

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT

**SPR18-03**

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Title	Action Requested
Appellate Procedure: Finality of Appellate Division Decisions	Review and submit comments by June 8, 2018
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rules 8.887, 8.888, 8.889, 8.935, 8.976, and 8.1005	January 1, 2019
Proposed by	Contact
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### Executive Summary and Origin

The Appellate Advisory Committee proposes amendments to several rules of court relating to the finality of appellate division decisions. The 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 before 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 have 15 days from the date the decision is filed to file a petition for rehearing.<sup>1</sup> 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a parallel structure between the two sets of rules was a significant priority when the appellate division rules were repealed and replaced in full in 2008.<sup>2</sup>

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<sup>1</sup> See Cal. Rules of Court, rules 8.888(a)(1) and 8.264(b)(1) (decisions final 30 days after filing); rules 8.889(b)(1) and 8.268(b)(1) (petition for rehearing due no later than 15 days after decision filed, with exceptions).

<sup>2</sup> See Judicial Council of Cal., Advisory Com. Rep., *Appellate Procedure: Rules and Forms for the Superior Court Appellate Divisions* (Feb. 6, 2008), p. 8, [www.courts.ca.gov/documents/022208item7.pdf](http://www.courts.ca.gov/documents/022208item7.pdf) (“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

*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.*

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<sup>3</sup> or 40 days to prepare a petition for review.<sup>4</sup> 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.<sup>5</sup> 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 before the time the appellate division loses jurisdiction (i.e., 30 days after the opinion is filed) because:

- Litigants are unfamiliar with the procedure for preparing applications for certification for transfer;
- Most superior courts notify the parties by mail; and
- 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 before 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

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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 rules governing the Court of Appeal. *Ibid.*

<sup>3</sup> See Cal. Rules of Court, rule 8.268(b)(1).

<sup>4</sup> See Cal. Rules of Court, rule 8.500(e).

<sup>5</sup> See Cal. Rules of Court, rules 8.1005(b) and 8.889(b)(1).

date that such decisions are posted on the court’s website. This would remedy a perceived timing issue with respect to public notice of published appellate division opinions. The committee decided 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 operational 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 amendments to rules 8.887(b), 8.935(a)(1), and 8.976(a) are implemented and court clerks are required to send opinions on the same day they are filed, are the other amendments still beneficial?
- To clarify the date an opinion or order is *sent*, should rules 8.887, 8.888, 8.935, and 8.976 require the trial court clerk to *serve* all opinions and orders?

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?
- Under the proposed procedure in the appellate division, will the Court of Appeal be able to determine the date a decision or order was sent?
- 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**

1. Cal. Rules of Court, rules 8.887, 8.888, 8.889, 8.935, 8.976, and 8.1005, pages 4–7

Rules 8.887, 8.888, 8.889, 8.935, 8.976, and 8.1005 of the California Rules of Court would be amended, effective January 1, 2019, to read:

1 **Rule 8.887. Decisions**

2  
3 (a) \* \* \*

4  
5 (b) **Filing the decision**

6  
7 The appellate division clerk must promptly file all opinions and orders of the court  
8 and ~~promptly on the same day~~ send copies (by e-mail where permissible under rule  
9 2.251) showing the filing date to the parties and, when relevant, to the trial court.

10  
11 (c) \* \* \*

12  
13  
14 **Rule 8.888. Finality and modification of decision**

15  
16 (a) **Finality of decision**

17  
18 (1) Except as otherwise provided in this rule, an appellate division decision,  
19 including an order dismissing an appeal involuntarily, is final 30 days after  
20 the decision is ~~filed~~ sent by the court clerk to the parties.

21  
22 (2) If the appellate division certifies a written opinion for publication or partial  
23 publication after its decision is filed and before its decision becomes final in  
24 that court, the finality period runs from the ~~filing date of~~ the order for  
25 publication is sent by the court clerk to the parties.

26  
27 (3) \* \* \*

28  
29 (b) **Modification of judgment**

30  
31 (1) \* \* \*

32  
33 (2) An order modifying a decision must state whether it changes the appellate  
34 judgment. A modification that does not change the appellate judgment does  
35 not extend the finality date of the decision. If a modification changes the  
36 appellate judgment, the finality period runs from the ~~filing date of~~ the  
37 modification order is sent by the court clerk to the parties.

38  
39 (c) \* \* \*

1 **Rule 8.889. Rehearing**

2  
3 (a) \* \* \*

4  
5 (b) **Petition and answer**

6  
7 (1) A party may serve and file a petition for rehearing within 15 days after the  
8 following is sent by the court clerk to the parties, whichever is later:

9  
10 (A) The decision ~~is filed~~;

11  
12 (B) A publication order restarting the finality period under rule 8.888(a)(2),  
13 if the party has not already filed a petition for rehearing;

14  
15 (C) A modification order changing the appellate judgment under rule  
16 8.888(b); or

17  
18 (D) ~~The filing of~~ A consent filed under rule 8.888(c).

19  
20 (2)–(4) \* \* \*

21  
22 (c)–(d) \* \* \*

23  
24  
25 **Rule 8.935. Filing, finality, and modification of decisions; rehearing; remittitur**

26  
27 (a) **Filing of decision**

28  
29 (1) The appellate division clerk must promptly file all opinions and orders of the  
30 court and ~~promptly on the same day~~ send copies (by e-mail where  
31 permissible under rule 2.251) showing the filing date to the parties and, when  
32 relevant, to the trial court.

33  
34 (2) \* \* \*

35  
36 (b) **Finality of decision**

37  
38 (1) \* \* \*

39  
40 (2) Except as otherwise provided in (3), all other appellate division decisions in a  
41 writ proceeding are final 30 days after the decision is ~~filed~~ sent by the court  
42 clerk to the parties.

1 (3) \* \* \*

2

3 (c)–(e) \* \* \*

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

7

8 **(a) Filing of decision**

9

10 The appellate division clerk must promptly file all opinions and orders in  
11 proceedings under this chapter and ~~promptly~~ on the same day send copies (by  
12 e-mail where permissible under rule 2.251) showing the filing date to the parties  
13 and, when relevant, to the small claims court.

14

15 **(b) Finality of decision**

16

17 (1) \* \* \*

18

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

22

23 (3) \* \* \*

24

25 (c)–(d) \* \* \*

26

27

28 **Rule 8.1005. Certification for transfer by the appellate division**

29

30 (a) \* \* \*

31

32 **(b) Application for certification**

33

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

38

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

40

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

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9

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

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

(2)–(5) \* \* \*

**(c)–(e)** \* \* \*