JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
June 10, 2020

To
Appellate Advisory Committee, Rules Subcommittee

From
Sarah Abbott, Attorney, Legal Services

Subject
Method of notice to the court reporter

Action Requested
Please read before June 30 subcommittee meeting

Deadline
June 30, 2020

Contact
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Introduction

As you may recall, earlier this spring the Appellate Advisory Committee recommended circulating for public comment a proposal to amend California Rules of Court, rules 8.405, 8.450, and 8.454[1] to remove the requirement that court clerks notify court reporters "by telephone and in writing" to prepare a reporter's transcript.[2]

[1] All further references to "rule" or "rules" are to the California Rules of Court.

[2] Rule 8.405(b)(1) currently requires that when a notice of appeal is filed in a juvenile case, the superior court clerk "must immediately . . . [n]otify the reporter *by telephone and in writing* to prepare a reporter's transcript and deliver it to the clerk within 20 days after the notice of appeal is filed." (Italics added.) Rules 8.450 and 8.454 address the filing of a notice of intent to file a writ petition to review orders under Welfare and Institutions Code sections 366.26 and 366.28, respectively.[2] Subdivision (h)(1) of each of these rules currently requires that: "When the notice of intent is filed, the superior court clerk must: [¶] (1) Immediately notify each court reporter *by telephone and in writing* to prepare a reporter's transcript of the oral proceedings at each session of the hearing that resulted in the order under review and deliver the transcript to the clerk within 12 calendar days after the notice of intent is filed." (Italics added.) The proposal circulated for comment was to simply delete the italicized phrases from each of these rules.

The proposed amendments were intended to more closely align these rules with other appellate rules governing notice to court reporters and provide greater flexibility for clerks. The Judicial Council's Rules Committee approved the recommendation for circulation and the proposal was circulated for public comment from April 10, 2020 through June 9, 2020 as part of the regular spring cycle. A copy of the invitation to comment is included in your meeting materials.

This memorandum and the attached materials discuss the public comments received on the proposal. Prior to the subcommittee meeting, members should review the attached draft Report to the Judicial Council, comment chart, and modified draft amended rules. Proposed amendments circulated during the comment period are highlighted in yellow; proposed modifications to the proposal based on comments received, and subject to the subcommittee's review, are highlighted in blue.

Public Comments

The committee received six comments on this proposal. Two commenters, the Superior Court of San Diego County and the Litigation Section of the Committee on Appellate Courts of the California Lawyers Association (CLA), agreed with the proposal. Four commenters—the Court of Appeal for the Third Appellate District, the California Court Reporters Association (CCRA), the Orange County Bar Association (OCB), and the Service Employees International Union (SEIU)—disagreed with the proposal. The full text of the comments received and staff's proposed committee responses are set out in the attached draft comment chart. Based on comments received, staff recommends that the subcommittee recommend modifying the proposal for the reasons discussed below and at pages 4–5 of the draft Report to the Judicial Council.

Of the two commenters who agreed with the proposal, San Diego Superior Court provided no substantive comment, while CLA agreed that removal of the phrase "by telephone and in writing" would bring the rules more in line with other appellate rules and provide clerks with greater flexibility.

In contrast, the four commenters that disagreed with the proposal expressed concern that, if the phrase "by telephone and in writing" is removed from the rules, court reporters and appellate courts will be negatively impacted. In particular, the Court of Appeal for the Third District emphasized that juvenile writs and appeals are "priority" cases with very short deadlines.[3] The court opined that if the rules were amended as proposed, a trial court clerk might provide notice to the reporter by paper mail only, which—even if mailed "immediately"—could delay the reporter's actual notice of the need to prepare a transcript, which in turn could delay a court of appeal's receipt of the transcript and hinder its ability to conduct a timely review. The appellate court suggested that, if the rules are amended to remove the telephonic notice requirement, that they instead be amended to require notice "by the most expedient method available."

[3] See, e.g., Welf. & Inst. Code, §§ 800(a) [delinquency], 395(a)(1) [dependency]; Code of Civ. Proc. § 45 [appeals from orders freeing a minor from parent's custody/control].

CCRA similarly disagreed with the proposal, opining that the existing notice requirements are "imperative" because juvenile writs and appeals are time-sensitive and take precedence over all other court reporter work and changing the rules would hinder appellate courts' timely receipt of transcripts in juvenile cases. CCRA commented that immediate notice by telephone is needed to inform reporters that a notice of writ or appeal has been filed while written notice gives the reporter other necessary information to complete the transcript. OCB expressed a similar opinion that immediate notice both by telephone and in writing is useful in juvenile writs and appeals. SEIU, a union representing court reporters in 37 counties, also disagreed with eliminating required telephonic notice to court reporters in juvenile writs and appeals, noting that notice often goes to an office of court reporter services before the relevant individual reporter receives the notice which results in a loss of time for the individual reporter. SEIU suggested that, if the proposal is not rejected, then email notice should be provided directly to the individual reporter.

In light of the comments received, the majority of which disagreed with the proposal and contended that the rules should not be amended due to concerns about timely notice under the unique time constraints of juvenile writs and appeals, one alternative would be to recommend that the Appellate Advisory Committee not move forward with the proposal. Because the requirement that court clerks notify court reporters "by telephone and in writing" does not directly conflict with another rule, no amendment is necessary.

However, withdrawing the proposal would not address one of the reasons that initially prompted the proposal—to allow greater flexibility in how court clerks provide notice to court reporters in these cases. Therefore, a second alternative would be to modify the proposed amendments to address timing concerns while still providing court clerks with greater flexibility in how they accomplish the required immediate notice to court reporters. One suggestion would be to revise the proposal to, rather than simply omit the phrase "by telephone and in writing," instead replace it with a more general phrase. The Court of Appeal suggested insertion of the phrase "by the most expedient method available." However, staff suggests that it might be clearer to reiterate that the notice must be immediate by inserting the phrase "in a manner providing immediate notice" as follows:

Rule 8.405. Filing the appeal

(a) Notice of appeal

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(b) Superior court clerk's duties

(1) When a notice of appeal is filed, the superior court clerk must immediately:

***

(B) Notify the reporter, in a manner providing immediate notice, ~~by telephone and in writing~~ to prepare a reporter's transcript and deliver it to the clerk within 20 days after the notice of appeal is filed.

Rule 8.450. Notice of intent to file writ petition to review order setting hearing under Welfare and Institutions Code section 366.26

***

(h) Preparing the record

When the notice of intent is filed, the superior court clerk must:

(1) Immediately notify each court reporter, in a manner providing immediate notice, ~~by telephone and in writing~~ to prepare a reporter's transcript of the oral proceedings at each session of the hearing that resulted in the order under review and deliver the transcript to the clerk within 12 calendar days after the notice of intent is filed; and

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Rule 8.454. Notice of intent to file writ petition under Welfare and Institutions Code section 366.28 to review order designating specific placement of a dependent child after termination of parental rights

***

(h) Preparing the record

When the notice of intent is filed, the superior court clerk must:

(1) Immediately notify each court reporter, in a manner providing immediate notice, ~~by telephone and in writing~~ to prepare a reporter's transcript of the oral proceedings at each session of the hearing that resulted in the order under review and to deliver the transcript to the clerk within 12 calendar days after the notice of intent is filed; and

***

The subcommittee should consider whether it agrees with staff's recommendation to move forward with the proposal as revised, and if so whether it agrees with the suggested revisions or believes a different phrasing would be more appropriate.

The only other substantive comment, made by the Court of Appeal for the Third Appellate District, addressed the potential implementation requirements for courts. The appellate court commented that, while there would be no cost savings as a result of the proposal, there would also be no implementation requirements and no different impact based on the size of the court, and three months would be sufficient time for implementation. It appears from these comments that implementation requirements do not present a barrier to amendment of the rules.

Staff Recommendation

The staff recommendation is to move forward with the proposal as revised, and for the subcommittee to recommend the revisions to the Appellate Advisory Committee for Judicial Council adoption at the September 2020 meeting.

Subcommittee Task

Staff has prepared a draft of the report to the Judicial Council on this proposal. The subcommittee's task with respect to this proposal is to:

- Discuss the comments received on the proposal and approve or modify staff suggestions for responding to these comments, as reflected in the draft comment chart and draft Report to the Judicial Council; and
- Discuss and approve or modify staff's draft recommendation to the Appellate Advisory Committee regarding adoption of the proposal, with additional revisions, as reflected in the draft report to the Judicial Council.

Attachments:
1. Draft Report to the Judicial Council
2. Draft amended rules
3. Comment chart with draft committee responses
4. Invitation to Comment

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
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REPORT TO THE JUDICIAL COUNCIL

Item No.: 20-??
For business meeting on September 25, 2020:

Title
Appellate Procedure: Method of Notice to Court Reporter

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 8.405, 8.450, and 8.454

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

Agenda Item Type
Action Required

Effective Date
January 1, 2021

Date of Report
June 16, 2020

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

Executive Summary

The Appellate Advisory Committee recommends amending three appellate rules of court governing juvenile appeals and writs to replace the requirement that the clerk notify the court reporter to prepare the reporter's transcript "by telephone and in writing" with a requirement that notice be given "in a manner providing immediate notice" to the reporter. *[NOTE: Does the subcommittee agree with this revision?]* The existing "by telephone and in writing" requirement is not found in other appellate rules governing notice to court reporters and the change would provide clerks with more flexibility in how they provide notice while retaining the requirement that the notice be immediate.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2021, amend rules 8.405, 8.450, and 8.454 to (1) omit the requirement that the court clerk notify the court reportes "by telephone and in writing" to prepare the reporter's transcript to more closely align these rules with other appellate rules and provide clerks with more flexibility in how they provide notice to court reporters, and (2) add a requirement that the clerk immediately

notify the reporter "in a manner providing immediate notice." *[NOTE: Does the subcommittee agree with this revision?]*

The text of the amended rules is attached at pages 6 through 8.

Relevant Previous Council Action

Rule 4.450 of the California Rules of Court, governing juvenile appeals, was adopted in 2010 and amended in 2016 but the amendments are not relevant to this proposal. Rules 8.450 and 8.454 governing notice of intent to file a writ petition to review orders under Welfare and Institutions Code sections 366.26 and 366.28 were adopted in 2005, renumbered in 2007, and amended in 2007, 2008, 2009, 2010, 2013, and 2017 but the amendments are not relevant to this proposal.

Analysis/Rationale

Rules 8.400 through 8.474 of the appellate rules govern juvenile appeals and writs. Rule 8.405(b)(1) currently requires that when a notice of appeal is filed in a juvenile case, the superior court clerk "must immediately . . . [n]otify the reporter *by telephone and in writing* to prepare a reporter's transcript . . ." (Italics added.) Rules 8.450 and 8.454 address the filing of a notice of intent to file a writ petition to review orders under Welfare and Institutions Code sections 366.26 and 366.28, respectively.[1] Subdivision (h)(1) of each of these rules requires that: "When the notice of intent is filed, the superior court clerk must: [¶] (1) Immediately notify each court reporter *by telephone and in writing* to prepare a reporter's transcript of the oral proceedings at each session of the hearing that resulted in the order under review. . ." (Italics added.)

No other appellate rule requires a court clerk to immediately notify a court reporter "by telephone and in writing" to prepare a transcript. Some appellate rules require that the reviewing court clerk "make a reasonable effort to notify the clerk of the respondent court by telephone or e-mail" of an urgent situation such as an appellate decision to grant a writ or issue an order staying or prohibiting a proceeding to occur in the lower court within a short time frame.[2] Other appellate rules require the clerk to notify the parties "by telephone or another expeditious method" of events that would seem to require immediate attention, such as shortening the time for oral argument.[3] However, none of these rules requires immediate telephonic and written

[1] Welfare and Institutions Code section 366.26 governs hearings terminating parental rights or establishing guardianship of children adjudged dependent children of court, and section 366.28 governs the appeal of decisions involving placement or removal orders following the termination of parental rights.

[2] See, e.g., rules 8.452(h)(3) (requiring appellate court clerk to make "reasonable effort to notify the clerk of the respondent court by telephone or e-mail" if a writ under Welfare and Institutions Code section 366.26 staying or prohibiting a proceeding to occur within seven days or requiring action within seven days is granted); 8.456(h)(3) (same for writ or order under juvenile writ under Welfare and Institutions Code section 366.28); 8.489(b)(1) (same for writ or order in Supreme Court and Court of Appeal); 8.975(b)(1) (same for small claims writ in appellate division).

[3] See, e.g., rules 8.256(b) (requiring appellate clerk to "immediately notify the parties by telephone or other expeditious method" if notice period for oral argument in court of appeal is shortened); 8.392(b)(5) (same if court of

notification for court reporters. Instead, the rules addressing notice to court reporters in other types of appeals generally require court clerks to "promptly" send notice of an appeal to court reporters without specifying the method of notification.[4] Notably, however, by statute juvenile appeals have priority over most other appeals.[5]

This proposal would replace the requirement in rules 8.405, 8.450, and 8.454 that court clerks notify court reporters "by telephone and in writing" with a requirement that notice be given "in a manner providing immediate notice." *[NOTE: Does the subcommittee agree with this revision?]* The committee believes that the amendments will more closely align these rules with other appellate rules and provide clerks with additional flexibility in how they provide notice, while retaining the requirement that notice of the need to prepare a transcript in juvenile writs and appeals be immediate.

Policy implications

The committee did not identify any significant policy implications relating to the proposed amendments.

