JUDICIAL COUNCIL OF CALIFORNIA

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# MEMORANDUM

Date
September 6, 2018

To
Members of the Appellate Advisory Committee

From
Christy Simons
Attorney, Legal Services

Subject
Development of committee's proposed 2019 annual agenda, including review of new and pending suggestions for changes to appellate rules and forms

Action Requested
Please read before September 11 committee conference call

Deadline
September 11, 2018

Contact
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## Introduction

As you're all aware, under the timeline established by the Judicial Council's Rules and Projects Committee (RUPRO), this is the time of year when the committee must develop its proposed annual agenda for the 2019 committee year (November 2018-October 2019). The committee's proposed annual agenda must be submitted to RUPRO for its review. RUPRO will determine what items the committee may work on for the 2019 committee year. RUPRO will meet in late October to review the proposed agendas of the committees that it oversees, including the Appellate Advisory Committee.

Attached are two items that provide background information about the annual agenda process:

- Guidelines for the Annual Agenda Process (Attachment 1) – these guidelines, adopted by RUPRO and the other Judicial Council oversight committees, provide an overview of the annual agenda process. The questions on page 5 of these guidelines may be of particular interest in considering what items to include on the committee's proposed annual agenda.

- An October 2015 letter from Justice Hull, chair of RUPRO (Attachment 2) – this letter provides additional information about the prioritization of rule and form projects on annual agendas. This is particularly important for the committee, since the bulk of the committee's work has historically been developing recommended changes to appellate rules and forms.

## Rule and Form Suggestions and Prioritization

### Suggestions

The committee's main task in developing its annual agenda is reviewing the recommendations of its rules, appellate division, and joint appellate technology (JATS) subcommittees on new and pending suggestions for changes to the appellate rules and forms. These recommendations are set out in the following the following attachments to this memo:

- Tables of the rules and form suggestions reviewed by the subcommittees (Attachment 3). These tables include all of the new suggestions received by the committee since last October and all of the suggestions that remained pending, either from the committee's 2017 annual agenda or on the list of previously deferred suggestions. These suggestions have been sorted into tables based on the subcommittees' recommended action:
  - Suggestions that were previously designated as Priority 1 projects or that a subcommittee recommends as Priority 1 projects;
  - Suggestions that were previously designated as Priority 2 projects or that a subcommittee recommends as Priority 2 projects;
  - Suggestions that were previously deferred or that a subcommittee recommends be deferred. This means that these suggestions would not be worked on by the committee this year, but will remain on this list for possible consideration by the committee next year. Please note, as explained below, the committee will not be discussing these suggestions at this meeting unless a member requests that a particular suggestion be discussed.
  - Suggestions that a subcommittee recommends not be pursued.

### Prioritization

As the attached letter from Justice Hull (Attachment 2) reflects, for the past several years, the committee's rule and form projects have been limited in light of the economic crisis in the courts. These limits reflect concerns both about the economic impact on courts of any proposed modification of a rule or form and about the economic burden on the courts of reviewing and responding to proposals for modifications to rules and forms. In light of these concerns, RUPRO has established the following criteria for advisory committees to consider in determining whether a rule or form proposal is a high priority – priority 1 – and should be developed *within the same*

*committee year* (for this year, these would be rules and form changes proposed for circulation in spring 2018 to be effective January 1, 2019):

- The proposal is urgently needed to conform to the law;
- The proposal is urgently needed to respond to a recent change in the law;
- A statute or council decision requires the adoption or amendment of rules or forms by a specified date;
- The proposal will provide significant cost savings and efficiencies, generate significant revenue, or avoid a significant loss of revenue;
- The change is urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; or
- The proposal is otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk.

Committees can ask to work on other rule and form proposals within their subject matter areas that do not meet the criteria for priority 1 projects. The criteria for such projects – priority 2 projects – are:

- The proposal is useful, but not necessary, to implement statutory changes; or
- The proposal is helpful in otherwise advancing Judicial Council goals and objectives.

Proposals with priority level 2 are generally considered for circulation *the second year after they are approved for inclusion on a committee's annual agenda* – so new priority 2 rule or form projects included on this year's proposed annual agenda have proposed completion dates of January 1, 2021: they would be developed for potential circulation in the spring of 2020 to be effective January 1, 2021. RUPRO has cautioned that committees should expect that new priority 2 proposals may not be approved for the current year due to the ongoing fiscal situation affecting the judicial branch.

You will see in reviewing the tables of suggestions that there are several proposals that were previously approved by RUPRO last year as priority 2 projects. These carry-over items have January 1, 2020 proposed completion dates. RUPRO has indicated that it will review last year's priority level 2 projects on an item-by-item basis and that it would be helpful to know where these projects are in development and what resources have been expended thus far.

In applying RUPRO's criteria for prioritizing rule and form suggestions, it is often important to consider the following:

- Is the problem/issue identified in a suggestion something that arises frequently or infrequently?

- If the proponent suggests that there would be savings in time or money for the courts, what is the likely amount of such savings?
- Are there likely to be costs for the trial courts, appellate courts, or litigants associated with implementing a suggestion?

Often, additional information about these issues helps the committee assess the need for and priority of a particular suggestion. To this end, ***you are encouraged to seek information about these issues from those with whom you work that may have experience in the areas raised in the suggestions***.

In addition to RUPRO's prioritization criteria, there are several other things committee members may want to keep in mind in reviewing the rules subcommittee's recommendations:

- There are more suggestions for rule and form changes than the committee will be able to work on during the upcoming year. For the proposed annual agenda to realistically represent what projects the committee is actually able to undertake this coming year, the committee will need to prioritize among those suggestions that are identified as Priority 2 projects - good ideas, but not urgent. Last year, the committee worked on 10 projects, some of which involved several different suggestions: 4 priority 1 projects and an additional 6 priority 2 projects. Subcommittee members should assume that during the upcoming year, the committee will be able to work on approximately that same number of projects.
- Because the combined list of new suggestions and those pending from last year's annual agenda is fairly long, as noted above, the committee will not be reviewing items on the "deferred" list at this time unless a committee member specifically requests that an item be considered for possible re-categorization. If you think an item on this "to be deferred" list should be re-categorized as a priority 1 or priority 2 project, should be referred to another group, or should be placed on the list of items the committee will not pursue, please send an e-mail identifying the item so that the committee can discuss this potential re-categorization at the meeting. If an item on the "to be deferred" list is not called out for discussion, it will be presumed all members approve of it remaining on this list.
- In some cases, there are multiple suggestions relating to the same rule or same topic. These can be (and have been, in several instances) combined into a single project for purposes of the annual agenda.
- Inclusion of a project on the annual agenda does not mean that the committee is obligated to pursue the suggested rule or form change. As has happened in the past, the committee could determine later in the year not to pursue a particular project on its annual agenda. This would be reported to RUPRO in the advisory committee's subsequent annual agenda update.

## Committee Task

The committee's task is to review the subcommittees' recommendations, as reflected in the attached draft annual agenda and tables and decide which of them should be:

- Included in the draft annual agenda as priority 1 proposals (urgent proposals that the committee will work on this year);
- Included in the draft annual agenda as priority 2 proposal (non-urgent proposals that the committee would like to work on this year or next year);
- Not included in the draft annual agenda, but deferred for possible future consideration;
- Referred to a subcommittee or another body; or
- Not pursued at all.

# GUIDELINES FOR THE ANNUAL AGENDA PROCESS
## From the Judicial Council's Executive and Planning Committee, Rules and Projects Committee, Technology Committee, and Litigation Management Committee

## Introduction

This document provides an overview of the annual agenda process and information to help prepare the Judicial Council internal committees serving as oversight committees—the Executive and Planning Committee (E&P), the Rules and Projects Committee (RUPRO), the Judicial Council Technology Committee (JCTC), and the Litigation Management Committee (Lit. Mgmt.)—advisory body chairs, and lead staff for annual agenda review meetings.

## Annual Agenda Review Meetings

The Judicial Council governance policies express the council's interest in connecting with the leaders of its advisory bodies and coordinating efforts for the sake of continuously improving access to the courts and the administration and delivery of justice. The annual agenda review meetings serve as substantive conversations in a multiyear process between the oversight committees and the chairs of the advisory bodies to define the key objectives and projects for advisory bodies in order to align them with judicial branch goals, objectives, and desired outcomes.

The oversight committees and the advisory body chairs discuss the best use of each advisory body's resources for the coming year. The oversight committees also identify any overlap in advisory body activities and projects. In these conversations, oversight committees are likely to convey their interest in the fulfillment of the council's strategic goals and operational objectives through the advisory body's objectives and projects. The oversight committees may also see possibilities for synergies and opportunities for collaboration between advisory bodies.

Through the review meetings, E&P, RUPRO, JCTC, and Lit. Mgmt. provide oversight to the council's advisory bodies to guide them in focusing on matters of importance to the council and on providing the council with valuable advice and policy recommendations. E&P meets to review and approve the annual agendas of advisory bodies whose work focuses on projects and administrative issues. RUPRO meets to review and approve the annual agendas of advisory bodies whose work focuses on rule making, forms, and legislation. JCTC meets to review and approve the annual agenda of the Court Technology Advisory Committee, and Lit. Mgmt. meets to review and approve the annual agenda of the Judicial Branch Workers' Compensation Program Advisory Committee, the committees over which they exercise oversight. The advisory body chairs and lead staff attend the meetings either in person or by telephone.

### Preparing Draft Annual Agendas for Review

Before the annual agenda review meetings, advisory bodies submit their draft annual agendas to their respective oversight committees for review. Using the template approved by the four oversight committees, each advisory body submits, in advance, a proposed annual agenda

consistent with its charge, which includes a list of key objectives and a list of related projects that the advisory body intends to either commence or accomplish in the coming year. The annual agenda also contains information relating to any subgroups (e.g., subcommittees) and the status of the previous year's projects.

If the advisory body would like to create a new subgroup, it may request approval from the oversight committee by including "new" before the name of the proposed subgroup and describing its purpose and membership on the annual agenda.[1] The annual agenda template includes a space for this information in the *Subgroups/Working Groups–Detail* section.

### Review and Approval of Draft Annual Agendas

Each advisory body's draft annual agenda forms the basis for a conversation during the review meetings about the advisory body's key objectives for the coming year, related projects, and the alignment of those projects with the council's strategic and operational plans. During the meetings, the oversight committees ask questions of the advisory body chairs and engage in conversations to understand the direction and priorities of the advisory bodies. Lead staff are generally included in these meetings to assist with scheduling and to provide further detailed information as needed. Understanding an advisory body's recent history may be helpful, but the focus of the chair and lead staff should be on the advisory body's present and future work. Questions and proposals from the advisory body chair and lead staff asking for the oversight committee's guidance are also welcome and appropriate.

The intended outcome is an understanding between the oversight committee, the advisory body chair, and lead staff of the advisory body's priorities for the coming year, the objectives to be pursued, and the projects to be undertaken. This understanding serves as a foundation for subsequent annual agenda meetings in a continuous effort to enhance mutual support and coordination between the Judicial Council and its advisory bodies.

Following the review meetings, the approved annual agendas are posted on the advisory bodies' webpages of the California Courts website to allow branch stakeholders to be informed of the work of the advisory bodies.

## Roles of a Judicial Council Advisory Body and Its Chair

The Judicial Council governance policies, adopted in 2008, state that the advisory bodies:

- Provide policy recommendations and advice to the council on topics specified by the council or the Chief Justice, using the members' individual and collective wisdom;

[1] California Rules of Court, rule 10.30(c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.

- Work at the same policy level as the council, developing recommendations that focus on the strategic goals and long-term impacts that align with the judicial branch goals[2];
- Do not usually implement policy, although the council or the oversight committees may assign policy implementation and programmatic responsibilities;
- Do not speak or act for the council except when formally given that authority for specific and time-limited purposes; and
- Are responsible, through staff, for gathering stakeholder perspectives.

The advisory body chair, with the assistance of the lead staff, is responsible for developing a realistic annual agenda and discussing appropriate staffing and resources with the advisory body's office head. The oversight committees are responsible for reviewing and approving the annual agendas, which provide the advisory bodies with charges specifying what they are to achieve during the coming year. The oversight committees may add or delete specific projects and reassign priorities. The template provides descriptions of priority level 1 and 2 projects that involve rules and forms; this applies to projects approved by RUPRO. Projects of advisory bodies overseen by E&P, JCTC, and Lit. Mgmt. often are other than rule and form proposals. RUPRO offers the following guidance for rule and form proposals approved by RUPRO:

> An advisory body can expect that a rule or form proposal on its annual agenda that was approved by RUPRO will be circulated for comment. There are limited circumstances in which approval to work on a proposal might not result in approval for public circulation. For example, RUPRO could reasonably not approve for circulation something that it earlier approved for development if there is a significant change in the proposal and the proposal: (1) is much bigger in scope or more complex than described on the annual agenda; (2) has consequences not recognized or anticipated when presented on the annual agenda; or (3) is no longer urgent or needed to avoid inconsistency in the law.

If, after approval of its annual agenda, an advisory body identifies additional or different priorities and projects, because of legislation or other reasons, it may seek approval from its oversight committee to revise its annual agenda. RUPRO has approved a template to be used for this purpose for its advisory bodies, which is available to lead staff on The Hub. In determining whether to give approval to a proposed additional project, the oversight committee considers:

- The new project's urgency;
- Whether it is consistent with the advisory body's charge;
- The advisory body's approved annual agenda;
- The Judicial Council's strategic plan; and
- Whether it falls within the body's available staff and other resources.

