable to limiting the filing of letter only until oral argument because it allows the court to receive more assistance from the parties in identifying any new authority that might impact the court's decision-making process. However, the committee would particularly appreciate comments on whether it would be preferable to set an earlier deadline for filing these letters.

As in the California Supreme Court under rule 8.520, this proposed rule would apply only to new authority that that was not available in time to be included in the last brief that the party filed or could have filed, not to existing authority a party learns of after briefing. The proposed rule would also provide that if the letter is served and filed after oral argument is heard, it may only address new authority that was not available in time to be addressed at oral argument.

Specific Comments Requested

The committee welcomes comments on any of the changes included in this proposal. However, as noted above, the committee would particularly appreciate comments on whether the rule should allow a letter bringing new authority to the court's attention to be filed any time before the Court of Appeal issues its opinion or whether it would be preferable to set an earlier deadline for filing these letters.

Rule 8.254 of the California Rules of Court would be adopted, effective January 1, 2012, to read:

1 **Title 8. Appellate Rules**

2
3 **Division 1. Rules Relating to the Supreme Court and Courts of Appeal**

4
5 **Chapter 2. Civil Appeals**

6
7 **Article 4. Hearing and Decision in the Court of Appeal**

8
9
10 **Rule 8.254. New Authorities**

11
12 **(a) Letter to court**

13
14 If a party learns of significant new authority, including new legislation, that was
15 not available in time to be included in the last brief that the party filed or could
16 have filed, the party may inform the Court of Appeal of this authority by letter.

17
18 **(b) Form and content**

19
20 The letter may provide only a citation to the new authority and identify, by citation
21 to a page or pages in a brief on file, the issue on appeal to which the new authority
22 is relevant. No argument or other discussion of the authority is permitted in the
23 letter.

24
25 **(c) Service and filing**

26
27 The letter must be served and filed before the court issues its opinion. If the letter is
28 served and filed after oral argument is heard, it may address only new authority that
29 was not available in time to be addressed at oral argument.

30
31 **Advisory Committee Comment**

32
33 This rule is not intended to prevent a party from asking the presiding justice for permission to file
34 supplemental briefing under rule 8.200(a)(4).

Item SPR11-10 Response Form

Title: Appellate Procedure: Bringing New Authorities to the Attention of the Court of Appeal (adopt Cal. Rules of Court, rule 8.254)

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ Title: _____

Organization: _____

- Commenting on behalf of an organization

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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DEADLINE FOR COMMENT: 5:00 p.m., Monday, June 20, 2011

Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee. All comments will become part of the public record of the council's action.