Comments

The proposed amended rules were circulated for public comment between April 10 and June 9, 2020, as part of the regular spring comment cycle. As circulated, the proposal was to omit—rather than replace—the phrase "by telephone and in writing." The committee received six comments on this proposal. Two commenters, the Superior Court of San Diego County and the Litigation Section of the Committee on Appellate Courts of the California Lawyers Association (CLA), agreed with the proposal. Four commenters—the Court of Appeal for the Third Appellate District, the California Court Reporters Association (CCRA), the Orange County Bar Association (OCB), and the Service Employees International Union (SEIU)—disagreed with the

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appeal requires an answer to a request for certificate of appealability to review superior court decision denying relief on successive habeas corpus petition in death penalty-related proceeding); 8.524(c) (same if notice period for oral argument in Supreme Court is shortened); 8.702(g) (same if notice period for oral argument in CEQA appeals is shortened); 8.716 (same if notice period for oral argument in appeal of decision to compel arbitration is shortened); 8.885(c)(1) (same if notice period for oral argument in misdemeanor appeal is shortened); 8.889(b)(2) (same if court decides to require answer to request for rehearing in misdemeanor appeal); 8.929(c)(1) (same if notice period for oral argument in infraction appeal is shortened).

[4] See, e.g., rules 8.130(d)(2) (in civil appeals, "clerk must promptly send the reporter notice of the designation [of the reporter's transcript] and of the deposit or substitute and notice to prepare the transcript, showing the date the notice was sent to the reporter" when the clerk receives specified items); 8.304(c)(1) (in criminal appeals, "[w]hen a notice of appeal is filed, the superior court clerk must promptly send a notification of the filing . . . to each court reporter, and to any primary reporter or reporting supervisor"); 8.834(b)(4) (in limited civil appeals to the appellate division of the superior court, "clerk must promptly notify the reporter to prepare the transcript when the court receives" the deposit or substitute for the cost); 8.864(a)(1) (in misdemeanor appeals, "[i]f the appellant elects to use a reporter's transcript, the clerk must promptly send a copy of appellant's notice making this election and the notice of appeal to each court reporter"); 8.915(a)(1) (same for infraction appeals).

[5] See Welf. & Inst. Code, §§ 800(a) [delinquency], 395(a)(1) [dependency]; Code of Civ. Proc. § 45 [appeals from orders freeing a minor from parent's custody/control].

proposal. A chart with the full text of the comments received and the committee's responses is attached at pages 9 through 15.

Of the two commenters who agreed with the proposal, the Superior Court of San Diego County provided no substantive comment, while CLA agreed that removal of the phrase "by telephone and in writing" would bring the rules more in line with other appellate rules and provide clerks with greater flexibility.

In contrast, the four commenters that disagreed with the proposal expressed concern that, if the phrase "by telephone and in writing" were removed from the rules, court reporters and appellate courts would be negatively impacted due to the unique time constraints of juvenile writs and appeals. In particular, the Court of Appeal for the Third District emphasized that juvenile writs and appeals are "priority" cases with very short deadlines. The appellate court opined that if the rules were amended as proposed, a trial court clerk might provide notice to the reporter by paper mail only, which—even if mailed "immediately"—could delay the reporter's actual notice of the need to prepare a transcript, which in turn could delay the court of appeal's receipt of the transcript and hinder its ability to conduct a timely review. The appellate court suggested that, if the rules are amended to remove the telephonic notice requirement, that they also be amended to require notice "by the most expedient method available."

CCRA similarly disagreed with the proposal, opining that the existing notice requirements are "imperative" because juvenile writs and appeals are time-sensitive and take precedence over all other court reporter work and changing the rules would hinder appellate courts' timely receipt of transcripts in juvenile cases. CCRA commented that immediate notice by telephone is needed to inform reporters that a notice of writ or appeal has been filed while written notice gives the reporter other necessary information to complete the transcript. OCB expressed a similar opinion that immediate notice both by telephone and in writing is useful in juvenile writs and appeals. SEIU, a union representing court reporters in 37 counties, also disagreed with eliminating required telephonic notice to court reporters in juvenile writs and appeals, noting that notice often goes to an office of court reporter services before the relevant individual reporter receives the notice which results in a loss of time for the individual reporter. SEIU suggested that, if the proposal is not rejected, then email notice be provided directly to the individual reporter.

In response to the comments received, and to address timing concerns while still providing court clerks with greater flexibility in how they accomplish the required immediate notice to court reporters, the committee modified the proposal. Rather than merely omitting the "by telephone and in writing" requirement, the committee decided to also replace it with a requirement that the notice be given "in a manner providing immediate notice" to the clerk. This modification is intended to reiterate the need for immediate notice and foreclose the possibility of notice only by paper mail or of notice being directed to an office as opposed to the court reporter themself, without dictating the manner in which such immediate notice must be given. *[NOTE: Does the subcommittee agree with this revision?]*

The only other substantive comment, made by the Court of Appeal for the Third Appellate District, addressed the potential implementation requirements for courts. The appellate court commented that, while there would be no cost savings as a result of the proposal, there would also be no implementation requirements and no different impact based on the size of the court, and three months would be sufficient time for implementation.

Alternatives considered

Because the requirement that court clerks notify court reporters "by telephone and in writing" does not directly conflict with another rule, the committee considered not recommending any amendment to these rules. Following public comment, the committee further considered this alternative, but determined that withdrawing the proposal would not address one of the reasons that initially prompted it—to allow greater flexibility in how court clerks provide notice to court reporters in these cases. *[NOTE: Does the subcommittee agree with this?]*

The committee also considered simply omitting the phrase "by telephone and in writing" from each rule without replacement. However, based on public comments received, the committee modified the proposal as discussed above.

Fiscal and Operational Impacts

The proposal replaces the requirement that the court clerk immediately notify court reporters "by telephone and in writing" to prepare a reporters transcript in juvenile appeals and writs with a requirement that notification be provided "in a manner providing immediate notice" to the clerk. This will likely result in minimal or no implementation costs.

Attachments and Links

1. Cal. Rules of Court, rules 8.405, 8.450 and 8.454, at pages 6–8
2. Chart of comments, at pages 9–15

Rules 8.405, 8.450, and 8.454 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Title 8. Appellate Rules

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

Chapter 5. Juvenile Appeals and Writs

Article 2. Appeals

Rule 8.405. Filing the appeal

(a) * * *

(b) Superior court clerk's duties

(1) When a notice of appeal is filed, the superior court clerk must immediately:

(A) Send a notification of the filing to:

(i) Each party other than the appellant, including the child if the child is 10 years of age or older;

(ii) The attorney of record for each party;

(iii) Any person currently awarded by the juvenile court the status of the child's de facto parent;

(iv) Any Court Appointed Special Advocate (CASA) volunteer;

(v) If the court knows or has reason to know that an Indian child is involved, the Indian custodian, if any, and tribe of the child or the Bureau of Indian Affairs, as required under Welfare and Institutions Code section 224.2; and

(vi) The reviewing court clerk; and

(B) Notify the reporter, in a manner providing immediate notice, ~~by telephone and in writing~~ to prepare a reporter's transcript and deliver it to the clerk within 20 days after the notice of appeal is filed.

(2)–(6) * * *

Article 3. Writs

Rule 8.450. Notice of intent to file writ petition to review order setting hearing under Welfare and Institutions Code section 366.26

(a)–(g) * * *

(h) Preparing the record

When the notice of intent is filed, the superior court clerk must:

(1) Immediately notify each court reporter, in a manner providing immediate notice, ~~by telephone and in writing~~ to prepare a reporter's transcript of the oral proceedings at each session of the hearing that resulted in the order under review and deliver the transcript to the clerk within 12 calendar days after the notice of intent is filed; and

(2) Within 20 days after the notice of intent is filed, prepare a clerk's transcript that includes the notice of intent, proof of service, and all items listed in rule 8.407(a).

(i)–(j) * * *

Rule 8.454. Notice of intent to file writ petition under Welfare and Institutions Code section 366.28 to review order designating specific placement of a dependent child after termination of parental rights

(a)–(g) * * *

(h) Preparing the record

When the notice of intent is filed, the superior court clerk must:

(1) Immediately notify each court reporter, in a manner providing immediate notice, ~~by telephone and in writing~~ to prepare a reporter's transcript of the oral proceedings at each session of the hearing that resulted in the order under review and to deliver the transcript to the clerk within 12 calendar days after the notice of intent is filed; and

(2) Within 20 days after the notice of intent is filed, prepare a clerk's transcript that includes the notice of intent, proof of service, and all items listed in rule 8.407(a).

**(i)–(j) * * *

SPR20-05

Appellate Procedure: Method of Notice to Court Reporter (Amend Cal. Rules of Court, rules 8.405, 8.450, and 8.454)

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

	Commenter	Position	Comment	Committee Response
1.	California Court Reporters Association by Joshua Thubei Sacramento, CA	N	The California Court Reporters Association (CCRA) a statewide organization whose membership includes freelance court reporters, CART/captioning, official and student communities, opposes deleting or changing the duties of the clerk to notify court reporters. The specific duty of the clerk to notify the reporter by telephone and in writing is imperative. Juvenile appeals take precedence over all other work. They are also time sensitive. Reporters must be notified timely with both a telephonic and written notification, their time runs before receiving a written notice of appeal and the phone call is to give the reporter a heads up that an appeal has been filed. Written notice gives the reporter all the pertinent information they need to complete the transcript, such as dates, appealing parties, and what is to be contained within the reporter's transcript. Changing this rule would be detrimental to appellate courts receiving timely reporters' transcripts on juvenile appeals.	The committee appreciates the commenter's perspective on the benefit of both telephonic and written notice to court reporters and the appellate courts. The committee has considered this comment and modified the proposal to reiterate the need for immediate notice to the court reporter, while providing some flexibility for clerks in how they provide immediate notice.
2.	California Lawyers Association by Committee on Appellate Courts, Litigation Section Sacramento, CA	A	The Committee on Appellate Courts supports this proposal, which omits anomalous wording from the rules governing notices from court clerks to court reporters (regarding transcript preparation)	The committee notes the commenter's support for the proposal; no further response is required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR20-05

Appellate Procedure: Method of Notice to Court Reporter (Amend Cal. Rules of Court, rules 8.405, 8.450, and 8.454)

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

	Commenter	Position	Comment	Committee Response
			in juvenile appeals and writs. Rules 8.405, 8.450, and 8.454 currently require court clerks to notify court reporters "by telephone and in writing" to direct transcript preparation. This language is unique: No other appellate rules require telephonic and written notice. The proposal merely removes this phrase and instead provides clerks with greater flexibility in how to provide notice. The proposal originated with a superior court clerk in charge of juvenile appeals. This proposal appropriately resolves the problem and should be adopted.	
3.	Court of Appeal, Third Appellate District by Colette M. Bruggmann, Assistant Clerk/Executive Officer Sacramento, CA	N	The proposed rule change is likely to cause delay in providing notice to the court reporter of the need to prepare reporter's transcripts for these expedited writs and appeals. The proposed rule change would permit notice to the reporter to be provided "immediately" by mail only, potentially resulting in several days of delay. The requirement of immediate telephonic and written notice in these cases is not an "anomaly" but, rather, a necessity for these unusual cases with priority and short timelines. In notice of intent cases, the reporter has only 12 calendar days within which to lodge their transcripts with the	The committee appreciates the commenter's perspective on the impact that elimination of the telephonic notice requirement could have, and the delay that could result, if only "paper mail" is used. The committee has considered this comment and modified the proposal to reiterate the need for immediate notice to the court reporter, while providing some flexibility for clerks in how they provide immediate notice. The committee appreciates that juvenile appeals and writs are subject to unique priority and timing, and has modified the proposal to further account for this.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR20-05

Appellate Procedure: Method of Notice to Court Reporter (Amend Cal. Rules of Court, rules 8.405, 8.450, and 8.454)

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

	Commenter	Position	Comment	Committee Response
			superior court clerk. Any extension of time requires an "exceptional showing of good cause." (Cal. Rules of Court, rule 8.450(d).) Accordingly, any delay (even a day or two) in getting notice to the reporter of the need to prepare transcripts is significant and puts a strain on both the reporter and the appellate court. Compliance with the time limits, including those for preparation and submission of the record, is especially crucial to implementing the Legislature's stated intent that reasonable efforts be made to complete appellate review of extraordinary writ petitions within the applicable time periods for conducting the selection and implementation hearing (Welf. & Inst. Code, § 366.26, subd. (l)(3)(B) and (4)(A)); In re Albert A. (2016) 243 Cal.App.4th 1220, 1241–1242.) Any delay in transmitting the record to the appellate court makes it difficult, if not impossible, for the appellate court to do so. Even with the current rule requiring immediate telephonic notice to the court reporters, this court has had ongoing and substantial difficulty getting reporters' transcripts in time to process extraordinary	The committee appreciates that juvenile appeals and writs are subject to unique priority and timing, and has modified the proposal to further account for this.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR20-05

Appellate Procedure: Method of Notice to Court Reporter (Amend Cal. Rules of Court, rules 8.405, 8.450, and 8.454)

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

	Commenter	Position	Comment	Committee Response
			writ petitions prior to the selection and implementation hearings. Juvenile appeals are also priority proceedings. In appeals, the reporter must lodge the transcripts within 20 calendar days. While time constraints are not as restrictive in appeals, delays in obtaining records due to requests for extension of time to prepare transcripts in appeals from a termination of parental rights, especially adversely affect the appellate court's ability to timely process the appeal. In order to minimize delays in providing permanency to minors, the appellate court is charged with making reasonable efforts to complete such appeals within 250 days of the filing of the notice of appeal. Does the proposal appropriately address the stated purpose? The only stated purpose provided for the rule change is to more closely align these rules with other appellate rules and to provide flexibility to the superior court clerks in how they might choose to provide notice to reporters. While the proposal may address these goals, it does so at the expense of implementing the purpose of the	The committee appreciates that juvenile appeals and writs are subject to unique priority and timing, and has modified the proposal to further account for this. The committee appreciates the commenter's responses to the specific questions presented in the invitation to comment; no further response is required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR20-05