[2] The Judicial Council's strategic plan can be found at *http://www.courtinfo.ca.gov/jc/sp.htm*, and its operational plan can be found at *www.courtinfo.ca.gov/reference/documents/2008_operational_plan.pdf*.

## Policy Considerations in Reviewing Annual Agendas

### Distinction Between Policy Recommendation and Policy Implementation

Because the primary role of advisory bodies is to advise and provide policy recommendations to the Judicial Council, the oversight committees may focus on projects that fall outside of this role. If an advisory body has been directed to implement policy or produce a program, the oversight committee will want to ensure that staff continue to be accountable to the Administrative Director for the satisfactory performance of the implemented policy or program, and that the role of the advisory body is to provide advice to staff. These roles are consistent with the council's governance policies.

For advisory bodies that have policy implementation and programmatic projects, the annual agenda process can clarify for the advisory body the part for which it is responsible (e.g., providing advice and guidance to staff) and the part for which staff are responsible (e.g., performing to the standards and expectations of the Administrative Director).

Preliminary questions about the annual agendas include:

- Which projects give advice or make policy recommendations? (Both are the advisory body's primary role.)
- Which projects are policy implementation or programmatic?

An advisory body's *recommendations* of new or revised rules and forms are policy recommendations because they require the weighing of various possibilities and alternatives, and their approval requires a policy decision by the Judicial Council. An advisory body's *recommendations* of specific programs or of specific ways to implement policy are also policy recommendations. As long as an advisory body stays in the realm of making recommendations to the council, it occupies its traditional advisory role.

Under the council's governance policies, however, when the advisory body's project actually produces products or services, such as resource materials, content, or programs, or the advisory body takes final action independent of the council, it is considered to be performing the work of implementation and program delivery. An explicit Judicial Council or oversight committee charge is required for an advisory body to take this action or pursue this type of project. The advisory body's oversight committee may approve the body's involvement with policy implementation or program delivery, but it is important to specify on the annual agenda that a policy implementation project is being approved and to clarify the role and accountability of the advisory body and staff. In particular, the oversight committee's expectations for reviewing final products or introducing new services at the completion of a committee's project should be made clear. That way, oversight committees can ensure that the Administrative Director continues to be accountable to the Judicial Council for staff performance and advisory bodies can proceed with the explicit support of their respective oversight committees. In the event of recommendations to the Judicial Council that result from the advisory body's work, that are

subject to the council's approval or adoption, please consult the calendar of Judicial Council meeting dates and the Executive and Planning Committee's agenda-setting schedule to ensure timely delivery of the Judicial Council report.

**Judicial Branch Strategic and Operational Plan Goals, Objectives, and Desired Outcomes**
The annual agendas require advisory bodies to identify the strategic and operational plan goals achieved by each project. If an oversight committee determines that a project does not appear to align with existing branch priorities, the oversight committee can propose soliciting involvement by a more appropriate entity (e.g., the State Bar). If the annual agenda conversation results in the conclusion that a specific project is attenuated or not covered by branch priorities, the oversight committee and the advisory body chair should discuss and decide whether the project can be modified to meet a judicial branch strategic goal or policy, or an operational objective or outcome, or whether that project should be referred to an outside entity.

## General Questions and Issues Applicable to Most Annual Agendas

The following are general questions that may be applicable to annual agendas under review:

- Is this a "realistic" list of objectives and projects for the coming year? (Factors may include the number of projects on the list, the varied scope of projects, the impact on the courts if approved, the resources needed, etc.)
- What is the key direction and focus for this advisory body?
- What is the status of the previous year's priority level 2 projects? (For priority level 2 projects approved by RUPRO, the expectation is that the advisory body can develop the project [typically rules or forms] and that it will be approved for circulation in the second year, absent unusual circumstances.)
- Were there issues/projects that the advisory body worked on during the previous year that were unanticipated? If so, what were they?
- For a project that implements policy or produces a program:
    - What role do the advisory body members play in performing this project? What role do staff play? To whom are staff accountable for the satisfactory and timely completion of this project?
    - Does the advisory body have an explicit Judicial Council or oversight committee charge to pursue this project? If the charge is ambiguous or was issued several years ago, should the oversight committee renew that charge? If so, under what circumstances and conditions should the advisory body pursue this project?
- Does the advisory body gather stakeholder perspectives?
- How does the advisory body intend to obtain information about the cost and training impact on the courts of a particular proposal?
- Do the chair or staff have any concerns about the adequacy of resources to accomplish the projects?

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October 22, 2015

To: Judicial Council Advisory Committee Chairs

Re: Development of Rules and Forms Proposals on Annual Agendas

Dear Advisory Committee Chairs:

The Judicial Council's Rules and Projects Committee (RUPRO) will meet on December 10, 2015, to consider the annual agendas of the advisory committees it oversees. I would like to provide some guidance specifically about rules and forms proposals as your committee develops its annual agenda. RUPRO recognizes the valuable contributions of advisory committees in advancing the administration of justice through the proposals they develop. Due to limited resources, however, not every meritorious proposal can be put forward.

In establishing the priority levels and criteria listed below, RUPRO considered the goal of reducing burdens on courts, the need to be responsive to changes in the law, and the desire to address urgent problems and promote cost savings and efficiencies. The criteria for the two priority levels and the significance of RUPRO approval of annual agenda items for each level are discussed below.

## Priority Level 1

The criteria that RUPRO recommends advisory committees consider in determining whether a proposal has a high priority and should be developed and proposed to be effective January 1, 2016, are the following:

(a) The proposal is urgently needed to conform to the law;
(b) The proposal is urgently needed to respond to a recent change in the law;
(c) A statute or council decision requires the adoption or amendment of rules or forms by a specified date;

(d) The proposal will provide significant cost savings and efficiencies, generate significant revenue, or avoid a significant loss of revenue;
(e) The change is urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; or
(f) The proposal is otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk.

There are limited circumstances in which RUPRO's approval to work on a proposal might not result in approval for public circulation. For example, a circumstance that could justify RUPRO not approving for circulation a proposal that it earlier approved to develop is a significant change in the proposal such that the proposal (1) is much bigger in scope or more complex than described on the annual agenda, (2) has consequences not recognized or anticipated when presented on the annual agenda, or (3) is no longer urgent or needed to avoid inconsistency in the law.

## Priority Level 2

RUPRO understands that advisory committees and task forces may have new priority level 2 proposals for their 2016 annual agendas. Advisory committees should include any such proposals, but also should expect that the proposals may not be approved for the current year due to the ongoing fiscal situation affecting the judicial branch. A priority level 2 proposal is one that is:

(a) Useful, but not necessary, to implement statutory changes; or
(b) Helpful in otherwise advancing Judicial Council goals and objectives.

Advisory committees can expect that a proposal with priority level 2 may be developed and will be approved for circulation in the second year, absent unusual circumstances. RUPRO will review last year's priority level 2 projects on an item-by-item basis. RUPRO is interested in learning whether the advisory committee considers that last year's priority level 2 projects remain at level 2, are now considered level 1, or are no longer a project the committee wishes to work on in the immediate future. It will also be helpful to know where these projects are in development and what resources have been expended thus far.

## Alternatives to rules and forms

In developing proposals to respond to a specific need, advisory committees should consider whether the need could be addressed in other ways, such as developing suggested practices for courts. Advisory committees should consider whether a proposal must have statewide application

as a rule or whether a different solution tailored to specific courts or all courts of a particular size would address the matter.

**Pre-review of annual agendas**

Each RUPRO member will be assigned an advisory committee annual agenda to pre-review and will be encouraged to talk to its chair and staff before the meeting to best understand the committee's projects.

I want to say again, as I have tried to say in the past, on behalf of the RUPRO committee and the Judicial Council as a whole, we sincerely appreciate the important work that you do. Without the committees, none of our efforts to provide the people of California the best judicial system possible could be realized.

I look forward to our discussion on December 10, 2015 about your committee's proposals.

Sincerely,

Harry E. Hull, Jr.
Chair

HEH/SRM

# RECOMMENDATIONS FROM THE SUBCOMMITTEES
# REGARDING APPELLATE RULE AND FORM SUGGESTIONS AND OTHER POTENTIAL PROJECTS
# 2018-2019

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE PRIORITY 1 PROJECTS THIS YEAR

| | Rule/Form | Suggestion/Issue | Source | Priority/Other Info |
|---|---|---|---|---|
| 1. | ***PRIVACY—*** *Protecting privacy in appellate opinions* | This ad hoc subcommittee was formed to address privacy concerns about information included in opinions given the ease with which these opinions are now searchable on the web. Examples include:<br>• Victim names or identifying information;<br>• Witness names or identifying information;<br>• Information that a harasser was restrained from revealing.<br><br>There is a very real concern that fear about what information will become widely and easily available on the internet may cause individuals not to seek restraining orders, not to testify, or not to appeal even when an appeal may be warranted.<br><br>The subcommittee has identified the following projects it would like to work on this year:<br>• Continue to monitor the pilot program to reduce indexing of unpublished opinions until the end of 2018. Review data and draft a report and recommendations.<br>• Draft a new section on privacy for the appellate court attorney handbook as part of the education efforts.<br>• Review rule 8.90, which took effect January 1, 2017, for how well it is working and whether any amendments should be considered. Any rule amendment would be a project for a future rules cycle.<br>• Draft a notice regarding privacy considerations for court clerks to send to parties at the outset of an appeal.<br><br>***In addition, the ad hoc subcommittee recommends that it be converted to a standing subcommittee because privacy issues are ongoing and evolving, rather than discrete and limited in time.*** | The privacy subcommittee was formed in response to issues identified by members of the Family and Juvenile Law Advisory Committee and the Access and Fairness Advisory Committee | Priority 1(e)<br><br>This was a priority 1(e) project on last year's agenda– Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public. |

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE PRIORITY 1 PROJECTS THIS YEAR

| | Rule/Form | Suggestion/Issue | Source | Priority/Other Info |
|---|---|---|---|---|
| 2. | ***APPELLATE DIVISION—*** *Appointment of counsel for misdemeanor appeals. Rule 8.851 and form CR-133* | Consider amending rule 8.851 to provide for counsel in pre-trial misdemeanor appeals and revising form CR-133 (Request for Lawyer in Misdemeanor Appeal) to clarify that a defendant need not be the appellant to use the form and request appointment of counsel.<br><br><u>Background on proposed amendment to rule 8.851</u><br>Concern with current language<br>CRC 8.851(a) sets forth the standards for appointment of counsel in misdemeanor appeals. The rule speaks only to appeals that are post-conviction, but there situations in which a misdemeanor defendant may be involved in an appeal before trial (e.g., as the appellant when appealing the denial of a section 1538.5 motion to suppress; as the respondent if the People appeal the trial court's order granting a 1538.5 motion). The proposed revision would broaden the language of the rule to encompass this situation as well as any others that might be created by the Legislature in the future.<br><br>*Proposed revision*<br>(a) Standards for appointment<br>(1) On application, the appellate division must appoint appellate counsel for a defendant <u>accused or</u> convicted of ~~a~~ <u>one or more</u> misdemeanor<u>s</u> who:<br>(A) Is subject to incarceration or a fine of more than $500 (including penalty and other assessments), or who is likely to suffer significant adverse collateral consequences as a result of <u>being convicted of the misdemeanor allegations</u> ~~the conviction~~; and<br>(B) <u>Is or</u> ~~W~~<u>w</u>as represented by appointed counsel in the trial court or establishes indigency.<br>(2) On application, the appellate division may appoint counsel for any other indigent defendant <u>accused or</u> convicted of a misdemeanor.<br>(3) A defendant is subject to incarceration or a fine if the incarceration or fine is in a sentence, is a condition of probation, or may be ordered if the defendant violates probation.<br>(Cal. Rules of Court, rule 8.851(a).)<br><br>**Combined with:**<br><br><u>Background on proposed revision to form CR-133</u> | See below<br><br>Ann Salisbury, Senior Research Attorney, Orange County Superior Court and former member of appellate division subcommittee<br><br>Milica Novakovic, | Priority 1(e); may be 1(b) [urgently needed to respond to a recent change in the law]<br><br>This project is deferred while *Gardner v. Superior Court* (formerly *Morris v. S.C*. (2017) 17 Cal.App.5th 636) is pending in the Supreme Court. The issue being briefed and argued is whether an Appellate Division of the Superior Court is required to appoint counsel for an indigent defendant charged with a misdemeanor offense on an appeal by the prosecution. |