Appellate Procedure: Method of Notice to Court Reporter (Amend Cal. Rules of Court, rules 8.405, 8.450, and 8.454)

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

	Commenter	Position	Comment	Committee Response
			rules and the ability of the appellate court to timely obtain the record in these priority cases. If it is determined that the requirement of telephonic notice is burdensome to the superior court clerks, perhaps a modification to delete "by telephone and in writing" and replace with "by the most expedient method available" would be more advisable. This would eliminate the option of providing notification only by mail, but permit immediate, instant electronic notification, which would be equally expedient as telephone notification.	The committee appreciates the commenter's suggestion to revise the proposal to reiterate that immediate notice is required and has modified the proposal accordingly.
			Would the proposal provide cost savings? If so, please quantify.	
			There is no cost savings.	The committee has considered the stated implementation requirements; no further response is required.
			What would the implementation requirements be for courts?	
			None. Although the proposal affects the courts, it would not require implementation by the appellate court.	The committee has considered the stated implementation requirements; no further response is required.
			Would three months from Judicial Council approval of this proposal until its effective	

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR20-05

Appellate Procedure: Method of Notice to Court Reporter (Amend Cal. Rules of Court, rules 8.405, 8.450, and 8.454)

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

	Commenter	Position	Comment	Committee Response
			date provide sufficient time for implementation? Yes. How well would this proposal work in courts of different sizes? It does not appear to have any different impact to court based on the size of the court.	The committee has considered the stated implementation requirements; no further response is required. The committee has considered the stated implementation requirements; no further response is required.
4.	Orange County Bar Association by Scott B. Garner, President Newport Beach, CA	N	The proposal notes that juvenile appeals have priority over most other appeals. What is the impetus to remove the belt and suspenders approach with respect to juvi cases? Is it that burdensome to place a call to the reporter? Sounds like the recommendation was made by a director of juvenile operations at one court but not otherwise considered.	The committee appreciates the commenter's perspective on the utility of the proposed amendments. No further response is required.
5.	Service Employees International Union by Michelle Castro, Director of Government Relations Sacramento, CA	N	The proposed rule would eliminate telephone notice to court reporters. With only 10 days to submit a juvenile writ and 20 days for an appeal, time is of the essence with regard to notice. The reporter must prepare and submit the transcript within that time frame and not from when the notice is provided. The original telephone notice was instituted because of these tight timelines. Oftentimes, notice goes to the office of court reporter services THEN to the reporter and precious time is lost. If the proposed	The committee appreciates that juvenile appeals and writs are subject to unique priority and timing, and has modified the proposal to further account for this.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR20-05

Appellate Procedure: Method of Notice to Court Reporter (Amend Cal. Rules of Court, rules 8.405, 8.450, and 8.454)

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

	Commenter	Position	Comment	Committee Response
			rule is not rejected then we request email notice be provided directly to the affected court reporter. If not, the telephone notice remains essential to ensure court reporters have adequate time to file transcripts. Thank you for your consideration.	
6.	Superior Court of San Diego By Michael M. Roddy, Court Executive Officer	A	The Appellate Advisory Committee proposes amending three appellate rules of court for juvenile appeals and writs to update the language regarding the notice the clerk must give to the court reporter to prepare the reporter's transcript. The requirement that the notice must be "by telephone and in writing" is not found in other appellate rules governing notice to court reporters and the change would provide clerks with more flexibility in how they provide notice.	The committee notes the commenter's support for the proposal; no further response is required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR20-08

Title
Appellate Procedure: Method of Notice to Court Reporter

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 8.405, 8.450, and 8.454

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

Action Requested
Review and submit comments by June 9, 2020

Proposed Effective Date
January 1, 2021

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

Executive Summary and Origin

The Appellate Advisory Committee proposes amending three appellate rules of court for juvenile appeals and writs to update the language regarding the notice the clerk must give to the court reporter to prepare the reporter's transcript. The requirement that the notice must be "by telephone and in writing" is not found in other appellate rules governing notice to court reporters and the change would provide clerks with more flexibility in how they provide notice. This proposal is based on a suggestion received from the director of juvenile operations at a superior court.

Background

Rules 8.400 through 8.474 of the appellate rules govern juvenile appeals and writs. Rule 8.405(b)(1) currently requires that when a notice of appeal is filed in a juvenile case, the superior court clerk "must immediately . . . [n]otify the reporter *by telephone and in writing* to prepare a reporter's transcript and deliver it to the clerk within 20 days after the notice of appeal is filed." (Italics added.) Rules 8.450 and 8.454 address the filing of a notice of intent to file a writ petition to review orders under Welfare and Institutions Code sections 366.26 and 366.28, respectively.[1] Subdivision (h)(1) of each of these rules requires the following:

[1] Welfare and Institutions Code section 366.26 governs hearings terminating parental rights or establishing guardianship of children adjudged dependent children of court, and section 366.28 governs the appeal of decisions involving placement or removal orders following the termination of parental rights.

> When the notice of intent is filed, the superior court clerk must:
> [¶] (1) Immediately notify each court reporter *by telephone and in writing* to prepare a reporter's transcript of the oral proceedings at each session of the hearing that resulted in the order under review and deliver the transcript to the clerk within 12 calendar days after the notice of intent is filed.

(Italics added.) No other appellate rule requires a court clerk to notify a court reporter "by telephone and in writing" to prepare a transcript. Some appellate rules do require that the reviewing court clerk "make a reasonable effort to notify the clerk of the respondent court by telephone or e-mail" of an urgent situation such as an appellate decision to grant a writ or issue an order staying or prohibiting a proceeding to occur in the lower court within a short time frame.[2] Other appellate rules require the clerk to notify the parties "by telephone or another expeditious method" of events that would seem to require immediate attention, such as shortening the time for oral argument.[3] However, none of these rules requires immediate telephonic and written notification for court reporters.

Instead, the rules addressing the notice that the court clerk must give to court reporters in other types of appeals use more general language, and generally require court clerks to "promptly" send notice of an appeal to court reporters, without specifying the method of notification.[4]

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[2] See, e.g., rules 8.452(h)(3) (requiring appellate court clerk to make "reasonable effort to notify the clerk of the respondent court by telephone or e-mail" if a writ under Welfare and Institutions Code section 366.26 staying or prohibiting a proceeding to occur within seven days or requiring action within seven days is granted); 8.456(h)(3) (same for writ or order under juvenile writ under Welfare and Institutions Code section 366.28); 8.489(b)(1) (same for writ or order in Supreme Court and Court of Appeal); 8.975(b)(1) (same for small claims writ in appellate division).

[3] See, e.g., rules 8.256(b) (requiring appellate clerk to "immediately notify the parties by telephone or other expeditious method" if notice period for oral argument in court of appeal is shortened); 8.392(b)(5) (same if court of appeal requires an answer to a request for certificate of appealability to review superior court decision denying relief on successive habeas corpus petition in death penalty-related proceeding); 8.524(c) (same if notice period for oral argument in Supreme Court is shortened); 8.702(g) (same if notice period for oral argument in CEQA appeals is shortened); 8.716 (same if notice period for oral argument in appeal of decision to compel arbitration is shortened); 8.885(c)(1) (same if notice period for oral argument in misdemeanor appeal is shortened); 8.889(b)(2) (same if court decides to require answer to request for rehearing in misdemeanor appeal); 8.929(c)(1) (same if notice period for oral argument in infraction appeal is shortened).

[4] See, e.g., rules 8.130(d)(2) (in civil appeals, "clerk must promptly send the reporter notice of the designation [of the reporter's transcript] and of the deposit or substitute and notice to prepare the transcript, showing the date the notice was sent to the reporter" when the clerk receives specified items); 8.304(c)(1) (in criminal appeals, "[w]hen a notice of appeal is filed, the superior court clerk must promptly send a notification of the filing . . . to each court reporter, and to any primary reporter or reporting supervisor"); 8.834(b)(4) (in limited civil appeals to the appellate division of the superior court, "clerk must promptly notify the reporter to prepare the transcript when the court receives" the deposit or substitute for the cost); 8.864(a)(1) (in misdemeanor appeals, "[i]f the appellant elects to use a reporter's transcript, the clerk must promptly send a copy of appellant's notice making this election and the notice of appeal to each court reporter"); 8.915(a)(1) (same for infraction appeals).

The Proposal

The committee proposes removing the requirement that court clerks notify court reporters "by telephone and in writing" from rules 8.405, 8.450, and 8.454 governing juvenile appeals and writs. The committee believes that, because the requirement for immediate telephonic and written notice is an anomaly among the appellate rules, it is advisable to amend these rules to more closely align them with other appellate rules by removing the phrase "by telephone and in writing" from each of them. This change would also provide clerks with more flexibility in how they provide notice, while retaining the requirement that the notice be immediate.

Alternatives Considered

Because the requirement that court clerks notify court reporters "by telephone and in writing" does not directly conflict with another rule, the committee considered not recommending any amendment to these rules, but decided that the proposed amendments would be beneficial.

The committee also considered whether the existing requirement in each of these rules that notification to the court reporter be "immediate" should be modified to instead require "prompt" (or some other temporal descriptor) notification. However, the committee does not recommend this additional modification because, by statute, juvenile appeals have priority over most other appeals.[5] The committee determined that this priority justifies the requirement for "immediate" rather than "prompt" notice to the reporter in the rules under consideration.

Fiscal and Operational Impacts

The proposal removes the requirement that the court clerk immediately notify court reporters "by telephone and in writing" to prepare a reporters transcript in juvenile appeals and writs. This will likely result in minimal or no implementation costs, and should result in a slight decrease in workload for the clerk providing the notice.

[5] See Welf. & Inst. Code, §§ 800(a) (delinquency), 395(a)(1) (dependency); Code Civ. Proc., § 45 (appeals from orders freeing a minor from parent's custody/control).

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

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

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rules 8.405, 8.450, and 8.454, at pages 5–7

Rules 8.405, 8.450, and 8.454 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Title 8. Appellate Rules

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

Chapter 5. Juvenile Appeals and Writs

Article 2. Appeals

Rule 8.405. Filing the appeal

(a) * * *

(b) Superior court clerk's duties

(1) When a notice of appeal is filed, the superior court clerk must immediately:

(A) Send a notification of the filing to:

(i) Each party other than the appellant, including the child if the child is 10 years of age or older;

(ii) The attorney of record for each party;

(iii) Any person currently awarded by the juvenile court the status of the child's de facto parent;

(iv) Any Court Appointed Special Advocate (CASA) volunteer;

(v) If the court knows or has reason to know that an Indian child is involved, the Indian custodian, if any, and tribe of the child or the Bureau of Indian Affairs, as required under Welfare and Institutions Code section 224.2; and

(vi) The reviewing court clerk; and

(B) Notify the reporter ~~by telephone and in writing~~ to prepare a reporter's transcript and deliver it to the clerk within 20 days after the notice of appeal is filed.

(2)–(6) * * *

Article 3. Writs

Rule 8.450. Notice of intent to file writ petition to review order setting hearing under Welfare and Institutions Code section 366.26

(a)–(g) * * *

(h) Preparing the record

When the notice of intent is filed, the superior court clerk must:

(1) Immediately notify each court reporter ~~by telephone and in writing~~ to prepare a reporter's transcript of the oral proceedings at each session of the hearing that resulted in the order under review and deliver the transcript to the clerk within 12 calendar days after the notice of intent is filed; and

(2) Within 20 days after the notice of intent is filed, prepare a clerk's transcript that includes the notice of intent, proof of service, and all items listed in rule 8.407(a).

(i)–(j) * * *

Rule 8.454. Notice of intent to file writ petition under Welfare and Institutions Code section 366.28 to review order designating specific placement of a dependent child after termination of parental rights

(a)–(g) * * *

(h) Preparing the record

When the notice of intent is filed, the superior court clerk must:

(1) Immediately notify each court reporter ~~by telephone and in writing~~ to prepare a reporter's transcript of the oral proceedings at each session of the hearing that resulted in the order under review and to deliver the transcript to the clerk within 12 calendar days after the notice of intent is filed; and

(2) Within 20 days after the notice of intent is filed, prepare a clerk's transcript that includes the notice of intent, proof of service, and all items listed in rule 8.407(a).

(i)–(j) * * *

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REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on: September 24–25, 2020

Title
Appellate Procedure: Date and Time of Filing for Electronically Submitted Documents

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 8.77

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

Agenda Item Type
Action Required

Effective Date
January 1, 2021

Date of Report
June 24, 2020

Contact
Eric Long, 415-865-7691
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Executive Summary

The Appellate Advisory Committee recommends amending the rule regarding confirmation of receipt and filing of electronically submitted documents to clarify the date and time of filing. Among other things, rule 8.77 of the California Rules of Court currently addresses the receipt date of submissions received electronically after the close of business but is silent as to when a received document is deemed filed. The committee proposes amending rule 8.77 to state that an electronic document that complies with filing requirements is deemed filed on the date and time it was received by the court.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council amend rule 8.77, to clarify the date and time of filing for documents submitted electronically, effective January 1, 2021.

The text of the amended rule is attached at page 5.

Relevant Previous Council Action

Rules 8.70 to 8.79, the appellate e-filing rules, were adopted effective July 1, 2010. Some provisions have been amended and renumbered since that time. Effective January 1, 2017, rule 8.77 was renumbered and amended to state the requirements for a court to give notice to the filer when a document is received by the court and when a document is accepted or rejected for filing.