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE PRIORITY 1 PROJECTS THIS YEAR

| | Rule/Form | Suggestion/Issue | Source | Priority/Other Info |
|---|---|---|---|---|
| | | Form CR-133, Request for Court-Appointed Lawyer in Misdemeanor Appeal, only allows a defendant/appellant to utilize it since the form only refers to "appellant" and "appellant's lawyer" rather than simply "defendant" as stated in California Rules of Court, 8.851. If the defendant is the respondent relative to the People's appeal and was represented by a private attorney at trial but is now indigent, wondering if a "universal" form replacing "appellant" with "defendant" would be beneficial?<br><br>Needless to say, most defendants are appellants, and I note that in the family context, the California Supreme Court left it up to the courts. (See *In re Bryce C.* (1995) 12 Cal.4th 226, 235 ["We merely hold that appellate courts are not required to appoint counsel for all responding parents, but may, and sometimes must, appoint counsel in specific cases."].)<br><br>**Combined with:**<br><br>Amend rule 8.851(b)(1) and (3) to require the appellant or counsel to file the CR-133 and/or MC-210 forms in order to request appointed counsel, and to file these forms directly in the appellate division rather than in the superior court. | Staff Attorney, Superior Court of San Diego, and incoming committee member<br><br>Los Angeles Superior Court | |
| 3. | ***APPELLATE DIVISION***—*Proposed amendments to rule 8.885 regarding oral argument in misdemeanor appeals* | Current rule 8.885(a) requires oral argument to be set in every appeal "[u]nless ordered otherwise." Taken literally, this would require setting oral argument in every case where no issue is raised pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 unless the court issues an order stating otherwise. Some, but not all, courts do set oral argument in this situation. Judge Williams suggests it would clarify the rule to add an amendment that oral argument will not be set when there are no issues. I believe this is good idea and propose the above wording.<br><br>A related change suggested by Judge Williams is to clarify the procedure for waiving oral argument. Current rule 8.885(d) permits waiver of oral argument but does not specify how. Many appellants appear at argument only to submit the matter. This is frustrating to the judges and opposing counsel who must prepare for an argument that will never happen. Some practitioners in misdemeanor appeals inform the district attorney's office it will not pursue oral argument and the practitioner does not appear. The attorney for the People then informs the court that appellant wishes to waive oral argument and the People do not oppose the request. This system is flawed because the judges still prepare for the oral argument. It is | Hon. Helen E. Williams, Superior Court of Santa Clara County, Presiding Judge of Appellate Division, and Jonathan Grossman, Sixth District Appellate Program and | Priority 1(e)<br><br>The appellate division recommends this as a priority 1(e) project– Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public. |

| | Rule/Form | Suggestion/Issue | Source | Priority/Other Info |
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| | | also potentially vulnerable to miscommunication or abuse. I think the proposed amendment would create a clear procedure for waiving oral argument.<br><br>Striking the phrase "[u]nless ordered otherwise" in subdivision (a) would mean that oral argument would automatically not be set in *Wende* cases. It would also mean that oral argument must remain on calendar if a party objects to the waiver of oral argument. This draws from the rule that exists in court of appeal that a party is entitled to oral argument in all non-*Wende* appeals as a matter of right. (*People v. Brigham* (1979) 25 Cal.3d 283, 285-286.)<br><br>(1) ORAL ARGUMENT IN MISDEMEANOR APPEALS<br>**Rule 8.885. Oral argument**<br>**(a) Calendaring and sessions**<br>Except in appeals where no issue is raised ~~Unless otherwise ordered~~, 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.<br>* * *<br>**(d) Waiver of argument**<br>Parties may waive oral argument by filing notice of waiver of oral argument within 10 days after 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. | committee member | |
| 4 | ***RULES***— *Amend rule 5.590 to expand advisement of appellate rights in juvenile cases* | PROPOSAL TO AMEND RULE 5.590(a)<br><br>1) Text of proposed amendment to rule 5.590(a): Amend subdivision to read as follows [only amendment is to *delete* the words, "if present," as in bold below]:<br><br>Rule 5.590. Advisement of right to review in Welfare and Institutions Code section 300, 601, or 602 cases<br><br>. (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 | Rosemary Bishop | Priority 1(e)<br><br>This was on the committee's 2017 annual agenda and is on the 2018 annual agenda with a January 1, 2019 completion date. |

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE PRIORITY 1 PROJECTS THIS YEAR

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| | | 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:<br><br>. (1) The right of the child, parent, and guardian to appeal from the court order if there is a right to appeal;<br><br>. (2) The necessary steps and time for taking an appeal;<br><br>. (3) The right of an indigent appellant to have counsel appointed by the reviewing court; and<br><br>. (4) The right of an indigent appellant to be provided with a free copy of the transcript.<br><br>2) A description of the problem to be addressed: The problem is the current rule 5.590(a), read literally, provides parents who are not present at hearings are not entitled to notice of appeal rights. The rule applies both to delinquency cases (Welf. and Inst. Code §§ 601,602 et seq.), and dependency cases (Welf. and Inst. Code § 300 et seq.).<br><br>Rule 5.590(a), is not based on any statutory provision or case law. There is no authority, other than this rule, for denying notice of appeal rights to parents who are not present at their dependency hearing.<br><br>3) The proposed solution and alternative solutions: The proposed solution is to amend the current rule to provide for notice of the right to appeal post-jurisdiction orders, to parents and children of sufficient age, without regard to whether the parents are present at the hearing.<br><br>4) Any likely implementation problems: Implementation should not be complex. Trial courts are already mailing notice to parents and other parties of writ rights pursuant to rule 5.590(b). The same procedures could be used for notice of appeal rights. In fact, San Diego County uses a local court form that already includes both | | The subcommittee began work on this project earlier this year but recommended deferring in order to work more closely with Fam/Juv, which had previously addressed this issue by including an advisement on some juvenile dependency forms (after seeking the AAC's input).<br><br>NOTE: Fam/Juv will include this item on its 2018-2019 annual agenda. |

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| | | writ rights and appeal rights. (Form SDSC JUV-026, attached.) This form could be revised for clarity and used by other Counties to implement the change.<br><br>5) Any need for urgent consideration: None, other than the recent published decision in *In re Albert A., supra,* 243 Cal.App.4th 1220, may be leading trial courts to forego notice of appeal rights to parents who are not present at post-jurisdiction hearings.<br><br>6) Known proponents and opponents: Unknown.<br><br>7) Any known fiscal impact: The only cost should be clerical time and postage in sending written notice of appeal rights to parties after jurisdiction hearings. Some counties may already do this, by sending a minute order and appeal rights notice to parties. (See Form SDSC JUV-026, attached.)<br><br>**Combined with:**<br><br>There appear to be only two situations in which the rules of court require the juvenile court to advise the parent, guardian, and child in a dependency case of the right to seek review: (1) at disposition on a original (300), subsequent (342) , or supplemental (387) petition [Cal. Rules of Ct., rule 5.590(a) [notice required re. right to appeal] ]; and (2) upon the setting of a Welfare and Institutions Code section 366.26 hearing [id., rule 5.590(b) [notice required re. right to seek statutory writ relief].) The juvenile court's duty to advise a party of the right to appeal does not track the scope of the statutory right to appeal. (Welf. & Inst. Code, § 395, subdivision (a)(1) [the judgment and postjudgment orders (with exceptions not relevant here) are appealable].) The lack of coincidence between the rules of court regarding notification of the right to appeal and the statute regarding the scope of the right to appeal may be viewed as a conflict. Under that scenario, the rules of court on the question of the scope of the duty to advise the party of the right to appeal should not be controlling here. (*In re Abbigail A*. (2016) 1 Cal.5th 83, 92 [Judicial Council may not adopt rules that are inconsistent with the governing statute.]) Thus, the juvenile court should not base its proposed decision to cease notifying the parties of the right to appeal the outcome of the section 366.26 hearing on the absence of any such requirement in the rules of court. | Stephanie Miller, via Joseph Lane, Clerk/Executive Officer of the 2DCA | New suggestion |
| | *Juvenile law – expanding the proceedings in which parents must be advised of their right to appeal* | | | |

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| | | In order to implement the statutory right to appeal , the juvenile court should be required to notify the parent, guardian, and child of the right to seek review by appeal not only of the disposition of a 300, 342, and 387 petition, but of all postjudgment orders, including the order made at the section 366.26 hearing -- with the exception of the order setting the section 366.26 hearing. (See Rule 5.590(b).) In addition to the advisement of the right to appeal required at disposition (Rule 5.590(a)), the juvenile court should notify the parent, guardian, and child at the conclusion of each postjudgment review hearing and progress hearing, through the section 366.26 hearing, of the statutory right to appeal. The juvenile court should also be required to notify the parent, guardian, and child of the right to appeal the denial of a postjudgment petition for modification of orders. (Welf. & Inst. Code, § 388.)<br><br>Most weeks, this office receives from the juvenile court a service copy of a Notice of No Court Action on Notice of Appeal filed in the juvenile court in response to a late notice of appeal. (Rule 8.406(c) [late notice of appeal].) Many times, there is no indication in the minute order of an advisement of the statutory right to appeal. Although trial counsel in dependency cases may have a statutory duty to advise his or her client of the right to appeal (Pen. Code, § 1240.1, subds.(a), (b)), by adopting Rule 5.590(a), the Judicial Council determined that the right to appeal the disposition of a 300, 342, and 387 petition is of such importance that the juvenile court should be required to advise the parties of the right to appeal. No less significant is the right to appeal the order terminating parental rights made at the section 366.26 hearing.<br><br>**Combined with:**<br><br>Rule 5.590 does not specify all of the limitations on the right to appeal. Suggest amending the rule to specify these limitations<br><br>**Combined with:**<br><br>The current advisements of appellate rights that are given do not clearly explain the implications for orders concurrently made with the order setting the hearing under Welfare and Institutions Code section 366.26 or the orders to which the requirements for filing a notice of intent to file a writ petition applies. These should be clarified. | Appellate Defenders, Inc.<br><br>Seth Gorman | In 2010, Fam Juv decided to not to pursue any rule or form changes that were not mandated by statute or necessitated by caselaw.These two suggestions were deferred in light of that decision. |

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| 5. | ***JATS—*** *Formatting rules for electronic documents in the appellate courts* | **Modernize Appellate Court Rules for E-Filing and E-Business**<br><br>• Develop rules for formatting electronic documents in the appellate courts. This project combines two items from last year's annual agenda (develop rules for bookmarking and exhibits) and expands the scope to developing uniform rules for formatting electronic documents generally. | Justice Mauro, committee chair | JATS recommends this as a priority 1(e) project– Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public. |

## SUGGESTIONS A SUBCOMMITEE RECOMMENDS BE PRIORITY 2 PROJECTS

| | Rule/Form | Suggestion/Issue | Source | Priority/Other Info |
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| 1. | ***APPELLATE DIVISION –*** *Amend rule 8.817, application of the overnight delivery rule to briefs in appellate division cases* | I'm sending a note about a possible rule change involving rule 8.817, which governs service and filing in the Appellate Division. The attached order, issued by the Appellate Division of the Orange County Superior Court, sparked my suggestion. I am appellate counsel for the defendants and appellants in this misdemeanor appeal. An attorney who wanted to file an amicus brief supporting my clients mistakenly relied on rule 8.25(b), believing that her amicus brief would be deemed timely filed if she gave it to Federal Express on the due date. In the attached order, the Appellate Division points out that rule 8.25 applies only to filings in the Court of Appeal and Supreme Court.<br><br>However, the attorney might have reached the same conclusion even if she had relied on rule 8.817 (pasted below), which applies to the Appellate Division. Subdivision (b)(3) deems a "brief" to be timely filed if it is delivered to an overnight carrier on the due date. However, the attached Appellate Division order says rule 8.817 does not apply to amicus briefs. The Appellate Division order does not explain its conclusion, which seems to be wrong. (The Appellate Division allowed the amicus brief to be filed anyway, however.) Indeed, rule 8.630(e) provides: "Amicus curiae briefs may be filed as provided in rule 8.520(f)." Rule 8.520(f), in turn, is governed by rule 8.25(b), which expressly includes requests to file amicus briefs. Therefore, I wonder if modification of rule 8.817 is in order to clarify that amicus briefs are one kind of "brief" referred to in rule 8.817(b)(3)? | Lisa Jaskol, former committee member (now Judge, LA Superior Court) | Priority 2(b).<br><br>This is on the current annual agenda as a priority 2 item with a January 1, 2020 completion date. |
| 2. | ***APPELLATE DIVISION –*** *amend rule 8.817 concerning format of motions and applications filed in appellate division* | Rules 2.100-2.118 generally apply to papers filed in the superior court. Rules 8.40, 8.44(b) and (c) and 8.204(a) and (b) apply to papers filed in a reviewing court. The two rules appear to conflict for papers filed in the appellate division. Generally, the appellate rules do not apply because they apply only in cases pending in a reviewing court, and the appellate division is not considered to be a reviewing court under rule 8.10(6). However, rule 8.883 incorporates most of the appellate rules for the filing of briefs, and the rules concerning the filing of extraordinary writ petitions refer to rule 8.883. This creates uncertainty how to format a motion or application in the appellate division. This amendment would make it clear that motions and applications filed in the superior court shall comply with rules 2.100-2.118. My goal is not to impose superior court rules for motions and applications in the appellate division if most courts follow the format of the courts of appeal. What I think is needed is clarity. If the committee would prefer court of appeal rules to apply, that would be just as good. | Jonathan Grossman, Sixth District Appellate Program | Priority 2(b).<br><br>This is on the current annual agenda as a priority 2 item with a January 1, 2020 completion date. |

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| | | **Rule 8.817. Service and filing**<br>*** * ***<br>**(c) Format**<br>Motions and applications filed in the appellate division shall comply with rules 2.100-2.118. | | |
| 3. | ***APPELLATE DIVISION –*** *Statement on appeal forms and record on appeal rules* | Revise statement on appeal forms to be consistent with newly revised settled statement forms in unlimited civil cases. Also, address payment issues for the respondent designating the record on appeal (rules 8.831, 8.832, 8.834).<br><br>***Combined with*:**<br><br>Comments suggesting clarifications and corrections to statement on appeal forms (APP-104, APP-105, CR-135, CR-136, CR-143, and CR-144).<br><br>***Combined with*:**<br><br>"Did a little presentation for our civil judges regarding the Statement on Appeal process and the revisions to 8.837 and APP-105. I noted that the rule requires that the trial court order include "the date by which the new proposed statement must be filed and served" (Cal. Rules of Court, rule 8.837 (d)(3)(A)), and also encouraged the trial court judges to similarly include a "due date" in orders under (d)(3)(b)(ii) and orders under (d)(4)(B) so that the statement on appeal process doesn't end up in limbo.<br><br>"However, the revised APP-105 does not include spaces for such 'due dates.' I realize that this is totally an example of 'hindsight is 20-20,' but I wanted to let you know in the event you weren't already aware and to suggest the addition of a section perhaps at the bottom of APP-105 – section 3 – stating something like: 'Appellant is to comply with any orders in section 2b above by _____ [date].' " | Identified in 2018 work on settled statement forms<br><br>Los Angeles Superior Court<br><br>Milica Novakovic, staff attorney, San Diego Superior Court, and incoming committee member | Priority 2(b).<br><br>The suggestions from LA Superior Court were deferred until this past year due to lack of resources.<br><br>Comments pertaining to notice of appeal and record on appeal forms were addressed this year; the statement on appeal suggestions were deferred while work was in progress on the settled statement forms. |
| 4. | ***JATS–*** *Modernize Appellate Court* | Rules Modernization | Information Technology | Overall project was on last 3 annual agendas |

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| | *Rules for E-Filing and E-Business* | a. Review appellate rules to ensure that they are consistent with e-filing practice; evaluate, identify, and prioritize potential rule modifications where outdated policy challenges or prevents e-business.<br>b. Consider rule modifications to remove requirements for paper versions of documents (by amending individual rules or by introducing a broad exception for e-filing/e-service).<br>c. Consider potential amendments to rules governing online access to court records for parties, their attorneys, local justice partners, and other government agencies.<br><br>Some specific rule projects within the scope of this item:<br><br>• **Numbering of materials in requests for judicial notice**. Consider amending rule 8.252 which requires that materials to be judicially noticed be numbered consecutively, starting with page number one. But such materials are attached to a motion and declaration(s) and are electronically filed as one document, making pagination and reference to those materials in the briefs confusing for litigants and the courts.<br><br>• **Method of notice to the court reporter.** Consider amending rule 8.405 which governs the filing of an appeal in juvenile cases to remove the requirement in subdivision (b)(1)(B) that the clerk notify the court reporter "by telephone and in writing" to prepare a transcript.<br><br>• **Clarify the filing date of an e-filed document**. Amend rule 8.77 to clarify that an e-filed document received by the court before midnight is deemed filed that day.<br><br>• **Court of Appeal service copy of a petition for review**. Amend rule 8.500(f)(1) to remove the requirement of a separate service copy of a petition for | Advisory Committee<br><br>Dan Kolkey, committee member<br><br>Tricia Penrose, Director Juvenile Operations, LA Superior Court<br><br>California Lawyers Ass'n by Paul Killion and Saul Bercovitch | as Priority 2 – helpful but not urgent.<br><br>Priority 2. This is on the current annual agenda as a priority 2 item, January 1, 2020 completion date.<br><br>Priority 2. This is a new suggestion.<br><br>Priority 2. This is a new suggestion. |

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| | | review. Once the Supreme Court accepts a petition for review for filing, the Court of Appeal automatically received a filed/endorsed copy of the petition. The filing of the petition satisfies the service requirements for the Court of Appeal.<br><br>• **Amend rule 8.70 to correct errors and clarify content**. Problems identified: (1) subdivision (c)(2)(B) defines a document as a document; (2) subdivision (c)(2)(C) has a typo (extraneous "on"); and (3) subdivision (c)(2)(D) is not parallel with the rest of (c)(2). | Colette Bruggman, Assistant Clerk/Administrator, 3DCA<br><br>Justice Mauro, committee chair | Priority 2. This is on the 2017-2018 annual agenda as a Priority 2 item with a January 1, 2020 completion date.<br><br>Priority 2. This is a new suggestion. |
| 5. | ***JATS—****inmate e-filing and e-readers* | Work with other branches of government and CDCR to arrange for inmate e-filing and e-readers in state prisons. One clear benefit would be eliminating paper reporters' transcripts. Note that (1) Michigan has an inmate e-filing system; (2) CDCR permits e-readers for digital textbooks; (3) other jurisdictions (including Arizona) permit tablets in state prisons. | Justice Mauro, committee chair | Priority 2. This is a new suggestion. |
| 6. | ***JATS****—rules regarding certification of electronic records, electronic signatures, paper copies of electronically filed documents* | ITAC is looking at rules to govern certification of electronic records, standards for electronic signatures, and whether parties should have to submit paper copies of documents when filing electronically. (In the trial courts, some changes will require legislation, as there are statutory requirements for the trial courts regarding electronic filing, service and signatures. See Code of Civil Procedure section 1010.6.) As these changes move forward for the trial courts, JATS will offer input on changes that will affect the appellate courts. JATS's work must wait until the project is moved forward by ITAC. In addition, this project may eventually result in rules work to be done by JATS. In future years, after ITAC has resolved these issues for the trial courts, JATS may wish to consider proposing changes to the appellate court rules on these issues. | ITAC | Priority 2. This project is on the committee's 2018 annual agenda as a priority 2 item. |
| 6. | ***JATS—****input on document management system* | Monitor and provide input on implementation of a new document management system in the appellate courts. Phase 1 is in progress. The 3DCA and the 5DCA are piloting the initial implementation. | ITAC | Priority 2. This project is on the committee's 2018 annual agenda as a priority 2 item. . |
| 7. | ***RULES*** *– rules 8.204 and* | Consider the word limit for briefs in civil cases in the appellate courts. Initial work would involve research and gathering data. | Kevin Green, | Priority 2. |

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| | *8.360 – Length of briefs* | The federal system just concluded a lively debate resulting in a decrease for the permitted length of federal appellate briefs. The same considerations that caused this to be proposed at the federal level apply to California's judicial branch – a new normal of daunting caseloads and decreased funding, and the perception in some quarters that lawyers don't need so many words to make their case on appeal. The New York Times recently ran this article summing up the debate and FRAP amendments effective December 1.<br><br>http://www.nytimes.com/2016/10/04/business/dealbook/judges-push-brevity-in-briefs-and-get-a-torrent-of-arguments.html?smprod=nytcore-iphone&smid=nytcore-iphone-share<br><br>To be clear, I am not stating a position on whether California's limits should be changed. I believe the topic warrants the subcommittee's consideration.<br><br>**Combined with:**<br><br>I am forwarding the below e-mail as a potential item for discussion for the next annual agenda. I know the word limits for briefs contained in present rules 8.204(c)(1) and 8.360(b)(1) have been in place for a substantial period of time, and roughly correspond to the page limits previously in place for even longer. And I note that for death penalty appeals (8.630(b)(1)), the page limit was actually increased about five years ago. I'm guessing that was done to reduce the workload of the court in dealing with requests to file oversize briefs.<br><br>"As chair of the appellate advisory committee, I recommend you address the size of appellate briefs. I particularly see no justification for permitting longer briefs for criminal than for civil cases." | committee member<br><br>Justice Ikola, former committee chair, and Justice Rylaarsdam | This project is on the committee's 2018 annual agenda as a priority 2 item with a January 1, 2020 completion date.<br><br>In 2014-2015, the committee placed this on deferred list because it was not considered a high priority. |
| 8. | ***RULES—*** *Appellate Court Administration, amend rule 10.1028 re time to keep reporters' transcripts,* | I think the time to keep reporter's transcripts in criminal cases should be changed. As shown below it is 20 years regardless of the sentence. I think that the Reporter's transcripts in Criminal Cases should include a digital copy in addition to the paper copy.<br><br>I expect it will still be some time before we can mandate a digital copy in all cases. But we should be able to get support for a digital copy NOW for all criminal appeals where the sentence is more than 20 years. Coupling this "mandate" (i.e. | Joseph Lane, Clerk/Executive Officer of the Court, Second Appellate District | This is on the 2017-2018 annual agenda with a January 1, 2020 completion date. |

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| | *digital copy, and standards for record preservation and destruction* | rule change) along with a change to how long we must maintain them should help convince the legislature that they should not fight us on this.<br><br>As in most cases, just a suggestion. Thanks<br><br>Rule 10.1028<br>(d) Time to keep other records<br>(1) Except as provided in (2), the clerk may destroy all other records in a case 10 years after the decision becomes final, as ordered by the administrative presiding justice or, in a court with only one division, by the presiding justice.<br>(2) In a criminal case in which the court affirms a judgment of conviction, the clerk must keep the original reporter's transcript or a true and correct electronic copy of the transcript for 20 years after the decision becomes final.<br><br>**Combined with:**<br><br>At some point I would like to propose amendment of Rule of Court 10.1028(d)(2), which requires retention of "the original reporter's transcript" for a period of 20 years when the court affirms a criminal conviction. Since Code of Civil Procedure section 271(a) requires that an "original transcript" be on paper, the storage costs are substantial. Amending the rule to require retention of a true and correct copy in electronic form would make it much easier for us to receive and use electronic copies as part of the appellate record for the courts that wish to do so, and could generate significant long term cost savings. Even the reporters are now asking about electronic delivery, and we could probably do this with little opposition. Although the statute ultimately needs to be amended, amending the rule would seem to be the far simpler interim solution.<br><br>**Combined with:**<br><br>Rule 10.1028 governs the preservation and destruction of Court of Appeal records. Under subdivision (a), we are referred to rule 10.854 for the standards or guidelines for the creation, maintenance, reproduction, and preservation of records. Rule 10.854 sets forth standards and guidelines for trial court records and further refers to the Trial Court Records Manual (TCRM). The TCRM is 121 pages without a fully developed index. | Justice Bruiniers, chair of CTAC<br><br>Colette Bruggman, Assistant Clerk/ Executive Officer, 3DCA | Deferred in 2013-2014 pending determination of whether proposal to amend Code of Civil Procedure section 271(a) would be developed<br><br>New suggestion |

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| | | Because we would like to scan our records and store them electronically, we have to put procedures in place that comply with the rules, and the rules require us to comply with the TCRM. I asked Darlene to review the TCRM to determine how much of it was applicable to us, and it was her opinion that perhaps 10-15% was applicable to Court of Appeal records.<br><br>I write to inquire whether rule 10.1028 could be reviewed and amended to eliminate the overly burdensome requirement that we follow to TCRM. Perhaps a manual should be developed that addresses Court of Appeal records. | | |
| 9. | ***RULES—*** *amend rule 8.714 to require notice to court reporter of appeal from an order dismissing or denying a petition to compel arbitration* | Review rules for whether to include a time frame for notice to the court reporter (expanding the scope beyond cases involving an appeal from an order dismissing or denying a petition to compel arbitration).<br><br>In reviewing the new rules while drafting forms, something came to my attention under rule 8.714. Rule 8.713(b)(2) gives a time frame for the due date of the RT, but it does not give a time frame to the trial court clerk to notice the reporter. I thought that perhaps if under rule 8.714(2) it included the notice to the reporter, this would take care of that gap. Then the trial court clerk would have to notice the reporter before sending the notice of appeal packet to the appellate court avoiding delay in RT preparation because the reporter was not promptly noticed. There are many counties where we are currently experiencing a delay in the filing of reporter's transcripts in other appeals, and sometimes the delay is caused by lack of notice.<br><br>And while I'm adding this, Rule 8.714(1)(A) doesn't include the notice of appeal itself; and Rule 8.714(2)(A) doesn't include the notice of filing of the notice of appeal.<br><br>I'm not trying to be picky or bothersome, and I realize there was a lot of ground work on this rule. I just thought a possible amendment down the road would avoid delay re the RT filing, and since I noticed that issue, I'm adding the other two items as well. | Sandy Green, Supervising Deputy Clerk, 3DCA | Expanded scope for 2018-2019 annual agenda.<br><br>This is on the 2017-2018 annual agenda with a January 1, 2020 completion date. |
| 10 | ***RULES— Criminal appeals,*** *rules* | I would like to request that the rules of court for criminal appeals be amended to add a rule for the normal record in civil commitment cases where the patient is entitled to appointed counsel. They include extensions for those found not guilty | Jonathan Grossman, | Priority 2 |

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| | *regarding the record in civil commitment cases* | by reason of insanity (Pen. Code, § 1026 et seq.) and those found incompetent to stand trial (Pen. Code, § 1367 et seq.). It also includes commitments under the Mentally Disordered Offenders Act (Pen. Code, § 2962 et seq.), Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 et seq.), Developmentally Disabled Persons Act (Welf. & Inst. Code, § 6500 et seq.), and Sexually Violent Predators Act (Welf. & Inst. Code, § 6600 et seq.).<br><br>Jeremy Price, a staff attorney at the First District Appellate Project, had unsuccessfully applied to be on this committee. He has suggested a form notice of appeal in civil commitment cases, and I agree this is a good idea. The proposed form is attached.<br><br>I have also found that there is no clear rule what is part of the normal record on appeal in civil commitment cases. Consequently, records are often inadequate and there are no clear grounds for writing to the superior court clerk to correct the record. My suggestion is to take current rule 8.320, concerning the normal record in criminal cases, and modify it as follows. Subdivision (a) would be changed to describe to what the rule applies. For the clerk's transcript, subdivision (b)(1) would be modified to state the petition instead of the charging document, subdivision (b)(2) would be modified to include admissions or denials, subdivision (b)(8) would omit a reference to a certified of probable cause, subdivision (b)(13) would be added to include any psychological report and any documentary exhibits, current subdivision (b)(13) would become (b)(14) and omit subdivisions (C) through (E). For the reporter's transcript, subdivision (c)(1) would be modified to include the oral proceedings on the entry of any admission or submission to the commitment petition or motion for involuntary medication, subdivision (c))(8) would omit a reference to the sentencing hearing, and subdivision (c)(9)(A) would be modified to delete a mention to Penal Code section 995 motions. Subdivision (d) concerning appeals from non-trials would be eliminated, subdivision (e) would become subdivision (d), and subdivision (f) would become subdivision (e).<br><br>Normal record; exhibits<br>(a) Contents<br>In an appeal in a civil commitment proceeding where the person is entitled to the appointment of counsel, the record must contain a clerk's transcript and a reporter's transcript, which together constitute the normal record. [modified]<br>(b) Clerk's transcript | SDAP Staff Attorney | This is on the 2017-2018 annual agenda with a January 1, 2020 completion date. The rules subcommittee recommends that this be worked on in 2019. |