Analysis/Rationale

Electronic filing allows for submission of documents at any time, even after a clerk's office is closed. Regardless of the date and time a document is submitted and received, however, the clerk's office needs time to confirm that the document complies with filing requirements. Such review by the clerk's office must be prompt, but it is not instantaneous for an electronically submitted document. Moreover, when a document is submitted after court business hours, the document will not be reviewed by the clerk's office before the next business day.

Under rule 8.77(a)(1), an electronically submitted document is initially "received" by the court, and a confirmation of receipt is generated. Rule 8.77(c) instructs that if a document is received after 11:59 p.m., it is considered received on the next court day.[1] Once a court clerk confirms that the document complies with filing requirements, a confirmation of "filing" indicating the date and time of filing is generated under rule 8.77(a)(2). However, rule 8.77 does not specify when the document is deemed filed.[2]

The California Lawyers Association, Committee on Appellate Courts, Litigation Section, suggested that the committee consider clarifying rule 8.77 to resolve any ambiguity about when an electronic document is filed. A member of the association reported that appellate courts have been determining the date and time of filing in different ways. Some courts deem compliant documents filed on the day they were received, but other courts deem them filed on the day the clerk approves the document for filing.

A practitioner reported electronically submitting a writ petition for filing in an appellate district on Day 1 at 5:30 p.m. A court clerk reviewed the materials on Day 2 and determined that the filing requirements had been satisfied. The clerk filed the document on Day 2 even though it was

[1] "A document that is received electronically by the court after 11:59 p.m. is deemed to have been received on the next court day." (Cal. Rules of Court, rule 8.77(c).)

[2] Some California appellate courts also address this topic by local rule. The local rules for the Courts of Appeal, First and Fifth Appellate Districts, state: "Filing documents electronically does not alter any filing deadlines. In order to be timely filed on the day they are due, all electronic transmissions of documents must be completed (i.e., received completely by the Clerk of the Court) prior to midnight." (Ct. App., First Dist. and Fifth Dist., Local Rules, rules 12(f) and 8(g), respectively, Electronic Filing.) Additionally, the Third Appellate District provides: "Electronic filing does not alter any filing deadlines. An electronic filing not completely received by the court by 11:59 p.m. will be deemed to have been received on the next court day." (Ct. App., Third Dist., Local Rules, rule 5(j), Electronic Filing.) The local rules for the Second, Fourth, and Sixth Districts do not address the topic.

received by the court on Day 1. If the litigant's writ petition had been due on Day 1, it would have been untimely.

The amended rule would alleviate concerns of litigants and practitioners that their timely, compliant submissions may be deemed untimely solely because they were e-filed after a clerk's office's hours. The proposal is of particular importance when an appellate due date is jurisdictional (e.g., a statutory writ).

Policy implications

A uniform time-of-filing provision will assist with the consistent handling of electronically submitted documents and is consistent with California Rules of Court, rule 1.20, which states, "Unless otherwise provided, a document is deemed filed on the date it is received by the court clerk." (Cal. Rules of Court, rule 1.20.) Rule 8.77(a)(2) will now provide that an electronically submitted document that complies with filing requirements is deemed filed on the date and time it was received by the court as stated in the confirmation of receipt.

Comments

This proposal was circulated for public comment from April 10 to June 9, 2020, as part of the spring rules cycle. The committee received comments from five bar associations and courts, including the Superior Court of San Diego County and the Superior Court of Orange County, Family Law Division. One court commenter answered the questions posed in the proposal and indicated that the proposal appropriately addressed the stated purpose; three commenters agreed with the proposal; and one commenter agreed with the proposal if modified. The committee considered all comments; discussed below is the primary issue raised by the comments.

Receipt by the court versus submission to the electronic filing service provider

The proposed rule circulated using the date and time of receipt by a court of an electronic submission from an electronic filing service provider (EFSP) as the date and time of filing. Under current practice, a document to be filed electronically reaches an appellate court through an EFSP. Although courts generally receive e-filers' submissions from the EFSP almost instantaneously, the committee recognized the possibility that transmission delays could occur. For example, an e-filer might submit a document just before midnight, but the court might not receive the document from the EFSP until after midnight because of a transmission delay between the EFSP and the court. Given the possibility of delay, the committee considered two alternatives to using the date and time of receipt as the date and time of filing: (1) using the date and time of submission to the EFSP as the date and time of filing, or (2) imposing an after-hours deadline (such as 11:45 p.m.) for submission of documents to an EFSP to make it more likely that a court will receive a submission before midnight.

With possible transmission delays in mind, the Invitation to Comment asked commenters to document any transmission delays between (1) the date and time of submission to an EFSP, and (2) the date and time of receipt by a court. Only one commenter, the San Diego Bar Association, Appellate Practice Section, addressed the potential for delays. The commenter canvased its members but did not document any of its members' experiences with transmission delays using

TrueFiling. Instead, the commenter urged the committee to use the date and time of submission by the e-filer to the EFSP as the date and time of filing—one of the two alternatives considered—based on the EFSP's User Guide publication showing an example from 2013. The committee is not persuaded to change the proposal as suggested without additional information. Absent real-world examples of transmission delays, the committee understands that transmission is almost instantaneous, and recommends using receipt by the court, over receipt by the EFSP, as proposed. The committee notes that the rule also allows an e-filer to file a motion to accept a document as timely filed if a deadline is not met because of delayed delivery. (Cal. Rules of Ct., rule 8.77(d).) If the committee becomes aware of delays that cause deadlines to be impacted, the committee will reconsider the issue in a future rulemaking cycle.

A chart with the full text of the comments received and the committee's responses is attached at pages 6–9.

Alternatives considered

The committee considered no action but determined that the experience of litigants and practitioners warrants the change proposed. As discussed above, the committee considered using the date and time of submission to the EFSP as the date and time of filing. The committee also considered imposing an after-hours deadline (such as 11:45 p.m.) for submission of documents to an EFSP to make it more likely that a court will receive a submission before midnight.

Fiscal and Operational Impacts

The committee anticipates no significant fiscal or operational impacts and no costs of implementation other than informing courts and litigants of the new rule amendments.

Attachments and Links

1. Cal. Rules of Court, rule 8.77, at page 5
2. Chart of comments, at pages 6–9

Rule 8.77 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Rule 8.77. Actions by court on receipt of ~~electronic filing~~ electronically submitted document; date and time of filing

(a) Confirmation of receipt and filing of document

(1) *Confirmation of receipt*

When the court receives an electronically submitted document, the court must arrange to promptly send the electronic filer confirmation of the court's receipt of the document, indicating the date and time of receipt by the court. ~~A document is considered received at the date and time the confirmation of receipt is created.~~

(2) *Filing*

If the electronically submitted document received by the court complies with filing requirements, the document is deemed filed on the date and time it was received by the court as stated in the confirmation of receipt.

~~(2)~~ (3) *Confirmation of filing*

~~If the document received by the court under (1) complies with filing requirements,~~ When the court files an electronically submitted document, the court must arrange to promptly send the electronic filer confirmation that the document has been filed. The filing confirmation must indicate the date and time of filing as specified in the confirmation of receipt, and ~~is proof that the document was filed on the date and at the time specified. The filing confirmation~~ must also specify:

(A) Any transaction number associated with the filing; and

(B) The titles of the documents as filed by the court.

~~(3)~~ (4)– ~~(4)~~ (5) * * *

(b)–(e) * * *

SPR20-04

Appellate Procedure: Date and Time of Filing for Electronically Submitted Documents (Amend Cal. Rules of Court, rule 8.77)

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

	Commenter	Position	Comment	Committee Response
1.	California Lawyers Association Committee on Appellate Courts, Litigation Section By Saul Bercovitch Director of Governmental Affairs Leah Spero, Chair Committee on Appellate Courts California Lawyers Association Sacramento	A	The Committee supports the proposal to amend rule 8.77 to state that an electronic document that complies with filing requirements is deemed filed on the date the document was received by the court. This proposal recognizes the importance of establishing a uniform practice among the Courts of Appeal in filing electronically submitted documents, and in providing practitioners with certainty as to when their electronically submitted documents will be deemed filed by the courts.	The committee thanks the commenter and notes its support for the proposal.
2.	Orange County Bar Association By Scott B. Garner, President	A	No specific comment provided.	The committee notes the commenter's support for the proposal.
3.	San Diego Bar Association Appellate Practice Section By Helen Izra, Chair	AM	The Appellate Practice Section of the San Diego County Bar Association ("APS") appreciates the opportunity to review and comment on the proposed amendments SPR20-04 to the California Rules of Court that relate to the filing date for electronically filed documents. After canvassing our membership and forming a subcommittee to discuss the proposed changes, we respectfully submit the following comments. The APS urges that a document be deemed filed on the date and time a party submitted it to an Electronic Filing Service Provider ("EFSP"). Currently, the proposed amendment would change rule 8.77 to state that "an electronic document that complies with filing requirements is deemed filed on the date and time it was received by the court." Invitation to Comment SPR20-04 p. 1, at < https://www.courts.ca.gov/documents/spr20-04.pdf> Problems may arise,	The committee thanks the commenter and notes its support for the proposal if modified. The committees appreciate the commenter's concerns relating to a possible delay between a filer's submission to an Electronic Filing Service Provider ("EFSP") and the EFSP's transmission of that submission to the court. Despite the example set out in the TrueFiling User Manual, which is a 2015 publication that reflects a 2013 example, the committee understands that the transmission between the two is virtually instantaneous. If delays like those described in the example are occurring in practice, the committee

	Commenter	Position	Comment	Committee Response
			however, if there is a delay between when the filer submits to the EFSP and when the EFSP submits to the court. The EFSP utilized by most California courts, TrueFiling, often imposes a delay between when the filer submits to the system and when the system transmits the document to the court. For example, the TrueFiling User Manual shows an example of the Filing Detail in a hypothetical case. That Filing Detail indicates that the system received a filing at 8:07 p.m. That document was conditionally accepted by TrueFiling at 8:19 p.m. It was not until 8:27 p.m. that the system reflects "Payment received. Filing officially accepted and filed." (TrueFiling User Guide, Release 1.0.36 p. 90, at <http://www.truefiling.com/documentation/UserGuide.pdf>)	is not aware of them. However, if e-filers do experience any issues like the one described in the comment, the committee is interested in hearing about them and with that information, the committee would consider further revisions to the rule's language in a future rulemaking cycle.
			A problem, therefore, could arise if a filer submits to an EFSP close to midnight. For example, if that filer submits to the EFSP at 11:30 p.m. on May 20, 2020 but the EFSP does not submit to the court until 12:01 am on May 21, 2020, the court will deem that document filed on May 21, 2020. If the filer had a deadline of May 20, 2020, the document would be late even though the filer submitted it to the EFSP before the deadline.	The committee is especially interested in hearing from any e-filers who experience delays of this duration, and any issues with deadlines being impacted.
			Due to the problems caused by this delay, the APS therefore recommends that the proposed rule 8.77, subdivision (a)(1) instead read as	The committee will reconsider in a future rulemaking cycle the proposed language if users bring examples of transmission delays in practice.

	Commenter	Position	Comment	Committee Response
			follows: "When the court receives an electronically submitted document, the court must arrange to promptly send the electronic filer confirmation of the court's receipt of the document, indicating the date and time of receipt by the court. A document is considered received at the date and time the filer submitted it to the Electronic Filing Service Provider."	
4.	Superior Court of Orange County Family Law Division	NI	No comments on this proposal as a whole. Request for Specific Comments **Does the Proposal appropriately address the stated purpose?** Yes **The proposed rule uses the court's receipt date and time as the date and time of filing because transmission from the electronic filing service provider to the court is generally instantaneous. Would it be more appropriate, however, to use the date and time of submission to the EFSP as the date and time of filing? Or would another alternative prove more workable? If an alternative is appropriate, describe the alternative and explain why it would be preferable to the instant proposal.** The proposed rule is appropriate, since transmission is instantaneous for most filings. There have been a few instances where the submission gets stuck, but it's rare. For those that do get delayed, once the issue is resolved,	The committee thanks the commenter for the responses to the questions posed in the Invitation to Comment. No further response required. The committee thanks the commenter for this information.

	Commenter	Position	Comment	Committee Response
			the court is able to retrieve the original date and time of submission. **Can you document one or more transmission delays between (1) the date and time of submission to an EFSP, and (2) the date and time of receipt by a court? If so, would an after-hours submission deadline adequately address such a transmission delay, and if so, what would the deadline be?** Yes, but it doesn't happen often. **Would the proposal provide cost savings? If so, please quantify.** No foreseeable savings or costs to implement. **What would the implementation requirements be for courts - for example, training staff (Please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in CMS's, or modifying CMS's?** In Orange County, appeals are not handled via eFiling. Implementing this as a new process would require a revision of procedures and minimal training hours. **Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?** Yes	No further response required. No further response required. The committee thanks the commenter for the input, but notes that this rule applies to the appellate courts, not the superior courts. No further response required.

SPR20-04

Appellate Procedure: Date and Time of Filing for Electronically Submitted Documents (Amend Cal. Rules of Court, rule 8.77)

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

	Commenter	Position	Comment	Committee Response
			How well would this proposal work in courts of different sizes? For those courts that process appeals via eFiling this should work well for courts of any size.	No further response required.
5.	Superior Court of San Diego County By Mike Roddy Court Executive Officer	A	No specific comment provided.	The committee notes the commenter's support for the proposal.