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| | | The clerk's transcript must contain:<br>(1) The petition; [modified]<br>(2) Any demurrer or other plea, admission or denial [modified];<br>(3) All court minutes;<br>(4) All jury instructions that any party submitted in writing and the cover page required by rule 2.1055(b)(2) indicating the party requesting each instruction, and any written jury instructions given by the court;<br>(5) Any written communication between the court and the jury or any individual juror;<br>(6) Any verdict;<br>(7) Any written opinion of the court;<br>(8) The judgment or order appealed from and the commitment order; [modified]<br>(9) Any motion for new trial, with supporting and opposing memoranda and attachments;<br>(10) The notice of appeal; [modified]<br>(11) Any transcript of a sound or sound-and-video recording furnished to the jury or tendered to the court under rule 2.1040;<br>(12) Any application for additional record and any order on the application;<br>(13) Any psychological report and any documentary exhibits; [new]<br>(14) And, if the appellant is the defendant:<br>(A) Any written defense motion denied in whole or in part, with supporting and opposing memoranda and attachments; and<br>(B) Any document admitted in evidence to prove a prior juvenile adjudication, criminal conviction, or prison term. [omitted remainder]<br>(c) Reporter's transcript<br>The reporter's transcript must contain:<br>(1) The oral proceedings on the entry of any admission or submission to the commitment petition or motion for involuntary medication; [modified]<br>(2) The oral proceedings on any motion in limine;<br>(3) The oral proceedings at trial, but excluding the voir dire examination of jurors and any opening statement;<br>(4) All instructions given orally;<br>(5) Any oral communication between the court and the jury or any individual juror;<br>(6) Any oral opinion of the court;<br>(7) The oral proceedings on any motion for new trial;<br>(8) The oral proceedings of the commitment order or other dispositional; [modified]<br>(9) And, if the appellant is the defendant: | | |

## SUGGESTIONS A SUBCOMMITEE RECOMMENDS BE PRIORITY 2 PROJECTS

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| | | (A) The oral proceedings on any defense motion denied in whole or in part except motions for disqualification of a judge; [omitted Penal Code section 995 motions]<br>(B) The closing arguments; and<br>(C) Any comment on the evidence by the court to the jury. [omitted 8.320(d)]<br>(d) Exhibits<br>Exhibits admitted in evidence, refused, or lodged are deemed part of the record, but may be transmitted to the reviewing court only as provided in rule 8.224.<br>(e) Stipulation for partial transcript<br>If counsel for the defendant and the People stipulate in writing before the record is certified that any part of the record is not required for proper determination of the appeal, that part must not be prepared or sent to the reviewing court. | | |
| 11 | ***RULES—*** *amend rules regarding record on appeal to include visual aids, PowerPoint presentations, and other such items that are not offered into evidence* | I write to you to suggest a new rules change to be considered whenever it would be appropriate. Increasingly, prosecutors and defense attorneys are relying on, and making objections to, PowerPoint presentations at jury trials. The rules of court should be amended to include as part of the normal record on appeal the PowerPoint slides shown to or excluded from the jury. The current practice of chasing down the PowerPoint presentation from the party that presented it is cumbersome and time consuming. | Jonathan Grossman, SDAP, committee member | New suggestion |

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE DEFERRED

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| 1 | ***RULES –*** *Settled statements* | The Family and Juvenile Law Advisory Committee may wish to pursue further work on the settled statement rule (8.137) and forms. This could include amending the rule to add headings, simplify the language, and remove the requirement that the settled statement must contain "a statement of the points the appellant is raising on appeal." Fam/Juv was also potentially interested in developing more forms, including an information sheet/flow chart to help parties understand which steps in the appellate process must be completed in in the trial court and which must be completed in the Court of Appeal, and a form for a respondent to elect to provide a reporter's transcript instead of proceeding with a settled statement. | Members of the Family and Juvenile Law Advisory Committee and the Access and Fairness Advisory Committee; Comments on the 2017 settled statements proposal | 2018 is the second year in a row that major changes to settled statements have been proposed. The committees agree that it is best to give courts and litigants time to use the new forms before more changes are contemplated.<br><br>Fam/Juv agrees with deferring further work. |
| 1 | ***APPELLATE DIVISION*** *– Develop an information sheet for form APP-103* | Develop an information sheet for APP-103, similar to proposed form APP-101-INFO that is attached to SPR-17-04 (Information on Appeal Procedures for Limited Civil Cases). Overall, it would be helpful for self-represented litigants if the appellate procedure forms and information sheets for both limited and unlimited civil cases are standardized. | State Bar of California, Standing Committee on the Delivery of Legal Services, by Sharon Djemal | Comment on ITC SPR17-01, Settled Statements in Unlimited Civil Cases.<br><br>The subcommittee recommends that this project be part of a comprehensive review of the record on appeal forms in a future rules cycle. (2018) |
| 1 | ***APPELLATE DIVISION*** *– new form for record election in* | Develop a form for appellants in infraction cases who receive notice that a transcript (reporter's or electronic) cannot be transcribed and they need to file a new record election form (see rules 8.917 and 8.919(f)). Appellants trying to use form CR-142 Notice on Appeal and Record on Appeal for this purpose often fill out | Los Angeles Superior Court | The subcommittee recommends that this be considered if it aligns with a larger |

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| | *infraction appeals* | the notice of appeal section, which results in two notices of appeal in the same case. (See LASC suggestion 8, last page.)<br><br>The LASC suggests either:<br>(1) separate the notice of appeal from the notice of record on appeal forms; or<br>(2) create a "supplemental record on appeal (infraction) form; or<br>(3) add an Advisory Committee comment after the rule that gives permission to infraction appellants to use CR-134 Notice Regarding Record on Appeal (Misdemeanor) instead of drafting their own notice of appeal or using CR-142. | | project in the future. (2018) |
| 1 | ***APPELLATE DIVISION*** *– Amend rule 8.835, Record when trial proceedings were officially electronically recorded* | Amend rule 8.835 to include language allowing respondents to designate additional proceedings that they wish to have transcribed, consistent with content in the rule regarding reporters' transcripts. Space for the respondent to designate additional proceedings was added to form APP-110, but amending the rule exceeded the scope of this year's project. The LASC also suggests amending the rule to include instructions for payment (how, when, etc.), consistent with companion rules for misdemeanor and infraction appeals. | Los Angeles Superior Court | This only very rarely comes up, if at all. To be considered if it aligns with a larger future project. (2018) |
| 1 | ***JATS, Rules modernization*** | Rule amendments re access. ITAC has developed trial court rules to address online access to case records for parties, attorneys, local justice partners, and other government agencies. These proposed rules are going to the JCC in September 2018 to take effect January 1, 2019. JATS may wish to propose companion amendments to appellate court rules 8.80-8.90. | ITAC | JATS recommends seeing how the trial court rules work for a time before considering the appellate rules. (2018) |
| 1 | ***General,*** *amend rule 8.500 to add grounds for grant and transfer* | As a longtime California appellate attorney, my interest in court procedure reaches well beyond case-by-case work; ideally, I'd like to do whatever I can to advance appellate justice. Discussing that topic a few years ago, former Supreme Court Justice Cruz Reynoso and I developed a proposal we published last year in the San Francisco Daily Journal. ("A New Ground for Review and Transfer," Aug. 2, 2016.) Taking it a formal step further, I hope the Committee will consider our proposal, as I'll explain below.<br><br>Background: The proposal seeks to address an overlooked problem: What happens if a Court of Appeal opinion presents no "important question of law" (rule 8.500(b)(1)) but arguably relies on a material factual or legal error, or an unbriefed | Hon. Cruz Reynoso, Associate Justice, Cal. Supreme Court (ret.) and Stephen Greenberg, Attorney, Nevada City | The rules subcommittee considered this to be an interesting proposal, but not appropriate to pursue at this time. (2017) |

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE DEFERRED

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| | | issue? (By "material" error, we mean one reasonably likely to have affected the appellate result.) Unless the Court of Appeal agrees it has erred and grants rehearing — an extremely rare occurrence — there's no corrective procedure available. But because the appellate process must be meaningful (People v. Howard (1992) 1 Cal. 4th 1132, 1165-1166), it should never end in a decision marred by error or unfairness.<br><br>Proposal: grounds for grant and transfer. Accordingly, we suggest that the Judicial Council adopt a new Rule of Court — actually, a new subsection of 8.500. In addition to the existing grounds for full review (8.500(b)(1)-(3)), there would be a formal ground for review and transfer: Essentially, if the Court of Appeal opinion was materially erroneous in some way, the Supreme Court may send the case back for reconsideration — and must do so, if the decision violated Government Code Section 68081's mandate. The rules already acknowledge the grant-and-transfer power (rule 8.500(b)(4)); this modification would provide guidance for its use.<br>1. Current subdivision (b) would continue as is, listing the four bases upon which "[t]he Supreme Court may order review of a Court of Appeal decision":<br>(1) When necessary to secure uniformity of decision or to settle an important question law;<br>(2) When the Court of Appeal lacked jurisdiction;<br>(3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or<br>(4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.<br>2. And a new subdivision (presumably (c), with current (c)-(g) becoming (d)-(h)) would identify several "transfer" grounds — three discretionary, one mandatory:<br>(c) Grounds for transfer<br>(1) The Supreme Court may transfer the matter to the Court of Appeal based on grounds including, but not limited to, the following:<br>(A) When the Court of Appeal decision contains one or more material errors or omissions of fact, and the Court of Appeal failed to correct the alleged errors or omissions after a party called the Court of Appeal's attention to them in a petition for rehearing;<br>(B) When the Court of Appeal decision contains one or more material errors or omissions of law, and the Court of Appeal failed to correct the alleged errors or | | |

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| | | omissions after a party called the Court of Appeal's attention to them in a petition for rehearing;<br>(C) When the Court of Appeal decision contains one or more material mischaracterizations or omissions of briefed issues, and the Court of Appeal failed to correct the alleged mischaracterizations or omissions after a party called the Court of Appeal's attention to them in a petition for rehearing.<br>(2) The Supreme Court shall transfer the matter to the Court of Appeal when, in violation of Government Code section 68081, the Court of Appeal decision is based upon an issue that was not proposed or briefed by any party to the proceeding, the court did not afford the parties an opportunity to present their views on the matter through supplemental briefing, and the court denied rehearing.<br><br>Benefits from proposal:<br>For the Supreme Court. There should be little increase in the number of review petitions filed. But some presumably would include transfer requests, highlighting material errors in the Court of Appeal opinion. Of course, petitioning parties already provide those highlights (see current rule 8.500(c)(2)), and they're likely to be noted in the court's conference memo. The salient difference under the proposed rule: In a limited number of cases, the court should consider whether, even if full review isn't warranted, an error-based transfer is appropriate. And if the court chooses that option, a one-sentence transfer order — ideally, including citations from or references to the petition — will effect an appropriate remand. There's nothing particularly radical about such a procedure — which the court already employs, albeit very rarely and with no identified grounds.<br>In some cases, the Supreme Court will end up receiving subsequent review petitions, following transfers and reconsidered Court of Appeal opinions. But the court already will have examined the record and issues; the additional work should be relatively simple.<br>For the Courts of Appeal. In what likely would be a small percentage of cases, the Courts of Appeal will have to reconsider opinions based on petitions and transfer orders identifying material errors. More work, but it will be (a) confined to cases already briefed, analyzed and argued; and (b) focused on specific points and whether their reconsideration alters the results. And as a policy matter, the Court of Appeal will have the ultimate say in the incidence of grant-and-transfer orders: To the extent appellate opinions avoid material factual and legal errors or correct them upon rehearing, the new procedure won't be invoked.<br>For litigating parties. When an appellate opinion appears to be based on a material error or an unbriefed issue, the losing party should have meaningful recourse even | | |