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
June 25, 2020

To
Rules Subcommittee

From
Eric Long, Legal Services

Subject
Appellate Procedure: Consent to Electronic Service

Action Requested
Review for consideration at Subcommittee meeting

Deadline
June 30, 2020

Contact
Eric Long
415-659-5971 phone
eric.long@jud.ca.gov

As you may recall, the Appellate Advisory Committee proposed revisions to California Rules of Court, rules 8.25, 8.77, and 8.78, and an information sheet (APP-009-INFO) relating to service. The proposal is intended to clarify the procedures for electronic service in the Supreme Court and the Courts of Appeal in light of recent amendments to the Code of Civil Procedure that address e-service in the trial courts. The proposal circulated for public comment as part of the spring rules cycle.

Five commenters responded; two agree with the proposal, two agree only if modified, and one did not indicate a position. The subcommittee's input on three issues arising from substantive suggestions to the language of rule 8.25 is required, as discussed below:

1. Aderant CompuLaw, a court-rules publisher who provides information to firms practicing before the California Supreme Court and Courts of Appeal, urged the committee to retain the phrase "by any method permitted by the Code of Civil Procedure" in rule 8.25(a)(1), suggesting that removing the phrase may cause confusion about how service may be accomplished. The proposal struck the phrase from the rule because "any method" appeared to be too broad, and in any event the advisory committee comment notes that "Code of Civil Procedure sections 1010.6–1013a describe generally permissible methods of service." The comment also directs filers to the

Information Sheet for Proof of Service (Court of Appeal) (form APP-009-INFO) for "additional information about how to serve documents and how to provide proof of service."[1]

Some filers may assume that the service provisions of the Code of Civil Procedure apply in matters before the Supreme Court and the Courts of Appeal, but the Appellate Rules of the California Rules of Court do not adopt the Code of Civil Procedure. Moreover, staff has not located any authority stating that the Code of Civil Procedure applies (or does not apply) in these reviewing courts. Without some clarifying language in rule 8.25(a), it may be unclear to filers how one may serve a document. On the other hand, retaining the existing language could be construed as adoption of section 1010.6(a)(2)(A)(ii)'s requirements, which is contrary to the purpose of this proposal. The subcommittee must decide whether to strike or retain the phrase *by any method permitted by the Code of Civil Procedure* or to replace it with other language that provides filers guidance about permissible methods of service in the appellate courts.

2. Aderant CompuLaw also suggested adding a statement to the accompanying advisory committee comment to make clear that Code of Civil Procedure section 1010.6(a)(2)(A)(ii)'s consent requirement is inapplicable in matters before the Supreme Court and Courts of Appeal. The proposal, as circulated, revised the comment to state: "Note that in the Supreme Court and the Courts of Appeal, registration with the court's electronic filing servicer provider is deemed to show agreement to accept service electronically at the email address provided, unless a party affirmatively opts out of electronic service under rule 8.78(a)(2)(B). This procedure differs from the procedure for electronic service in the trial courts (including the appellate division of the superior court). See rules 2.250–2.261." Aderant CompuLaw suggested an explicit reference to section 1010.6(a)(2)(A)(ii) for additional clarity.

One option is to conclude that the commentary as circulated for public comment provides enough clarity. An alternative option would be to add two sentences for additional clarity, like: "The express consent requirement set forth in Code of Civil Procedure section 1010.6(a)(2)(A)(ii) for electronic service does not apply to matters before the Supreme Court and Courts of Appeal. Rather, the Appellate Rules of the California Rules of Court govern electronic service procedures in the Supreme Court and Courts of Appeal." The subcommittee must decide whether to include additional language in the rule's comment, as suggested, or to rely on the language circulated for comment.

3. The San Diego Bar Association, Appellate Practice Section, suggested new language for subdivision (a)(2) to account for automatic electronic document service by the electronic filing

[1] The advisory committee comment and form had cited different service provisions of the Code of Civil Procedure; the spring proposal conformed the range included in the comment to rule 8.25 (sections 1010.6–1020) to the range provided in the newer form (sections 1010.6–1013a), which was adopted in 2017.

service provider. Based on this comment, staff has recommended adding to rule 8.25(a)(2): ", or, if using an electronic filing service provider's automatic electronic document service, the party may have the electronic filing service provider generate a proof of service."

The subcommittee must consider whether the proposed new language addresses the concern raised by the organization or if alternative language may be appropriate.

Attachments:
1. Draft Judicial Council Report, at pages 4–9
2. Cal. Rules of Court, rules 8.25, 8.77, and 8.78, at pages 10–12
3. Form APP-009-INFO, at pages 13–15
4. Chart of comments, at pages 16–21

JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on: September 24–25, 2020

Title
Appellate Procedure: Consent to Electronic Service

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 8.25, 8.72, and 8.78; revise form APP-009-INFO

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

Agenda Item Type
Action Required

Effective Date
January 1, 2021

Date of Report
June 25, 2020

Contact
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Executive Summary

To clarify the procedures for electronic service in the Supreme Court and the Courts of Appeal, the Appellate Advisory Committee recommends amending certain service and e-filing rules and revising an information sheet. Rules 8.25, 8.72, and 8.78 of the California Rules of Court would be amended, and form APP-009-INFO would be revised, to reflect the procedures for e-service in these reviewing courts, and to distinguish appellate procedure under these rules in light of recent amendments to the Code of Civil Procedure that address e-service in the trial courts.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2021:

1. Amend rule 8.25 to reflect actual practice for delivery of electronic proofs of service, and amend the accompanying advisory committee comment to clarify e-service consent procedure in the Supreme Court and Courts of Appeal;

2. Amend rule 8.72 to acknowledge that furnishing an email address does not necessarily mean that a party has authorized e-service because a party may opt out of e-service under rule 8.78(a)(2)(B);

3. Amend rule 8.78 and its accompanying advisory committee comment to reflect existing appellate practice concerning agreement to e-service through an electronic filing service provider (EFSP), and to exempt courts from the e-service rules applicable to parties; and

4. Revise APP-009-INFO to clarify that Code of Civil Procedure section 1010.6(a)(2)(A)(ii) addresses e-service in the trial courts, and rule 8.78 addresses e-service in the Courts of Appeal.

The text of the amended rules and the revised form is attached at pages 7–12.

Relevant Previous Council Action

Rule 8.25, adopted as rule 40.1, addresses service, filing, and filing fees. There are no relevant previous amendments to the rule.

Rules 8.70 to 8.79, the appellate e-filing rules, were adopted effective July 1, 2010. Some provisions have been amended and renumbered since that time. Effective January 1, 2017, rule 8.72 was revised to state additional responsibilities of the court, and rule 8.78 was renumbered from rule 8.71, and amended to (1) allow a party who files a document electronically to indicate that the party prefers to be served paper copies, by filing a notice with the court and serving it on the other parties; (2) apply the rule to nonparties who agree to or otherwise are required to accept electronic service or to electronically serve documents; (3) state that a proof of electronic service need not state that the person making service is not a party; and (4) delete the requirement that a proof of electronic service state time of service.

Analysis/Rationale

Effective January 1, 2018, the Legislature amended Code of Civil Procedure section 1010.6 to require all persons to provide express consent to electronic service in each specific action in the trial courts.[1] The trial court and appellate court rules had allowed the act of electronically filing alone to evidence consent to receive electronic service, but the 2018 amendments to section 1010.6 eliminated this option for trial courts. As amended, subdivision (a)(2)(A)(ii) states:

> For cases filed on or after January 1, 2019, if a document may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the document is not authorized unless a party or other person has expressly consented to receive electronic service in that specific action or the court has ordered electronic service on a represented party or other represented person under subdivision (c) or (d). Express consent to electronic service may be

[1] All further unspecified statutory references are to the Code of Civil Procedure.

> accomplished either by (I) serving a notice on all the parties and filing the notice with the court, or (II) manifesting affirmative consent through electronic means with the court or the court's electronic filing service provider, and concurrently providing the party's electronic address with that consent for the purpose of receiving electronic service. The act of electronic filing shall not be construed as express consent.

(Code Civ. Proc., § 1010.6(a)(2)(A)(ii).) Subdivision (e) directs the Judicial Council to "adopt uniform rules for electronic filing and service of documents *in the trial courts of the state*, which shall include statewide policies on vendor contracts, privacy, and access to public records, and rules relating to the integrity of electronic service." (§ 1010.6(e) (emphasis added).) There are no provisions in section 1010.6 that expressly speak to appellate court proceedings or to the adoption of rules for electronic service in the appellate courts.

It appears that the 2018 amendment to section 1010.6 only applies to the trial courts, not to the appellate courts, and that because section 1010.6 and its legislative history are silent about e-service in the appellate courts, the procedures in the Supreme Court and the Courts of Appeal do not need to change. The committee therefore proposes amending rules 8.25, 8.72, and 8.78 and revising form APP-009-INFO to reflect that express consent to electronic service is not required from every party in each specific appellate proceeding.

The committee recommends making the following clarifying changes to the rules:

Proof of service
Rule 8.25 establishes general requirements relating to serving and filing documents in reviewing courts, including requirements relating to proof of service. Currently, however, this rule does not reflect that a proof of service may be generated by an electronic filing service provider (EFSP). This amendment clarifies that, if a document is to be served electronically, a proof of service may be not be attached to the document presented for filing if it is generated by the EFSP.

Responsibilities of e-filers
Rule 8.72 presently requires e-filers to furnish an email address at which they agree to accept service. The proposal acknowledges that furnishing an email address does not necessarily mean a party has authorized e-service because a party may opt out of e-service under rule 8.78(a)(2)(B).

Electronic service
Proposed rule 8.78(a)(2)(B) would be clarified to reflect existing appellate practice. Although the rule has long provided that the act of electronically filing any document with the court is deemed to show a party's agreement to e-service, the appellate practice has been to rely on a party's registration with the court's EFSP and concurrent provision of an email address—prerequisites to electronically filing any document with the court—as a basis for showing agreement to e-service. This proposed change maintains the status quo with respect to e-filing and e-service in the Supreme Court and the Courts of Appeal and more accurately reflects how parties authorize e-service in these courts.

The proposal also amends the advisory committee notes to rules 8.25 and 8.78, and revises form APP-009-INFO, to clarify that e-service consent procedures in the Supreme Court and the Courts of Appeal are governed by these appellate rules, not section 1010.6(a)(2)(A)(ii).

Finally, the proposal exempts courts from the e-service rules applicable to parties, reflecting that courts send notifications and transmit documents rather than serving documents on parties. No changes are proposed with respect to e-service on courts.

Policy implications

In the appellate courts, e-filing and e-service are cost effective and convenient options for most individuals. With access to the internet, individuals may participate in appellate proceedings even if they do not have access to transportation or a permanent mailing address. E-filing and e-service eliminate the need and associated costs of paper, printers, copiers and fax machines, and obviate barriers like having to take paper documents to a post office or other courier to effect service and to a courthouse for filing.

Although e-filing and e-service are conveniences for most, it has been reported that they could disadvantage others, including those in rural and low-income households who do not have regular or reliable internet access. The committee acknowledges that internet access is not universally available in California, and is committed to providing equal access to courts. The e-filing and e-service rules exempt self-represented litigants from the requirement to file documents electronically (Cal. Rules Ct., rule 8.71(a)), and include an option allowing individuals to choose to be served paper copies at a specified address (Cal. Rules Ct., rule 8.78(a)(2)(B)). This proposal makes no changes to these options and, in the committee's view, does not impose any additional burdens on self-represented litigants.

Experience and other practicalities support maintaining existing appellate procedures. E-filing and e-service in the appellate courts and the trial courts are in different stages of implementation. The Judicial Council first adopted rules for e-filing and e-service in the appellate courts in 2010 as a pilot project in the Court of Appeal, Second Appellate District, and then in 2012 for all appellate courts. Last year, the Appellate Advisory Committee proposed instituting mandatory e-filing with statewide formatting requirements (subject to certain exceptions), effective January 1, 2020, which the council approved. Consistent with mandatory e-filing in the appellate courts, the appellate rules treat e-filing as agreement to receive e-service unless a party opts out of e-service. (Cal. Rules of Court, rule 8.78(a)(2)(B).) As for the trial courts, e-filing was authorized in 2012, when the Legislature enacted Assembly Bill 2073 (Stats. 2012, ch. 320). A pilot project on mandatory e-filing in the Superior Court of Orange County from 2013 was a success,[2] and as of 2019, 29 of the 58 trial courts provide e-filing and e-service to the public.[3] Although the trial

[2] See Judicial Council of Cal., *Report on the Superior Court of Orange County's Mandatory E-Filing Pilot Project* (Sept. 30, 2014), www.courts.ca.gov/documents/lr-SC-of-Orange-e-file-pilot-proj.pdf.

[3] See Judicial Council of Cal., *Report to the Legislature: State Trial Court Electronic Filing and Document Service Accessibility Compliance* (Dec. 23, 2019), https://jcc.legistar.com/View.ashx?M=F&ID=7977274&GUID=AE037AC0-DC91-496B-83D9-CDCDE8D0674A.

courts are making commendable progress in implementing e-filing, it nevertheless remains true that while the appellate courts uniformly rely on e-filing and e-service, about half of the trial courts have standardized the practice.

Comments

These proposed amendments were circulated for public comment as part of the spring 2020 comment cycle. Four organizations and one court submitted comments on this proposal. Two commenters agreed with the proposal, and two agreed with the proposal only if modified. One commenter did not indicate a position but suggested language changes to rule 8.25. The committee has modified its proposal to address suggestions regarding the language of rule 8.25.

Aderant CompuLaw, a court-rules publisher who provides information to firms practicing before the California Supreme Court and Courts of Appeal, urged retaining the phrase "by any method permitted by the Code of Civil Procedure" in rule 8.25(a)(1), suggesting that removing the phrase may cause confusion about how service may be accomplished. [Recommendation to be reached at Subcommittee meeting.]. Aderant CompuLaw also suggested adding a statement to the accompanying advisory committee comment to make clear that, under the Appellate Rules, section 1010.6(a)(2)(A)(ii)'s consent requirement is inapplicable in matters before the Supreme Court and Courts of Appeal. In response to this suggestion, the committee recommends [Recommendation to be reached at Subcommittee meeting.].

The Appellate Practice Section of the San Diego Bar Association agreed with the proposal, but suggested language for rule 8.25(a)(2) to address how e-service works with the EFSP. When an e-filer uses the EFSP to automatically generate a proof of service, the filer does not attach a proof of service to the document presented for filing, as the rule currently provides. To bring the proof-of-service provision into conformity with current practices, the committee recommends adding alternative language similar to that proposed by the commenter to subdivision (a)(2), "or, if using an electronic filing service provider's automatic electronic document service, the party may have the electronic filing service provider generate a proof of service."

A chart with the full text of the comments received and the committee's responses is attached at pages 13–18.

Alternatives considered

The committee considered proposing rules that would implement section 1010.6's express consent requirements in the appellate courts. The committee concluded that such a significant change in procedure was not supported for at least three reasons. First, there could be significant costs associated with directing the courts' EFSPs to develop an opt-in option at case initiation. Second, case filings might be delayed due to unexpected service requirements where the parties have been relying on e-service in the appellate courts for several years. Third, the Legislature did not address the appellate courts when it amended section 1010.6. The committee believes that e-filing and e-service has proved to be successful in the appellate courts, and that their benefits outweigh any potential disadvantages. The committee also was not independently aware of any

compelling reasons to adopt the trial court's practices at this time. The committee, therefore, proposes clarifying and maintaining existing appellate procedures for e-service.

The committee also considered leaving the appellate rules and form unchanged at this time. Considering the trial court's e-service procedures, however, the committee was concerned that preexisting references to the Code of Civil Procedure in the appellate rules and form could cause confusion for practitioners and litigants. The committee also recognized that the appellate rules did not fully reflect current practice and wanted the rules to be clearer about when e-service is permissible in the Supreme Court and the Courts of Appeal.

Fiscal and Operational Impacts

Implementation of this proposal should not have significant fiscal or operational impacts. This proposal is intended to create efficiencies and to assist parties and courts in understanding the existing appellate procedures. Unlike the alternative considered, which could burden the courts and litigants with additional service and filing requirements, no costs of implementation are anticipated other than informing courts and litigants of the new rule amendments and form revisions.

Attachments and Links

1. Cal. Rules of Court, rules 8.25, 8.77, and 8.78, at pages 7–9
2. Form APP-009-INFO, at pages 10–12
3. Chart of comments, at pages 13–18
4. Link A: Code Civ. Proc., § 1010.6, https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1010.6.&lawCode=CCP

Rules 8.25, 8.72, and 8.78 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Rule 8.25. Service, filing, and filing fees

(a) Service

(1) Before filing any document, a party must serve~~, by any method permitted by the Code of Civil Procedure,~~ one copy of the document on the attorney for each party separately represented, on each unrepresented party, and on any other person or entity when required by statute or rule.

(2) The party must attach to the document presented for filing a proof of service showing service on each person or entity required to be served under (1), or, if using an electronic filing service provider's automatic electronic document service, the party may have the electronic filing service provider generate a proof of service. The proof must name each party represented by each attorney served.

(b)–(c) * * *

Advisory Committee Comment

Subdivision (a). ~~Subdivision (a)(1) requires service "by any method permitted by the Code of Civil Procedure." The reference is to the several permissible methods of service provided in~~ Code of Civil Procedure sections 1010.6– ~~1020~~ 1013a describe generally permissible methods of service. *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) provides additional information about how to serve documents and how to provide proof of service. Note that in the Supreme Court and the Courts of Appeal, registration with the court's electronic filing servicer provider is deemed to show agreement to accept service electronically at the email address provided, unless a party affirmatively opts out of electronic service under rule 8.78(a)(2)(B). This procedure differs from the procedure for electronic service in the trial courts (including the appellate division of the superior court). See rules 2.250–2.261.

* * *

Rule 8.72. Responsibilities of court and electronic filer

(a) * * *

(b) Responsibilities of electronic filer

Each electronic filer must:

(1) Take all reasonable steps to ensure that the filing does not contain computer code, including viruses, that might be harmful to the court's electronic filing system and to other users of that system;

(2) Furnish one or more electronic service addresses, in the manner specified by the court, at which the electronic filer agrees to accept ~~service~~ receipt and filing confirmations under rule 8.77 and, if applicable, at which the electronic filer agrees to receive electronic service; and

(3) Immediately provide the court and all parties with any change to the electronic filer's electronic service address.

Rule 8.78. Electronic service

(a) Authorization for electronic service; exceptions

(1) A document may be electronically served under these rules:

(A) If electronic service is provided for by law or court order; or

(B) If the recipient agrees to accept electronic services as provided by these rules and the document is otherwise authorized to be served by mail, express mail, overnight delivery, or fax transmission.

(2) A party indicates that the party agrees to accept electronic service by:

(A) Serving a notice on all parties that the party accepts electronic service and filing the notice with the court. The notice must include the electronic service address at which the party agrees to accept service; or

(B) ~~Electronically filing any document with the court~~ Registering with the court's electronic filing service provider and providing the party's electronic service address. ~~The act of electronic filing shall be~~ Registration with the court's electronic filing service provider is deemed to show that the party agrees to accept service at the electronic service address that the party has ~~furnished to the court under rule 8.72(b)(2)~~ provided, unless the party serves a notice on all parties and files the notice with the court that the party does not accept electronic service and chooses instead to be served paper copies at an address specified in the notice.

(3) A document may be electronically served on a nonparty if the nonparty consents to electronic service or electronic service is otherwise provided for

by law or court order. All provisions of this rule that apply or relate to a party also apply to any nonparty who has agreed to or is otherwise required by law or court order to accept electronic service or to electronically serve documents.

(b)–(f) * * *

(g) Electronic ~~service~~ delivery by court and electronic service ~~or~~ on court

(1) The court may ~~electronically serve~~ deliver any notice, order, opinion, or other document issued by the court ~~in the same manner that parties may serve documents~~ by electronic ~~service~~ means.

(2) * * *

Advisory Committee Comment

In the Supreme Court and the Courts of Appeal, registration with the court's electronic filing servicer provider is deemed to show agreement to accept service electronically at the email address provided, unless a party affirmatively opts out of electronic service under rule 8.78(a)(2)(B). This procedure differs from the procedure for electronic service in the trial courts (including the appellate division of the superior court). See rules 2.250–2.261.

SPR20-03

Appellate Procedure: Consent to Electronic Service (Amend Cal. Rules of Court, rule 8.25, 8.72, and 8.78; revise form APP-009-INFO)

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

	Commenter	Position	Comment	Committee Response
1.	Aderant CompuLaw By Miri K. Wakuta Rules Attorney Culver City	NI	Aderant CompuLaw respectfully submits the following comments to the proposed amendments set forth in SPR 20-03. We are concerned that the proposed amendment to CRC 8.25 is too broad for the stated purpose and may raise confusion as to the general applicability of CCP 1010.6 to appellate cases. Invitation to Comment SPR20-03 points out that the e-service consent procedure set forth in CCP 1010.6(a)(2)(A)(ii) does not apply to appellate court proceedings since subdivision (e) only directs the adoption of uniform rules for "electronic filing and service of documents in the trial courts of the state." (SPR 20-03, 2.) The Committee states that the purpose of the proposed amendments is to clarify e-service consent procedures in the Supreme Court and the Courts of Appeal. Removing the phrase, "by any method permitted by the Code of Civil Procedure," from Rule 8.25(a)(1) seems unnecessary. Despite differing e-service consent procedures, it would remain accurate that a party may serve a document "by any method permitted by the Code of Civil Procedure." Even the proposed amendment to CRC 8.25 Advisory Committee Comment states, "Code of Civil Procedure sections 1010.6, 1013a describe generally permissible methods of service." The need for clarification is not with the permissible method of service but with the inapplicability of CCP	The committee thanks the commenter for this input. No further response required. The committee [Recommended response to be reached at Subcommittee meeting].

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR20-03

Appellate Procedure: Consent to Electronic Service (Amend Cal. Rules of Court, rule 8.25, 8.72, and 8.78; revise form APP-009-INFO)

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

	Commenter	Position	Comment	Committee Response
			1010.6(a)(2)(A)(ii) in the Supreme Court and the Courts of Appeal. We recommend the language of Rule 8.25 not be amended. Rather, the Advisory Committee Comment should specifically comment to the inapplicability of CCP 1010.6(a)(2)(A)(ii). We suggest the Advisory Committee Comment to CRC 8.25 be revised to include the following statement: "The express consent requirement set forth in CCP 1010.6(a)(2)(A)(ii) for electronic service does not apply to matters before the Supreme Court and Courts of Appeal. Rather, CRC 8.78(a)(2) governs electronic service consent procedures in the Supreme Court and Courts of Appeal." Aderant CompuLaw is a software-based court rules publisher providing deadline information to many firms practicing before the California Supreme Court and Courts of Appeal. We expect this issue to be important to our users. Thank you for your consideration of these comments.	As noted above, the committee [Recommended response to be reached at Subcommittee meeting]. No further response required.
2.	California Lawyers Association Committee on Appellate Courts, Litigation Section By Saul Bercovitch Director of Governmental Affairs, Leah Spero, Chair Committee on Appellate Courts California Lawyers Association Sacramento	AM	The Committee on Appellate Courts supports this proposal so long as parties are given notice at the time they register with the court's electronic filing service provider (EFSP) that by registering and providing an electronic service address, they consent to electronic service for all purposes during their case, including service by the court and the opposing party, unless they opt out.	The committee notes the commenter's support for the proposal if modified.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR20-03

Appellate Procedure: Consent to Electronic Service (Amend Cal. Rules of Court, rule 8.25, 8.72, and 8.78; revise form APP-009-INFO)

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

	Commenter	Position	Comment	Committee Response
			The Committee on Appellate Courts is mindful that digital inclusion is still a work in progress in California. We celebrate the appellate courts' transition to e-filing and eservice, but we do not want the resulting convenience to some to disadvantage others, including those in rural and low-income households. As the Advisory Committee and the Judicial Council are already aware, many Californians do not have household internet access (or have only a cellphone, or an extremely slow connection). Although they may be able to access WiFi for a limited time at a public location, or use their cellphone data plan, to successfully register with an EFSP and initiate an appeal, they will be seriously disadvantaged if, by doing so, they inadvertently relinquish paper/mail service of notice and filings if they do not have regular, reliable internet access. Only a third of rural California households have internet access, compared to 78% of urban households, according to an EdSource analysis of California Public Utilities Commission data in December 2019. (EdSource, Disconnected: Internet Stops Once School Ends for Many Rural California Students, available at <https://edsource.org/2019/disconnected-internet-stops-once-school-ends-for-manyrural-california-students/620825>.) The Public Policy Institute of California has noted:	The committee appreciates the commenter supplying this information about access to the internet. No further response required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR20-03

Appellate Procedure: Consent to Electronic Service (Amend Cal. Rules of Court, rule 8.25, 8.72, and 8.78; revise form APP-009-INFO)

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

	Commenter	Position	Comment	Committee Response
			"Though most demographic groups have seen significant increases in broadband subscriptions at home, gaps persist for low-income, less educated, rural, African American, and Latino households. Between 54% and 67% of these households had broadband subscriptions in 2017, compared to 74% for all households. Among low income households without broadband, 53% cited lack of interest and 25% cited affordability as key barriers. Notably, these households were more likely to rely on cellphones to access the internet." (California's Digital Divide, available at <https://www.ppic.org/publication/californias-digital-divide/>.) It is also a practical reality that many households are sharing a single device with children who are engaged in distance schoolwork during the COVD-19 pandemic, fire evacuations, and other periodic disruptions. In those households, inadvertent relinquishment of paper/mail service carries privacy and parenting implications. (See EdSource, More California Students Are Online, But Digital Divide Runs Deep with Distance Learning, available at <https://edsource.org/2020/more-california-students-areonline-but-digital-divide-runs-deep-with-distance-learning/630456>; see also California Emerging Technology Fund, Annual Report, available at <http://www.cetfund.org/progress/annualsurvey>.)	No further response required.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR20-03

Appellate Procedure: Consent to Electronic Service (Amend Cal. Rules of Court, rule 8.25, 8.72, and 8.78; revise form APP-009-INFO)

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

	Commenter	Position	Comment	Committee Response
			Thus, we recommend that a clear, plain-language advisory regarding the practical implications of registration, and the opt out alternative, should be required to be prominently displayed by EFSPs at the time of registration.	The committee appreciates this suggestion and shares the commenter's focus on providing equal access to the courts. The committee also acknowledges that internet access is not universally available in California. For this and other reasons, the existing appellate rules include an opt-out provision. Making changes to EFSPs' systems is beyond the scope of this rules proposal, but the committee will convey the recommendation to staff who work with these providers.
3.	Orange County Bar Association By Scott B. Garner, President Newport Beach	A	No specific comment provided.	The committee notes the commenter's support for the proposal.
4.	San Diego Bar Association Appellate Practice Section By Helen Izra, Chair	AM	The Appellate Practice Section of the San Diego County Bar Association ("APS") appreciates the opportunity to review and comment on the proposed amendments SPR20-03 to the California Rules of Court that relate to electronic service of documents. After canvassing our membership and forming a subcommittee to discuss the proposed changes, we respectfully submit the following comments. The APS supports the changes proposed by SPR20-03 but suggests that the Council further amend the rules to reflect better how electronic service works with Electronic Filing Service Providers ("EFSP"). As worded, rule 8.25, subdivision (a)(2) states that "[t]he party must attach to the document presented for filing a proof of service." EFSPs, however, can automatically generate a proof of service when a filer utilizes the service for electronic filing and	The committee thanks the commenter and notes its support for the proposal if modified. The committee appreciates the commenter supplying this information about current e-filing practices.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR20-03