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| | | if the case includes no review-worthy issue. And the party benefiting from the error is free to oppose a transfer petition. (Rule 8.500(a)(2).)<br>For society, and the legal profession. Inadequate appellate review "does not advance the cause of justice." (In re Steven B. (1979) 25 Cal.3d 1, 9; see People v. Jackson (2014) 58 Cal.4th 724, 792 (conc. & dis. opn. of Liu, J.) [re "the crucial role of appellate review in promoting adherence to the law"].) To the extent California allows an erroneous decision to be the last judicial word in a case, the legal system — and the respect it earns — is arguably diminished.<br>Conclusion: Again, while the state offers two remedial options — petitions for rehearing and review — they're simply insufficient for this purpose. Many or most errors survive the former, and the latter isn't designed as a corrective procedure: The Supreme Court's job isn't to correct appellate error. So the Court of Appeal, unlike its trial counterpart, isn't subject to full evaluation by a higher court. But with a modest modification to the Rules of Court, California can introduce more integrity and accountability into the appellate justice system. | | |
| 1 | ***General,*** *extend time for superior courts to respond to augment orders* | In our staff meeting you mentioned changes to the rules of court. I know you were talking about e-filing, but it occurs to me, I would love to see the time extended for the trial courts to respond to an augment order. Presently we give them 20 days and it's pretty unusual to have an augment in within that time frame. Matter of fact, it's pretty rare that they even get us a request for more time within the 20 day window. | Tori Ellis, Deputy Clerk, 3DCA | The rules subcommittee did not view this as requiring immediate attention. They noted that rule 8.155, augmenting and correcting the record, does not set forth the amount of time for trial courts to comply with an augment order, but that this time can be set in the order itself. (2017) |
| 1 | ***GENERAL****— consider a fix for link rot* | Background:<br>On our May 17th meeting, Lawrence Striley the Reporter of Decisions gave the appellate court librarians an overview of the solution developed for the Supreme Court. It's an "in-house" solution that required Reporter's staff to upload "target" documents to a special court web server for the Supreme Court as PDFs. Then, there were some special scripts that were developed (I didn't understand that part | Holly Lakatos, librarian, 3DCA | JATS did not view this as requiring immediate attention. Future consideration of this suggestion would benefit from the |

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| | | because it was more about how the backend of their computer systems worked, and he didn't go into too much detail). Then, any citations to the document would be edited to reflect that that an archived version resides at whateverurl.ca.gov/document.pdf. This solution will be rolled out later this year. Unfortunately, though, the Reporter's office will not be doing the same thing for the appellate courts. Lawrence said that while his office would share what they've done with us, we'd have to get a server and implement the solution ourselves.<br><br>Perma.CC:<br>The possible solution I mentioned during our meeting is called Perma.cc (https://perma.cc/signup/ courts). Lawrence actually said that this would be his #2 choice for the Supreme Court. The Perma "people" were willing to work with his office to hide the specific person submitting the document (like if a J.A. uploaded something) & the date it was originally uploaded (several weeks before the opinion was released). However, he preferred the in-house solution for his office due to how they actually process & post opinions right now. Michigan & Colorado are using Perma.cc & it's free. It was developed by Harvard's Law Library & is sponsored by a group of law libraries around the US.<br><br>I imagine that the workflow would go something like this at our court:<br>· Draft opinion goes through its process; the J.A. cite checks.<br>· When the J.A. sees a URL cited, they go to the site and create an archived copy of the page. They can do this by saving the page as a PDF, printing the page as a PDF using Adobe distiller, or saving the file in an achievable format if it cannot be preserved as a PDF (some graphics, I suppose).<br>· The JA (or whomever is assigned this task) would upload the document to the Perma.cc site & obtain a URL of the archived copy.<br>· The JA would then change the citation to include an indication that the original URL was archived at the Perma.cc URL.<br><br>Is this going to be more work for someone? Yes.<br>Will it require training? Yes, in both creating PDFs and uploading the document and the new citation<br>format.<br>Is it going to be a lot more work? I think it depends on how many URLs are cited. We don't seem to cite many…but I think that we could start doing this for things like loose-leaf reporters that change every year and anything else that is not really permanent or easily accessible…so that would mean that it may possibly be a lot | | Supreme Court's experience with its chosen solution. (2017) |

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| | | more work for some people. Also, this solution may be something that could be distributed across the workflow so that attorneys, clerks, justices, or anyone else would be able to create & upload the archived copies…depending on how that chambers works. | | |
| 2 | ***GENERAL*** *– Rules ?? – Access to appellate courts* | Court Access. I believe the Rules Subcommittee's proposals should be guided in part by the Chief Justice's Access 3D Initiative. I have no specific rule proposals in mind but am willing to review Title 8 of the California Rules of Court to identify rules, or provisions of them, that unduly hinder access or that could be amended to increase ease of access to the appellate courts. California has a high percentage of self-represented parties on appeal. Handing your own appeal without counsel is difficult enough. The rules should not make the exercise any harder than it needs to be. | Mr. Kevin Green, committee member | |
| 2 | ***GENERAL*** *– Rules ?? – Copies of out-of-state authorities* | *[Note to committee – this comment was received in response to the recent amendment to rule 8.1115, which included the following amendment to subdivision (c): On request of the court or a party, a copy of an opinion citable under (b) ~~or of a cited opinion of any court that is available only in a computer-based source of decisional law~~ must be promptly furnished to the court ~~and all parties~~ or the requesting party ~~by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation~~.]*<br><br>My point is that I think, with its focus on *California* cases, the Supreme Court has overlooked the fact that the old version of Rule 8.1115 subdivision (c) covered more than just the cases referred to in subdivision (b). That is, the old version of subdivision (c) covered unpublished *federal* cases. See footnote 8 in Californians for Disability Rights v. Mervyn's LLC (2008) 165 Cal.App.4th 571, 589. (There's a split of authority whether unpublished out-of-state cases can be cited in California state court, but I'll put that aside.) If I cite an unpublished federal case today, I have explicit direction from subdivision (c) and Californians for Disability Rights v. Mervyn's LLC to give the court and opposing party a copy of the case. As of July 1st, I will have no such specific direction.<br><br>As a practical matter after July 1, I will follow the new subdivision (c) in spirit and offer to give the court and opposing counsel a copy of any unpublished federal or out-of-state case I cite. But the way in which subdivision (c) has been amended the rules no longer give explicit direction on what is to be done when a party cites an unpublished *non*-California case. | Robert G. Scofield Attorney at Law | See also rule 3.1113(i) and invitation to comment on proposal to amend rule 8.1115 at http://www.courts.ca.gov/documents/W14-01.pdf |

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| 2 | ***GENERAL –*** *Rule 8.163 – Application of presumption from the record when settled statement is used* | A recent Court of Appeal decision [available at: http://www.courts.ca.gov/opinions/nonpub/B246970.PDF] appears to reason that since there was no reporter's transcript, the presumption of rule 8.163 (pasted below) comes into play -- even though there was a settled statement. The opinion even says the "situation is analogous to some appeals on the judgment role of long ago, where the record was so incomplete 'it was impossible to determine upon what theory the case was tried . . . ." (Page 13.) Yes, the record was deficient, but not because of the lack of an RT. It's was deficient because the superior court approved respondent's deficient settled statement after the appellants were unable to present an acceptable one.<br><br>So my suggestion for the Appellate Advisory Committee -- and in light of this opinion I think it's urgent: revise the second sentence of Rule 8.163 (pasted below) to insert the words "or an authorized substitute" after "reporter's transcript."<br><br>Rule 8.163. Presumption from the record<br>The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised. If the appeal proceeds without a reporter's transcript, this presumption applies only if the claimed error appears on the face of the record. | Lisa Jaskol, former committee member | In 2014-2015 annual agenda, this was designated as a Priority 2 project with a January 1, 2017 proposed completion date.<br><br>At its 10/29/15 meeting, the rules subcommittee recommended that this be moved to the deferred list because it appears that most courts have considered alternatives to reporter's transcript in applying presumption |
| 2 | ***CIVIL APPEALS*** *- Forms APP-03 and APP-010 - designation record in unlimited civil cases* | See attached annotated copies of these forms | Superior Court of San Diego County – in comments on SPR15-01 | Given that these forms will just have been amended effective 1/1/16 and these changes are not urgent, the rules subcommittee recommends deferring these changes |
| 2 | ***APPEALS IN CIVIL CASES*** Form APP-002 *Notice of Appeal* | We have attached form APP-002 with our proposed revisions highlighted in yellow. The proposed revisions would add a third section to that form, covering the filing fees and deposit requirements. The new section would parallel and complement the instructions in form APP-001 concerning those fees. Three options are proposed, each with its own check box. The first notes that the notice of appeal is accompanied by the required filing fee and deposit, and specifies those amounts. | Committee on Appellate Courts, State Bar of California | Was on 2013-2014 annual agenda as Priority 2 – helpful but not urgent. Had 1/2015 completion date but not worked |

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| | | The second notes that the notice of appeal is accompanied by a Request to Waive Court Fees (form FW-001). The third notes that the party filing the notice of appeal is exempt from filing fees and deposit requirements. We believe that including this information in form APP-002 will provide useful guidance and a helpful checklist for both parties and clerks. | | on last year In 2014-2015, the committee placed this on deferred list because it was not considered a high priority. |
| 2 | ***GENERAL –*** *Rule 8.25 – Application of overnight delivery rule to supplemental and letter briefs* | Our managing attorney mentioned to me that the clerks in our court have routinely been rejecting as untimely supplemental briefs or letter briefs when the filing party relied on rule 8.25(b)(3) for constructive filing by overnight delivery. Our PJ is posting a general order for our court indicating that supplemental and letter briefs get the benefit of the constructive filing rule in 8.25(b)(3). Apparently our clerks at some point in our history had been instructed (perhaps by our prior managing attorney) that supplemental and letter briefs were not in the list of documents to which the constructive filing rule applied, and thus should be rejected as untimely.<br><br>Perhaps there is a reason not to allow constructive filing for supplemental or letter briefs, but I can't think of one. And perhaps this interpretation of the rule is overly strained (which I tend to think it is). But maybe the committee should address this hiccup in our next annual agenda. And I'm now wondering why we wouldn't allow constructive filing for *every* document filed in a case. | Justice Ikola, Committee chair | In 2014-2015, the committee placed this on deferred list because it was not considered a high priority. |
| 2 | ***GENERAL –*** *Rule 8.45 et. seq. – Sealed and confidential records* | We urge that the rules be amended to expressly provide that the sealed records be paginated based on where they would have otherwise appeared in the record (e.g., the clerk's transcript, a party's appendix). | Court of Appeal Fourth District in comments on 2013 proposal regarding sealed and confidential records | Was on 2013-2014 annual agenda as Priority 2 - Helpful, but not urgent. Had 1/2016 completion date. In 2014-2015, the committee placed this on deferred list because it was not considered a high priority. |
| 2 | ***GENERAL –*** *Rule 8.45 et. seq. – Sealed* | Court practices vary with respect to the format of sealed records. It would be helpful if the rule specified whether the sealed records should be paginated with the rest of the record or separately. | TCPJAC/CEAC Joint Rules | Was on 2013-2014 annual agenda as Priority 2 - Helpful, but |

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| | *and confidential records* | | Working Group in comments on 2013 proposal regarding sealed and confidential records | not urgent. Had 1/2016 completion date. In 2014-2015, the committee placed this on deferred list because it was not considered a high priority. |
| 2 | ***APPEALS IN CIVIL CASES*** Rule 8.124 – Respondent's election to use appendix in lieu of clerk's transcript | As noted in the advisory committee comment, this "election procedure differs from all other appellate rules governing designation of a record on appeal," where the appellant's designation or the parties' stipulation control. In this case, the respondent can impose its view as to how the appellate record should be compiled. Yet, notwithstanding the ability of the respondent to place the burden of preparing a voluminous appendix on the appellant, there is no standard for the superior court to determine whether to allow the respondent's election to trump the appellant's election of the form of the appellate record on appeal. If we are going to maintain this odd exception to the normal right of the appellant to determine the form of the appellate record, there should at least be a standard by which the superior court can determine whether to sustain the appellant's objection to the respondent's election. Otherwise, the superior court is likely to uphold the respondent's election because it relieves the superior court of its burden to prepare the clerk's transcript. Further, it is odd that the form of the record in such circumstances is left with the superior court, even though the appellate court is the tribunal that benefits from, or is inconvenienced by, the form of the record. The process for a clerk's transcript places everything in chronological order; the appendix process may not result in a chronologically ordered record. | Daniel Kolkey, committee member | Was on 2013-2014 annual agenda as Priority 2 - Helpful but not urgent. Had 1/2015 completion date. Proposal prepared, but RUPRO declined to circulate. In 2014-2015, the committee placed this on deferred list because it concluded that issue does not arise very often |
| 2 | ***CIVIL APPEALS – Rule 8.124 – Time for respondent's election to use appendix*** | We recommend that rule 8.124(a)(1)(B) be amended to allow a respondent to use an appendix if respondent files an election within 10 days after an appellant files a notice designating the record. Currently, rule 8.124(a)(1)(B) provides that a respondent may elect to use an appendix if it files a notice of election "within 10 days after the notice of appeal is filed." As written, the rule forces a respondent to designate an appendix before the respondent knows what kind of record, if any, an appellant has elected, because under rule 8.121 an appellant has 10 days from the date it files its notice of appeal to file a designation of record. The current rule effectively encourages respondents to file what may be unnecessary elections. | Committee on Appellate Courts, State Bar of California | In 2014-2015, the committee placed this on deferred list because it was not considered a high priority. |