Appellate Procedure: Consent to Electronic Service (Amend Cal. Rules of Court, rule 8.25, 8.72, and 8.78; revise form APP-009-INFO)

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

	Commenter	Position	Comment	Committee Response
			service. Such a proof of service is therefore not attached to the actual document that the filer submits but is rather generated by the EFSP itself. For example, the TrueFiling system, which most California appellate courts utilize, says this about how the system generates a proof of service: "Auto-Servicing: Through auto-servicing you can choose to automatically e-serve filings and send a system-generated Proof of Service filing to the Court. When auto servicing is indicated, you no longer need to file a Proof of Service for the filing – one will be automatically created when you submit a filing to the Court." (TrueFiling User Guide, Release 1.0.36 p. 85, at <http://www.truefiling.com/documentation/UserGuide.pdf>). Such a system generated proof of service is therefore not attached to the document that the filer filed. The APS therefore proposes that the Judicial Council further amend rule 8.25, subdivision (a)(2) to add language such as "[t]he party must attach to the document presented for filing a proof of service **or, if filing electronically, the party may have the Electronic Filing Service Provider generate a proof of service."** Such language would better reflect how the EFSP system works and also allow filers to take advantage of the EFSP's full functionality.	The committee agrees and has revised the language of rule 8.25(a)(2) to bring the proof of service provision into conformity with current e-filing practices, which includes automatic electronic service via the EFSP.
5.	Superior Court of San Diego County By Mike Roddy Court Executive Officer	A	No specific comment provided.	The committee notes the commenter's support for the proposal.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
June 24, 2020

To
Members of the Rules Subcommittee

From
Christy Simons
Attorney, Legal Services

Subject
Proposal re Retention of Reporters' Transcripts in Criminal Appeals

Action Requested
Please review before the subcommittee meeting on June 30, 2020

Deadline
June 30, 2020

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

Introduction

As you may recall, earlier this spring, the Appellate Advisory Committee recommended circulation for public comment of a proposal to amend California Rules of Court, rule 10.1028, to extend the length of time the Court of Appeal must retain reporters' transcripts in cases affirming a felony conviction from 20 years to 100 years.[1]

The proposed amendments were intended to more closely align the length of time the reporters' transcripts are kept with the length of time they may be needed. Sentences for the most serious felony offenses often exceed 20 years, and changes in the law, for which individuals may seek relief, may occur at any time. The Judicial Council's Rules Committee approved the recommendation for circulation and the proposal was circulated for public comment from April

[1] The proposal also includes amendments to conform the rule to recent changes to Code of Civil Procedure section 271. The amendments to conform to statute are not controversial and the committee received no comments suggesting any modifications. This aspect of the proposal is not further discussed in this memo.

10, 2020 through June 9, 2020 as part of the regular spring cycle. A copy of the invitation to comment is included in your meeting materials.

This memorandum and the attached materials discuss the comments received on the proposal. Prior to the subcommittee meeting, members should review the attached comment chart with draft responses and the attached text of rule 10.1028 as it circulated for comment; there are no recommended modifications based on the comments. If the subcommittee recommends moving forward with the proposal at this time, staff will draft a Judicial Council report for the committee to review.

Public comments

The committee received eight comments on the proposal. Four commenters (the Committee on Appellate Courts, Litigation Section, of the California Lawyers Association (CLA), the First District Appellate Project (FDAP), the Orange County Bar Association (OCBA), and the Superior Court of San Diego County) agreed with the proposal. Three commenters (the California Court Reporters Association (CCRA), the Fourth Appellate District of the Court of Appeal (Fourth District Court of Appeal), and the Loyola Law School Project for the Innocent (Loyola)) agreed with the proposal if modified. Finally, one commenter, the Superior Court of Orange County, submitted positive comments but did not state a position. The full text of the comments received and staff's proposed committee responses are set out in the attached draft comment chart.

Length of retention period and cost

CLA, FDAP, Loyola, and OCBA support the proposed 100 year retention schedule. The OCBA commented, "Given the need to review the underlying basis of previously affirmed felony convictions brought on by changes in the law or other circumstances years later, the current 20 year period is clearly insufficient. The increased proposed mandated retention period of 100 years should accommodate any foreseeable need for review of such transcripts." FDAP stated, "One hundred years ensures new laws can be fairly applied to anyone affected." Regarding cost, the Superior Court of Orange County noted that keeping electronic copies of reporters' transcripts rather than hard copies would save the cost of physical storage space.

In contrast, the Fourth District Court of Appeal commented that extending the time "to 100 years is [neither] reasonable nor financially responsible." The court noted that it is a minority of cases in which the reporter's transcript may be needed beyond 20 years, and urged the committee to determine how many cases this would be and reconsider the alternative of a tiered retention schedule in which the length of retention is based on the length of the sentence. The court also expressed concern about the increased cost of longer storage, stating that specific funds would need to be set aside for both file conversion and hard copy storage. The chair and staff have been advised informally that other District Courts of Appeal have concerns regarding the cost of the

proposal, and it was suggested that this proposal be deferred to allow the courts more time to consider the issues.

In light of these comments, the subcommittee should consider whether to recommend deferring the proposal or modifying it. The Fourth District Court of Appeal did not suggest specific changes, but supports modifications that would tie the length of time to keep reporters' transcripts to the length of the sentence. This would reduce the number of transcripts being kept for the longest period of time and the associated cost of storage. However, it would not account for legal reforms that might make the transcripts relevant many years after the appeal or after the sentence is served. There is no dispute that the current 20 year period is too short.

Other comments

CCRA suggested modifying the text of the rule to reflect current practice by court reporters, which is to mark electronic reporters' transcripts "certified" rather than "original" and "copy." Staff recommends that the suggestion be considered as a potential future project. Any such amendment would be a substantive change that should circulate for public comment under rule 10.22(d). In addition, there are appellate rules that refer to an original and copies of reporters' transcripts. To maintain consistency, all of these rules should be reviewed if a change in terms is considered.

Two commenters, CLA and Loyola, expressed concern that, if paper versions of reporters' transcripts are converted to electronic format before storage, there be safeguards in place to ensure that the electronic versions are correct, complete, and accessible before hard copies are destroyed.

Staff recommendation

Based on comments received, staff recommends that the subcommittee defer action on this proposal to seek additional input from the other five District Courts of Appeal. Additional time would allow the courts to consider cost issues, implementation requirements, and whether a shorter period of retention or a tiered retention schedule would sufficiently protect individuals' rights.

Subcommittee task

The subcommittee's task with respect to this proposal is to discuss the comments received and:

- Decide whether to recommend deferring the proposal for some amount of time or moving forward now; and
- If the recommendation is to move forward, approve or modify staff suggestions for responding to the comments; or

• If the recommendation is to defer, discuss what information the subcommittee wishes to gather and how best to do that.

Attachments

1. Comment chart with draft committee responses, at pp. 5-12
2. Rule 10.1028, at pp. 13-14
3. Invitation to Comment, at pp. 15-18

SPR20-01

Court Records: Retention of Reporters' Transcripts in Criminal Appeals (Amend Cal. Rules of Court, rule 10.1028)

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

	Commenter	Position	Comment	DRAFT Committee Response
1.	California Court Reporters Association By Joshua Thubei	AM	The California Court Reporters Association (CCRA), a statewide organization whose membership includes freelance court reporters, CART/captioning, official and student communities; recommends amending this section to state, "the clerk/executive officer must keep the 'certified' reporter's transcript" instead of the original reporter's transcript. CCRA believes this amendment is necessary to reflect the current practice of reporters electronically filing reporters' transcripts. Court Reporters e-filing transcripts no longer mark the electronic transcript with "Original" and "Copy", they mark all e-filed transcripts with "Certified Transcript".	The committee notes the commenter's agreement with the proposal if modified and appreciates this feedback on current practice. The suggested modification to the rule text would be a substantive change that must circulate for public comment. (See rule 10.22(d).) The committee will retain the suggestion for consideration as a future rules project.
2.	California Lawyers Association Committee on Appellate Courts, Litigation Section By Saul Bercovitch Director of Governmental Affairs, California Lawyers Association Leah Spero, Chair Committee on Appellate Courts	A	In general, the Committee on Appellate Courts supports the entirety of this proposal. The proposal appropriately addresses the stated purpose. The Committee on Appellate Courts further supports the conclusion that the current requirement to keep the reporter's transcript for only 20 years in any case affirming a criminal conviction is insufficient. Requiring the court to keep a copy of the reporter's transcript in felony appeals for 100 years would cure the current deficiency. However, the Committee has potential concerns about the reliability of retention of electronic copies based on its experiences. It would be helpful to know the process(es) at the trial courts with regard to retaining electronic copies of reporter's transcripts. Without knowing how such records will be maintained, there is some	The committee notes the commenter's agreement with the proposal. Rule 10.1028 governs retention of court reporters' transcripts in the Court of Appeal, not the trial courts.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	DRAFT Committee Response
			concern about the practicality and assurances of their maintenance over 100 years. Indeed, some of our members have had experiences where a trial court was unable to locate an electronic copy of a reporter's transcript, but the court had in its possession the hard copy file. Maintaining these records is critical for criminal defendants and thus, before purging hard paper copies, we should ensure that the electronic version is being properly and accurately maintained in an accessible format.	The committee cannot speak to trial court practice or procedures, but rule 8.336(d) requires the court reporter to certify the transcript as correct, and rules 8.74(a) and 8.336(d) require electronic reporters' transcripts to be in text searchable portable document format. The committee agrees that digitization of paper records must ensure the availability of a correct and accessible electronic copy.
3.	Court of Appeal, Fourth Appellate District by Kevin Lane Clerk/Executive Officer	AM	Position: Support but only with modifications This proposal indicates that this proposal was originated from a clerk/executive officer however this committee needs to understand that this is not the position of all of the clerk/executive officers in the courts. This proposal tries to address the minority of cases that may be needed beyond the 20 years but does not specify how many cases that really is. The committee should endeavor to put exact numbers to measure how many cases we are actually evaluating compared to the number of cases that the courts process. The proposal to extend the time to keep reporters transcripts from 20 years to 100 years is not reasonable nor financially responsible. I recommend the committee reevaluate the last	The committee notes the commenter's support for the proposal if modified. The commenter's point is noted. There is no way to determine the number of appeals affirming felony convictions for which a reporter's transcript may be needed beyond 20 years from the date the decision becomes final. In addition to sentences that are longer than 20 years, there may be future changes in the law or circumstances, including changes in the law that take place after a sentence is served. *[For discussion by the subcommittee. The subcommittee previously rejected a retention schedule based on the length of the sentence because it would be more complicated to*

	Commenter	Position	Comment	DRAFT Committee Response
			alternative considered. In practice, the record retention at the AG's Office is longer than the current 20 years the courts have in place but is based on the sentence. The shortest time frame is 20 years but that is based on a sentence of 10 years or less and the number of years the file was kept went up with the sentence. For example, if someone is sentenced to 5 years, keeping that record for 100 years is not reasonable. This alternative is significantly better than the proposal even though it is not as simple as the one size fits all approach. Further, the technology of today will not be the technology of 100 years from now. If this proposal were to go forward there will need to be specific money set aside for file conversion as well as hard copy storage. Currently record storage is very expensive for the courts with only the 20 year requirement. Financial assistance will need to be increased significantly to address the additional costs. The committee should evaluate current costs of storage in each court so they have an estimate of the actual cost that will be needed in the future. Specific answers to the committees questions are: • Does the proposal appropriately address the stated purpose? No it does not in a reasonable fashion. • Should reporters' transcripts in any type of case be retained permanently? No, 100 years	*administer and would not ensure that the reporter's transcript will be available to all individuals who may be entitled to seek relief in the future. However, it does appear to be the case that courts are still receiving a substantial number of reporters' transcripts in paper format and are storing them off-site in boxes rather than digitizing them.]* The committee agrees that technology will continue to advance and that funding for file conversion will be important for reducing the cost of hard copy storage. Efforts to modernize and convert from paper to electronic transcripts should remain a priority. The committee is also acutely aware of the budget challenges facing the state in general and the judicial branch in particular. The committee appreciates the commenter's responses to specific questions asked in the invitation to comment. See response above. The committee appreciates this input.

	Commenter	Position	Comment	DRAFT Committee Response
			for a death penalty case or LWOP would be adequate and outlive the lives of anyone committing a criminal act • Should any other provisions regarding retention of an original reporter's transcript be considered? Yes, see above re procedure at AG's office. • Would the proposal provide cost savings? If so, please quantify. No, quite the opposite. It would increase costs significantly • What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? To implement this we would have to train each deputy clerk on a new procedure (minimal time), revise process and procedures to address how to account for cases that reach the 100 year mark, create new docket codes in our current CMS, publication requirements and destruction procedures. • Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes • How well would this proposal work in courts of different sizes? The proposal itself is a one size fits all approach, so different size courts could adapt equally.	See response above. The committee notes the commenter's concern. The committee appreciates this information on implementation requirements. No further response required. No further response required.

SPR20-01
Court Records: Retention of Reporters' Transcripts in Criminal Appeals (Amend Cal. Rules of Court, rule 10.1028)
All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	DRAFT Committee Response
4.	First District Appellate Project by Jonathan Soglin Executive Director	A	We strongly support retention of transcripts for 100 years. Data storage is relatively inexpensive and there is no anticipating what reforms might make the transcripts relevant many years after the appeal. One hundred years ensures new laws can be fairly applied to anyone affected.	The committee notes the commenter's support for the proposal and appreciates the comments explaining their position.
5.	Loyola Law School Project for the Innocent By Paula M. Mitchell, Legal Director	AM	The mandated preservation of RTs in criminal cases is critical to promoting justice and fairness in the system. As an attorney who works to overturn murder convictions and other serious felony convictions for clients who are factually innocent, I can attest to the devastating effect the destruction of criminal trial transcripts has on the system generally, and on individuals who are seeking to prove their innocence, specifically. It is also important that there be a mechanism to ensure that the electronic version being preserved is complete before the hard paper copy is destroyed. It is equally important that the CT also be digitally preserved for 100 years.	The committee thanks the commenter and notes the support for the proposal if modified. The committee agrees that a digitized version of a paper transcript must be complete; see response to California Lawyer's Association, above. Requiring that clerks' transcripts also be retained for 100 years is beyond the scope of this proposal. (See rule 10.22(d).) The committee will retain this comment as a suggestion for a future rules project.
6.	Orange County Bar Association By Scott B. Garner, President	A	Specific Comments: Does the proposal appropriately address the stated purpose? Yes for several reasons. This proposal conforms the rule of court to Code of Civil Procedure section 271(a). In lieu of paper, the true copy of	The committee notes the commenter's agreement with the proposal and appreciates the responses to questions asked in the invitation to comment. The committee appreciates this feedback.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

	Commenter	Position	Comment	DRAFT Committee Response
			the reporter's transcript in electronic form offers the distinct advantage of ease of digital duplication, minimal storage space required, less possibility of physical deterioration over time and finally, cost saving for the court resulting from all of the foregoing advantages. Given the need to review the underlying basis of previously affirmed felony convictions brought on by changes in the law or other circumstances years later the current 20 year period is clearly insufficient. The increased proposed mandated retention period of 100 years should accommodate any foreseeable need for review of such transcripts. Should reporters' transcripts in any type of case be retained permanently? No. This question appears to call for retention of the reporter's transcript in every case including criminal matters forever. Except for historical purposes, neither inclusion for all cases nor permanent retention is warranted. Should any other provisions regarding retention of an original reporter's transcript be considered? No. Cal. Rules of Court 8.144 ensures uniform accessibility for the reporter's transcript in digital form for future years.	No further response required. No further response required.

SPR20-01

Court Records: Retention of Reporters' Transcripts in Criminal Appeals (Amend Cal. Rules of Court, rule 10.1028)

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

	Commenter	Position	Comment	DRAFT Committee Response
7.	Superior Court of Orange County IMPACT Team- Criminal Operations By Randy Montejano Courtroom Operations Supervisor		• Does the proposal appropriately address the stated purpose? Yes, effective January 1, 2018, rule 10.1028, subdivision (d), was amended to allow the Court of Appeal to keep an electronic copy of the reporter's transcript in lieu of keeping the original unless an exception applies. If an exception applies and the original transcript is on paper, the court may continue to keep either the paper original or a true and correct electronic copy. The proposal also extends the time the court must keep the original or an electronic copy of the reporter's transcript in felony appeals to 100 years. • Should reporters' transcripts in any type of case be retained permanently? I do not see any reason why it would need to be retained permanently. • Should any other provisions regarding retention of an original reporter's transcript be considered? I feel that everything is covered regarding this. • Would the proposal provide cost savings? If so, please quantify. Yes, as currently written, if the court may keep either a paper original or a true and correct electronic copy, it would save the cost of physical storage space in keeping these documents for 100 years.	The committee appreciates the commenter's responses to the questions asked in the invitation to comment. No further response required. No further response required. No further response required. The committee agrees that keeping electronic copies rather than paper copies would save costs.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR20-01

Court Records: Retention of Reporters' Transcripts in Criminal Appeals (Amend Cal. Rules of Court, rule 10.1028)

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

	Commenter	Position	Comment	DRAFT Committee Response
			• What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? New docket codes may need to be created and staff who handle destruction of these documents would need to be trained. • Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, in our opinion it would be enough time for Orange County Superior Court. • How well would this proposal work in courts of different sizes? In our opinion it would work well no matter the size of the court.	The committee appreciates this input. No further response required. No further response required.
8.	Superior Court of San Diego County By Mike Roddy Court Executive Officer	A	No specific comment provided.	The committee notes the commenter's agreement with the proposal.

Rule 10.1028 of the California Rules of Court would be amended, effective January 1, 2021, to read:

Title 10. Judicial Administration Rules

Division 5. Appellate Court Administration

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

Rule 10.1028. Preservation and destruction of Court of Appeal records

(a) Form or forms in which records may be preserved

(1) Court of Appeal records may be created, maintained, and preserved in any form or forms of communication or representation, including paper or optical, electronic, magnetic, micrographic, or photographic media or other technology, if the form or forms of representation or communication satisfy the standards or guidelines for the creation, maintenance, reproduction, and preservation of court records established under rule 10.854.

(2) If records are preserved in a medium other than paper, the following provisions of Government Code section 68150 apply: subdivisions (c)–(*l*), excluding subdivision (i)(1).

(b) Methods for signing, subscribing, or verifying documents

Any notice, order, ruling, decision, opinion, memorandum, certificate of service, or similar document issued by an appellate court or by a judicial officer of an appellate court may be signed, subscribed, or verified using a computer or other technology in accordance with procedures, standards, and guidelines established by the Judicial Council. Notwithstanding any other provision of law, all notices, orders, rulings, decisions, opinions, memoranda, certificates of service, or similar documents that are signed, subscribed, or verified by computer or other technological means under this subdivision shall have the same validity, and the same legal force and effect, as paper documents signed, subscribed, or verified by an appellate court or a judicial officer of the court.

(c) Permanent records

The clerk/executive officer of the Court of Appeal must permanently keep the court's minutes and a register of appeals and original proceedings.

(d) Time to keep other records

(1) Except as provided in (2) and (3), the clerk/executive officer 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.

(2) Except as provided in (3), in a criminal case in which the court affirms a judgment of conviction, the clerk/executive officer must keep the original reporter's transcript or, if the original is in paper, either the original or a true and correct electronic copy of the transcript, for 20 years after the decision becomes final.

(3) In a felony case in which the court affirms a judgment of conviction, the clerk/executive officer must keep the original reporter's transcript or, if the original is in paper, either the original or a true and correct electronic copy, for 100 years after the decision becomes final.

Advisory Committee Comment

Subdivision (d). Subdivision (d) permits the Court of Appeal to keep an electronic copy of the reporter's transcript in lieu of keeping the original if the original transcript is in paper. Although subdivision (a) allows the Court of Appeal to maintain its records in any format that satisfies the otherwise applicable standards for maintenance of court records, including electronic formats, ~~the original of a reporter's transcript is required to be on paper under Code of Civil Procedure section 271(a).~~ Code of Civil Procedure section 271 provides that an original reporter's transcript must be in electronic form unless a specified exception allows for an original paper transcript. Subdivision (d) therefore specifies that an electronic copy may be kept if the original transcript is in paper, to clarify that the paper original need not be kept by the court.

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INVITATION TO COMMENT

SPR20-[# as assigned]

Title
Court Records: Retention of Reporters' Transcripts in Criminal Appeals

Action Requested
Review and submit comments by June 9, 2020

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rule 10.1028

Proposed Effective Date
January 1, 2021

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

Contact
Christy Simons, Attorney
415-865-7694
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Executive Summary and Origin

To conform to a recent statutory change and to better align the length of time reporters' transcripts must be kept with the length of time they may be needed, the Appellate Advisory Committee proposes amending the rule regarding preservation and destruction of Court of Appeal records. Code of Civil Procedure section 271, subdivision (a), no longer requires that an original reporter's transcript be in paper format. Thus, a provision in rule 10.1028 permitting the court to keep an electronic copy in lieu of an original paper reporter's transcript should be revised. This proposal would also extend the time the court must keep the original or an electronic copy of the reporter's transcript in felony appeals to 100 years. The rule's current requirement to keep the reporter's transcript for 20 years in any case affirming a criminal conviction does not account for longer sentences or changes in felony sentencing laws. This proposal originated with suggestions from a clerk/executive officer of a Court of Appeal and an attorney at the Supreme Court.

The Proposal

Statutory change

Rule 10.1028 governs the preservation and destruction of Court of Appeal records. Prior to 2018, the rule required the court to keep an original reporter's transcript, which, under the version of

Code of Civil Procedure section 271[1] in effect at the time, had to be on paper.[2] Effective January 1, 2018, rule 10.1028, subdivision (d), was amended to allow the Court of Appeal to keep an electronic copy of the reporter's transcript in lieu of keeping the original. An advisory committee comment was added to explain that, "[a]lthough subdivision (a) allows the Court of Appeal to maintain its records in any format that satisfies the otherwise applicable standards for maintenance of court records, including electronic formats, the original of a reporter's transcript is required to be on paper under Code of Civil Procedure section 271(a). Subdivision (d) therefore specifies that an electronic copy may be kept, to clarify that the paper original need not be kept by the court."

Legislation repealing and replacing section 271 took effect January 1, 2018. Among other changes, new section 271 requires that the reporter's transcript be delivered in electronic form unless any of the specified exceptions apply, and provides that an electronic transcript is deemed to be an original for all purposes unless a paper transcript is delivered under any of the exceptions. In light of the new statutory language, rule 10.1028 should be revised to reflect that an original reporter's transcript must be in electronic format unless an exception applies. If an exception applies and the original transcript is on paper, the court may continue to keep either the paper original or a true and correct electronic copy.

Time to keep reporters' transcripts

Rule 10.1028(d) governs the time the Court of Appeal is required to keep records. Under subdivision (c), the court must permanently keep the court's minutes and a register of appeals and original proceedings. Under subdivision (d), all other records, with one exception, may be destroyed 10 years after the decision becomes final. The exception is for original reporters' transcripts in cases affirming a criminal conviction; these must be kept for 20 years after the decision becomes final. This retention time has not changed since the adoption of the initial version of the rule in 1975. (See former rule 55, adopted effective July 1, 1975; renumbered as rule 70 effective January 1, 2005; and renumbered as rule 10.1028 effective January 1, 2007.)

This 20-year retention period is insufficient. Sentences for the most serious felony convictions often exceed 20 years, as does the actual time served under these sentences. Certain writ proceedings may be filed at any time during service of a prison sentence. In addition, changes in felony sentencing laws, such as Proposition 47,[3] which reduced penalties for certain offenses and allows for resentencing, warrant keeping reporters' transcripts in cases affirming felony convictions longer than 20 years so defendants can access opportunities for resentencing or other relief. This is not a theoretical problem. The committee has been advised that the California Department of Justice, which has a longer retention schedule, is frequently contacted by litigants

[1] All further statutory references are to the Code of Civil Procedure.
[2] Section 271 authorized courts and parties to receive, on request, copies of reporters' transcripts in "computer-readable form."
[3] Voters passed Prop. 47, "The Safe Neighborhoods and Schools Act," on November 14, 2014; it went into effect the next day.

for copies of reporters' transcripts in cases in which a criminal conviction was affirmed more than 20 years ago.

Accordingly, the committee proposes adding a provision to rule 10.1028(d) to extend the time for keeping the reporter's transcript in felony cases. New paragraph (d)(3) would state: "In a felony case in which the court affirms a judgment of conviction, the clerk/executive officer must keep the original reporter's transcript or, if the original is in paper, either the original or a true and correct electronic copy, for 100 years after the decision becomes final."

This proposal is required both to conform the rule to statute and to address an identified concern. It would improve access to justice by ensuring that the original reporter's transcript is actually available when needed.

Alternatives Considered

The committee considered taking no action, but rejected this option because portions of the rule are based on a former version of the relevant statute and are inadequate in light of longer sentences and criminal justice reforms.

The committee also considered whether to extend the time for keeping the reporter's transcript only in cases involving a sentence of life or life without the possibility of parole. The committee rejected this option because it is too narrow and would not include many cases in which a reporter's transcript might be needed long after the conviction is affirmed.

The committee also considered extending the time to 50 years rather than 100. The committee declined this option because 50 years might not be long enough in all cases.

In addition, the committee considered a graduated retention schedule, such as the retention schedule adopted by the California Department of Justice, in which documents are retained for different time periods depending on the type of document or the circumstances. Moreover, the committee considered other possible amendments, including whether any reporters' transcripts should be retained permanently and whether the rule should provide that the reporter's transcript must be kept for a certain number of years (such as 10) following the death of the defendant. The committee rejected these options in favor of a rule that is simple and straightforward for the courts to implement, but welcomes comments on these and other options.

Fiscal and Operational Impacts

This proposal would require the Courts of Appeal to change their record retention policies and procedures with respect to reporters' transcripts in the identified cases. Education and training of staff would also be required. Despite the implementation requirements, the committee believes that the benefit of the proposal—making certain reporters' transcripts available to defendants for a more realistic amount of time within which they may be needed, and thereby improving access to justice—outweighs its potential cost to the courts.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should reporters' transcripts in any type of case be retained permanently?
- Should any other provisions regarding retention of an original reporter's transcript be considered?

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

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 10.1028, at pages 5–6