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| | | Our proposed amendment would read as follows:<br><br>**(a) Notice of election**<br><br>(1) Unless the superior court orders otherwise on a motion served and filed within 10 days after the notice of election is served, this rule governs if:<br><br>(A) The appellant elects to use an appendix under this rule in the notice designating the record on appeal under rule 8.121; or<br><br>(B) The respondent serves and files a notice in the superior court electing to use an appendix under this rule within 10 days after ~~the notice of appeal is filed~~ the appellant serves and files a notice designating the record on appeal under rule 8.121 and no waiver of the fee for a clerk's transcript is granted to the appellant.<br><br>If a respondent is forced to designate an appendix before an appellant has designated any record at all, it may be that respondents unwittingly are creating records in cases that appellants intend to abandon. If a respondent designates an appendix within 10 days of the date the notice of appeal is filed, and the appellant never designates any record at all, the respondent's early designation may leave local clerks confused and ultimately delay dismissal of the case.<br>If the rule is amended as proposed, it would also allow a respondent to include an election to use an appendix in its counter-designation form, which must be filed within 10 days after the appellant serves and files a notice designating the record. (Cal. Rules of Court, rules 8.122(a)(2), 8.130(a)(3).) That would reduce the amount of paperwork that parties must file and the amount of paperwork that the clerk's office must process. | | |
| 3 | ***GENERAL –*** *Rule 8.208 – Request to seal certificate of interested parties* | Without the certificate, the presiding justice (or APJ) does not have enough information to determine if he or she should be disqualified for ruling on the application. I know it's a lot of trouble but, under the circumstances, I seems to me to be a good idea to propose a rule change to eliminate the 10-day provision in Rule 8.208(d)(2) and require any party applying to file a certificate under seal to lodge the certificate conditionally under seal along with the application. | Cheryl Shensa, writ attorney, Court of Appeal, Fourth Appellate District | In 2014-2015, the committee placed this on deferred list because it was not considered a high priority. |

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| 3 | ***PETITIONS FOR REHEARING –*** Rule 8.264 (applies in civil, criminal and juvenile appeals) | As you know, petitions for rehearing are filed in the courts of appeal in the vast majority of cases and consume appreciable court time -- at least in the aggregate. Further, their ubiquity degrades their credibility, which makes them usually futile (but not inexpensive) endeavors for the parties. While effective reform will require some careful thought, reform could include (1) a stricter page limit, (2) a prohibition against reply briefs (I have been served on several occasions with applications for leave to file reply briefs which attach a reply, which is annoying to the practitioner who receives the unauthorized final word and which further consumes the court's time), and (3) some means of limiting the grounds so that a mere repetition of arguments made in the briefs and addressed in the court's opinion is not permitted. Admittedly, this latter point may be difficult to implement in practice; thus, an alternative might include an advisory committee comment. Still, reducing the number of these petitions, and thereby making a petition a more meaningful exercise, is not an impossible dream. After all, they do not appear to be filed with the same frequency in the California Supreme Court. | Daniel Kolkey, committee member | In 2014-2015, the committee placed this on deferred list because it concluded further study was needed |
| 3 | ***APPEALS IN CIVIL CASES*** Rule 8.264 – Finality | Amend California Rules of Court, rule 8.264(b)(2) to include:<br>"(C)The denial of the request by a vexatious litigant for permission to file an appeal pursuant to Code of Civil Procedure section 391.7."<br><br>Reasons for request: Currently the rules do not address the finality of the denial of the request by a vexatious litigant for permission to file an appeal. At a meeting of the Managing Attorneys of the California Courts of Appeal, we discovered that the Courts of Appeal are not treating the finality in the same manner. The Managing Attorneys all agree that a rule addressing the issue is necessary. The Fourth District, Division Two recommends that the denial be final immediately because the order is similar to the denial of a request for transfer of a case within the jurisdiction of the appellate division of the superior court under California Rules of Court, rules 8.1000 et seq. Under California Rules of Court, rule 8.1018(a), the denial of a transfer request is final immediately. When the court denies a request for transfer or for permission to file an appeal, the court does not assume jurisdiction of the matter. | Susan Streble Supervising Appellate Court Attorney California Court of Appeal Fourth District, Division Two | In 2014-2015, the committee placed this on deferred list because it concluded that further information was needed |
| 3 | ***APPEALS IN CIVIL CASES*** Rule 8.278 – Costs on appeal | **Should the cost of preparing an "e-brief" be a recoverable cost on appeal:** Rule 8.278 governs the recovery of costs awarded on appeal, and specifies the specific categories of costs that may be recovered. In recent years, several (perhaps the majority) of the appellate court districts in California have begun | John Taylor, Horvitz & Levy, former | Was on 2013-2014 annual agenda as Priority 2. In 2014-2015, the committee |

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE DEFERRED

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| | | encouraging parties to appeals to submit an "e-briefs" disk at the conclusion of briefing, containing searchable copies of the record on appeal, the parties' briefs, copies of all decisions cited in the briefs, related motions on appeal (e.g., requests for judicial notice), all hyperlinked to one another. (See, e.g., "Invitation To File Electronic Briefs In The Second District Court Of Appeal"; Invitation To File Hyperlinked CD Documents, Fourth Appellate District, Division One.) Invitations to file e-briefs from the appellate courts typically warn that "Counsel should not assume that the preparation cost, if any, will be recoverable." (Ibid.) Nonetheless, in my firm's experience, some trial courts have been willing to award the cost of e-briefing as a recoverable cost on appeal under the category of "[t]he cost to print and reproduce any brief." (Cal. Rules of Court, rule 8.278(d)(1)(E), emphasis added.) Other trial courts, however, have ruled that the cost of preparing an e-briefs disk does not fall within that category and is not a recoverable cost. Amending the rule to clarify that the cost of preparing an e-brief is a recoverable cost on appeal would encourage the submission of e-briefs, which both the Supreme Court and the Courts of Appeal seem interested in receiving.<br><br>*2018 reconsideration of this item:*<br><br>Hi Kevin,<br><br>Well, that is certainly an oldie but goodie! I thought that proposal was long dead and buried. It concerned the cost of e-briefing rather than e-filing—i.e., the cost of preparing a CD-ROM containing the entire record, the briefs, the cited authorities, all hyperlinked to one another. Is that what the committee will be addressing?<br><br>In the past, opponents of the proposal have feared that well-heeled litigants will foist the cost of e-briefing on their opponents. But that objection could be addressed by giving the courts discretion to consider the relative resources of the parties in deciding whether the cost of e-briefing should be recoverable in a particular case. | committee member | placed this on deferred list because cost concerns, raised previously, would likely be raised again.<br><br>In spring 2011, the committee considered, but decided not to pursue, a proposal on this topic. Concerns raised at that time included the potential burden of the cost of electronic briefs on litigants and potential confusion about the difference between these briefs and electronically filed briefs.<br><br>*The rules subcommittee reconsidered this item in 2018 and recommends that it remain on the deferred list.* |

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE DEFERRED

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| | | I've always felt that e-briefs are of tremendous value to the appellate courts, but that their use will never become commonplace until the cost of providing an e-brief can be recovered at the end of a successful appeal. Thus, if the appellate courts would like to encourage the use of e-briefs (some districts have policy statements stating that is a goal) then adding them to the rule specifying recoverable costs would make sense.<br><br>Hope this helps,<br>John | | |
| 3 | ***APPEALS IN CIVIL CASES*** Rule 8.278 – Inclusion of hyperlinked briefs in recoverable costs on appeal | I would like to reiterate my previous request to make the cost of hyper-linked briefs a recoverable cost on Appeal.<br><br>Hyperlinked briefs provide a better way for all concerned to prepare and review appellate briefs. As more courts move to an all e-document filing system, the need to provide briefs, as well as other filings that are hyperlinked to the record and citations, becomes imperative. The cost in preparing hyperlinked briefs is decreasing and will continue to do so, especially as more and more courts either request them or mandate their use. See the attached document of a recent survey of courts requesting hyperlinked briefs.<br><br>Please note I AM NOT REQUESTING ANY RULES OR RULE CHANGES CONCERNING HYPER-LINKED BRIEFS, JUST THAT THE COST BE A RECOVERALBE COST ON APPEAL. | Joseph Lane, committee member | See notes regarding previous item |
| 3 | ***APPEALS IN CRIMINAL CASES*** *– Rule 8.320 – Record on appeal* | Rule 8.320(c)(3) specifically exempts opening statements from inclusion in the normal record on appeal. I would suggest that the language "and any opening statement" be deleted from the rule. Similarly, I would suggest that rule 8.320(c)(9)(B) be amended to provide that in a defendant's appeal, the normal record of the reporter's transcript should include "The opening statements and the closing arguments."<br><br>There is a twofold justification for the proposed change. First, having reviewed records in criminal appeals for over 30 years, it is my experience that the opening statements often provide useful information to the appellate lawyers and the court. In a substantial number of cases, the parties and the trial judge refer to something said or done during the opening statement. Rather than requiring a motion to augment the record in this situation, efficiency would be served by | Dallas Sacher, committee member | Was on 2013-2014 annual agenda as priority 2 project. Had 1/2016 completion date. Proposal was circulated for public comment last year. Based on the comments, the committee decided not to recommend adoption of the proposal last year, but |

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE DEFERRED

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| | | automatically providing the opening statement. Second, there have been a number of cases where appellate counsel has raised a claim of ineffective assistance of trial counsel based on promises made during opening statement which were not subsequently honored. (See generally People v. Corona (1978) 80 Cal.App.3d 684, 725-726; Harris v. Reed (7th Cir. 1990) 894 F.2d 871, 879.) I have personally worked on such cases. Once again, efficiency is served if the opening statements are made part of the record without the need for the delay attendant to a motion to augment the record.<br><br>For the most part, opening statements are quite short. As a result, the cost of the rules change will be quite modest since it is likely that most jury trial appeals will have opening statements that are less than 20 pages. | | to keep the suggestion on the list of deferred items for potential future re-consideration. |
| 3 | ***CRIMINAL CASES –*** *Rules 8.304 and 8.850 – Definitions of "felony case" and "misdemeanor case"* | I wanted to bring this opinion filed by our court on 11/14/13 (remittitur issued 2/13/14) to your attention just in case the Advisory Committee Comments need to be updated with this information. Not sure if it would matter or not. Thanks.<br><br>[*People v. Scott* (2013) 221 Cal.App.4th 525; opinion is available at: http://www.courts.ca.gov/opinions/archive/H037681.PDF. Holding is that a case in which the only felony charge was dismissed at the prosecutor's request and a new complaint charging only a misdemeanor filed before trial was not a "felony case," and thus appellate jurisdiction for defendant's appeal from the judgment of conviction was vested in the appellate division of the superior court] | Corrine Pochop, former committee member | In 2014-2015, the committee placed this on deferred list because it concluded that case appears to reflect rare circumstances and rule change most likely unnecessary |
| 3 | ***APPEALS JUVENILE CASES*** *Rule 8.401 – Confidentiality* | Amend 8.401(b)(2) which allows access to juvenile files to persons "considering filing an amicus brief." Seems like this could compromise confidentiality | Elaine Alexander, former committee member and director of Appellate Defenders | Deferred in 2013-2014<br><br>Was not considered high priority<br>Problem seems theoretical at this point; rules subcommittee members were not aware of any issues actually arising with respect to this provision |

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE DEFERRED

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| 3 | ***PETITIONS FOR REVIEW*** *– Rule 8.500* | In doing some research recently, I came across the advisory committee comment to former rule 28, the predecessor to current rule 8.500 on petitions for review, which made clear that a denial of a grant of review was not to be considered as an expression of the Supreme Court's view on the merits of the judgment sought to be reviewed . Here is the full text of the relevant portion of that former comment:<br><br>It has long been established in California law that a denial of hearing is not an expression of the Supreme Court on the merits of the cause. (E.g., People v. Davis (1905) 147 Cal. 346, 350; People v. Triggs (1973) 8 Cal.3d 884, 890-91.) Adoption of the new "review" procedure does not affect this legal doctrine, and denial of review will not be an expression of the opinion of the Supreme Court on the correctness of the judgment of the Court of Appeal or on the correctness of any discussion in the Court of Appeal opinion. A specification of issues to be argued, in connection with a grant of review, will not be an expression of the opinion of the Supreme Court on the correctness of the resolution of other issues by the Court of Appeal or on the correctness of any discussion of them in the Court of Appeal opinion.<br><br>Former rule 28 was amended effective January 1, 2003 and the advisory committee comment no longer address the issue of the meaning of a denial of review. The report to the Judicial Council that recommended the changes to rule 28 does not discuss the reasons for the changes to the advisory committee comment that accompanied this former rule.<br><br>Would it be helpful to add a provision to the advisory committee comment to rule 8.500 to address this issue? | Committee staff | Was not considered high priority |
| 3 | ***PETITIONS FOR REVIEW –*** *Rule 8.508 – Petitions to exhaust state remedies* | California Rules of Court Rule 8.508 now provides for a truncated or abbreviated Petition for Review to Exhaust State Remedies, often used by criminal appellants or petitioners to ensure compliance with federal habeas corpus rules.<br><br>There is currently an anomaly in this rule, however. Attorneys for criminal defendants generally have an obligation to "exhaust" every federal constitutional issue in an appeal or writ petition. They may believe that a full Petition for Review is merited as to one or more issues, but not all such issues. In that case, under the current rule, the attorney must file a full Petition for Review on each issue, when he or she is only actually seeking review (other than to exhaust) on one or a couple of the issues. | William Kopeny, committee member | In 2014-2015, the committee placed this on deferred list because it was not considered a high priority.<br><br>Note: Rule 8.508 was developed by the committee 2003 on the request of the Supreme |

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE DEFERRED

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| | | My proposal is to amend this rule to permit a the petition to be "to exhaust state remedies" as to some but not all issues, thus saving appointed counsel, and the Supreme Court staff the work involved in working up all issues, when the attorney only believes that one or two of such issues merit a full review work up, and is actually merely seeking to exhaust as to the remainder of the issues.<br><br>A simply amendment to Rule 8.508, subd. (b) may suffice (inserting "as to certain issues" requiring that the issues on which exhaustion alone is sought be identified on the cover of the Petition, and subd. (c) requiring full service as to a mixed petition. | | Court in response to proposals by practitioners representing indigent defendants in criminal appeals. |
| 4 | ***ORDERING REVIEW*** Rule 8.512 – Time for ordering review on court's own motion | Rule 8.512(c)(2) sets the time for the Supreme Court to order review on its own motion when a petition for review has been filed. Currently, this rule provides that the Supreme Court may deny the petition but order review on its own motion "within the periods prescribed in (b)(1)." Subdivision (b)(1), in turn, provides that the period for granting a petition for review is generally within 60 days after the last petition for review is filed. Rule 8.512(c)(2) has been interpreted by some as authorizing the court to grant review on its own motion anytime within this 60-day period, even if the court has already denied the petition for review. The court's practice, however, is to order any review on its own motion at the same time as it denies the petition and this is reflected in the fact that under rule 8.272(b)(1), the Court of Appeal clerk must issue a remittitur *immediately* after the Supreme Court denies review (emphasis added). Although not convinced that any change to the rule is necessary, the Supreme Court has asked that the Appellate Advisory Committee consider whether it would be helpful to amend this rule 8.512(c)(2) to clarify that when a petition for review is denied by the Supreme Court, the court must order any review on its own motion at the same time as it denies the petition. | Supreme Court | Deferred in 2013-2014<br><br>Was not considered high priority |
| 4 | ***COMMITMENT PROCEEDINGS*** Rule ? | There are not currently rules that address civil commitment cases other than LPS cases, such as SVP (Welf. & Inst. Code, § 6600 et seq.), MDO (Pen. Code, § 2666 et seq.), extended detention of youthful offenders (Welf. & Inst. Code, § 1800 et seq.), and extended commitment of persons found not guilty by reason of insanity (Pen. Code, § 1026.5). Should a rule or rules for these cases be developed? | Elaine Alexander, former committee member and director of Appellate Defenders | Deferred in 2013-2014<br><br>Was not considered high priority |

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE DEFERRED

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| 4 | ***APPEALS AND WRITS IN LPS CASES*** Rule ? | A couple of days ago, we published a case called Scott S. v. Superior Court. The case addressed the evidentiary showing an LPS conservator has to make to obtain the right to consent on behalf of the conservatee to a proposed surgical procedure (in this case, the amputation of a toe). The California Style Manual, section 5:13, requires that opinions involving an LPS conservatee use protective nondisclosure when identifying them – thus our caption was "Scott S."<br><br>Shortly after filing, however, either our clerk's office or our managing attorney (not sure which) got a call from Ed Jessen noting that our court's online docket identified the conservatee by name, without protective nondisclosure, and was available to the public online. The docket is now "offline," the same as Juvenile cases.<br><br>However, when a writ petition or an appeal is filed involving an LPS conservatee as a party, or as a real party in interest, unless the filing clerk review the contents of the petition or brief with every filing, they have no other way of knowing that the case involves an LPS conservatee unless the cover of the petition, notice of appeal, or brief uses a protective nondisclosure or otherwise flags the case in some fashion as an LPS case. The cover of the Scott S. petition did not contain any hint that it was an LPS case, except possibly inferentially because the public guardian was the real party in interest.<br><br>Perhaps one of our future agendas should ask the committee to consider whether a rule should be adopted which would require the cover in an LPS case to include some sort of flag to alert the filing clerk that the appellate court docket should not be made public. I'm not aware of any rule that would currently require this.<br><br>Not a huge problem – these cases are relatively rare – but I think it's worthy of adding to the list at some point. Thanks. | Justice Ikola, committee chair | Deferred in 2013-2014<br><br>Issue does not arise very often |
| 4 | ***GENERAL RULES*** Rule 2.1040 – Electronic recordings offered into evidence | In a contested probation revocation, a judge overruled a defense objection to the lack of a transcript based on the words "trial judge" in the rule, concluding that the hearing was not a "trial." I would suggest the rule be tweaked to say "superior court" rather than "trial judge."<br><br>STAFF NOTE: May also want to consider placing rule in a different division of the Rules of Court. | Howard C. Cohen Attorney | Deferred in 2013-2014<br><br>Was not considered high priority |

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE DEFERRED

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| 4 | ***GENERAL –*** *Form ? – Association of counsel* | There should be standard forms to use for . . . association of counsel on appeal.<br><br>* * * Finally, also to promote efficiency, it makes sense to craft a standard form for associating counsel on appeal. This typically does not require court approval. Under current practice, litigants seek to associate counsel in various ways, including by motion. A standard form would bring greater order to a simple step in an appeal, and reduce the burden on appellate clerks. | Kevin Green, committee member | Deferred in 2013-2014<br><br>Was not considered high priority |
| 4 | ***TRANSFER OF APPELLATE DIVISION CASES*** Rule 8.1005 | An Appellate Division issued an opinion on appeal at the same time ordered certification [for transfer] to the Court of Appeal. I don't think we anticipated that this would happen.<br>This is proper under Rule 8.1005(d), which says a case can be certified anytime after the Appellate Division receives the record on appeal and before its judgment is final. However, rule 8.1014 says that once the Appellate Division has issued a certification order the only action the Appellate Division can take is to send the record to the Court of Appeal.<br><br>The effect of this is to foreclose the litigants from filing a petition for rehearing or a request for publication--or, at last, to prevent the Appellate Division from considering and acting upon such matters.<br><br>Perhaps rule 8.1005(d) should be modified to say "A case may be certified at any time after the record on appeal is filed in the appellate division and before the appellate division has issued its opinion. The case may also be certified after the time for filing a petition for rehearing has passed, or such a petition has been denied, and before the appellate division judgment is final in that court." Or since that would not deal with the publication request issue, rule 8.1014 could be modified to say the appellate division can take no action except to consider a petition for rehearing or a request for publication. | John Hamilton Scott Los Angeles County Public Defender's Office | Deferred in 2013-2014<br><br>Issue does not arise very often<br><br>The appellate division subcommittee agrees that this should be deferred |

### Items Relating to Juvenile Cases

In 2010, Fam Juv decided to not to pursue any rule or form changes that were not mandated by statute or necessitated by caselaw.The suggestions below were deferred in light of that decision.

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE DEFERRED

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| 4 | ***APPEALS & WRITS IN JUVENILE CASES*** Rule 5.590 | Rule 5.590 does not specify all of the limitations on the right to appeal. Suggest amending the rule to specify these limitations | Appellate Defenders, Inc.<br><br>Moved to AA 2018-2019 |
| 4 | ***APPEALS & WRITS IN JUVENILE CASES*** Rule 5.590 | The current advisements of appellate rights that are given do not clearly explain the implications for orders concurrently made with the order setting the hearing under Welfare and Institutions Code section 366.26 or the orders to which the requirements for filing a notice of intent to file a writ petition applies. These should be clarified. | Seth Gorman<br><br>Moved to AA 2018-2019 |
| 4 | ***APPEALS & WRITS IN JUVENILE CASES*** Juvenile rules generally | Suggest separating rules relating to juvenile dependency and delinquency proceedings | Committee on Appellate Courts State Bar of California |
| 4 | ***APPEALS & WRITS IN JUVENILE CASES*** Rule 8.400 | 1. Modify Rule 8.400(1)(B) to add the underscored language: "Actions to free a child from parental custody and control under Family Code section 7800 et seq. OR PROBATE CODE SECTION 1516.5; and"<br>Termination of parental rights under Probate Code section 1516.5 is generally governed by the requirements under Family Code section 7800 et seq., but which standards apply to appeal is not entirely clear. However, such appeals have traditionally been handled under the standards of Rule 8.400.<br><br>2. Modify Rule 8.400(1)(C) to add "Actions under Family Code section 7662–7666."<br>In independent or agency adoptions when the parents do not consent to the adoption or relinquish parental rights, termination of the parent's rights occurs under two different schemes, Family Code section 7822/7825 (abandonment or unfitness), and Family Code section 7662–7666 (as to alleged or unknown fathers). Thus, when both parents appeal, one appeal is handled under Rule 8.400's standards and the other under the civil appeal standards. This amendment reconciles the conflict. | Seth Gorman |
| 5 | ***APPEALS & WRITS IN JUVENILE CASES*** Rule 8.403 | The provisions in 8.403(b)(2) on appointed counsel in dependency appeals are incomplete and not as helpful as they might be | Appellate Defenders, Inc. |

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| 5 | ***APPEALS & WRITS IN JUVENILE CASES*** Rule 8.416 | Amend the rule to allow that a motion to augment/correct the record be filed with the respondent's brief or, in the alternative, after 15 days with permission of the Court. | Los Angeles County Office of the County Counsel, by James M. Owens Assistant County Counsel |
| 5 | ***APPEALS & WRITS IN JUVENILE CASES*** Rule 8.452 | Suggest amending rule 8.452 to include a provision for extension of time (now seems to be covered by provision of rule 8.450(d)). Alternatively, the extension of time provision could be a stand-alone rule, with reference perhaps to the rules such an extension would apply to.<br>(Suggestions not part of comments on SPR09-10) | D'vora Tirschwell Writ Attorney Court of Appeal First District |
| 5 | ***APPEALS & WRITS IN JUVENILE CASES*** Rule 8.470 | Amend rule 8.470 to include cross-reference to rule 8.490.<br><br>Note: this suggestion may have been partially addressed by the July 2010 amendments to rules 8.452 and 8.456 that include cross-references to rule 8.490. However, rule 8.470 could still be clarified with respect to writ proceedings. | Joseph Lane Clerk/Executive Officer Court of Appeal, Second Appellate District |
| 5 | ***APPEALS & WRITS IN JUVENILE CASES*** Rules 8.480 and 8.482 | Rules 8.480, relating to appeals in LPS conservatorship cases, and rule 8.482, relating to appeals in sterilization cases, both currently provide that "except as otherwise provided in this rule, rules 8.304-8.368 and 8.508 govern" these appeals. Is the cross-reference to rule 8.508, which provides for petitions for review to exhaust state remedies in criminal cases for purposes of filing a federal habeas corpus petition, necessary? | Elaine Alexander, former committee member and director of Appellate Defenders |
| 5 | ***APPEALS & WRITS IN JUVENILE CASES*** Form JV-800 | The language of the current notice of appeal form has led some courts to refuse to consider a claim based on a ruling made at the hearing delineated in the checked box, when the ruling at issue was based on a different code section. Suggest changing the language for line 6 on page 2 of the notice of appeal form from "6. The order appealed from was made under Welfare and Institutions Code section (check all that applies): …" to "6. The order or orders appealed from were made at a hearing under: ...". | Appellate Court Committee of the San Diego County Bar Association |
| 5 | ***APPEALS & WRITS IN JUVENILE CASES*** Form JV-820 | The notice of intent form should include a box underneath the signature line, next to the attorney box indicating "with client's consent." This would allow the attorney to sign the form with the client's consent if the client is unavailable or otherwise unable to sign the form. | Los Angeles County Counsel, Office of the County Counsel by James Owen |

## SUGGESTIONS A SUBCOMMITTEE RECOMMENDS BE DEFERRED

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| 5 | ***WRIT PROCEEDINGS*** *-- clarify the verification requirements for public agencies responding to writ petitions* | [Issue is whether pleadings filed by a prosecutor/public agencies responding to extraordinary writs (other than habeas petitions) need to be verified. (Verification of a return to a habeas petition is not necessary, provided the return is filed by a sworn public officer in her/his official capacity. (Pen. Code, § 1480, subd. (5).)) Clarify the verification requirements for public agencies responding to writ petitions.]<br><br>Here are some of the applicable cases and relevant statutes on the verification requirement for public entities that I pulled from one of our documents for your consideration:<br><br>Verification of a return to a habeas petition is not necessary, provided the return is being filed by a sworn public officer in his or her official capacity. (Pen. Code, § 1480, subd. (5) ["The return must be signed by the person making the same, and, except when such person is a sworn public officer, and makes such return in his official capacity, it must be verified by his oath."].)<br><br>While returns in habeas cases need not be verified, the law is unsettled whether pleadings filed by a prosecutor either seeking or responding to other types of extraordinary writs need to be verified. (Compare Hall v. Superior Court (2005) 133 Cal.App.4th 908, 914 fn. 9 (2DCA, Div.7) ["[I]n a writ proceeding, as in a civil action, an answer filed by a public entity need not be verified when the answer is used merely to join the issues raised in the petition," relying on Code Civ. Proc., § 446, and citing cases]; Murrieta Valley Unified School District v. County of Riverside (1991) 228 Cal.App.3d 1212, 1223 [4] (4DCA, Div.2) [relying on Code Civ. Proc., § 446 for filing of unverified petition by public entity]; Freemont Union High School District v. Santa Clara County Bd. of Education (1991) 235 Cal.App.3d 1182, 1187 [5] (6DCA) [accord]; Los Angeles County Dept. of Children and Family Services v. Superior Court (Paul C.) (1998) 62 Cal.App.4th 1, 9, fn. 7 (2DCA, Div.4) [same], with Municipal Court v. Superior Court (Sinclair) (1988) 199 Cal.App.3d 19, 25, fn. 1 [5] (1DCA, Div.4) [held that Code Civ. Proc., § 446 authorizing public entities to file unverified pleadings superseded by Code Civ. Proc., §§ 1086, 1089, and Rule 56(a)]; People v. Superior Court (Alvarado) (1989) 207 Cal.App.3d 464, 469-470 [2] (2DCA, Div.3) [same].) | Jeff Laurence, Sr. Assistant Attorney General, Cal. DOJ | Mr. Laurence recommended removing this item from the deferred list.<br><br>Previously deferred: the rules subcommittee's view was that the case law appeared to address this issue, so it was not clear that a rule amendment was needed at this time. |