JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR22-__

Title
CEQA Actions: New Projects and Fees for Expedited Review

Proposed Rules, Forms, Standards, or Statutes
Amend Rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705.

Proposed by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair
Civil and Small Claims Advisory Committee
Hon. Tamara L. Wood, Chair

Action Requested
Review and submit comments by May 13, 2022

Proposed Effective Date
January 1, 2023

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Executive Summary and Origin

As mandated by the Legislature, the Judicial Council previously adopted rules and established procedures that implemented a statutory scheme for the expedited resolution of actions and proceedings brought under the California Environmental Quality Act (CEQA) challenging certain projects that qualified for such streamlined procedures. This proposal will implement additional legislation requiring that the Judicial Council amend these rules to include additional projects for streamlined review. The proposal will also implement new and reenacted statutory provisions requiring that, in cases under two of the statutes, the council, by rule of court, establish fees to be paid by those project applicants to the trial court and Court of Appeal for the costs of streamlined CEQA review.

Background

Since 2011 the Legislature has enacted numerous bills providing expedited judicial review for legal challenges brought under the California Environmental Quality Act (CEQA) for specified projects. Initially, the Legislature enacted the Jobs and Economic Improvement Through Environmental Leadership Act of 2011, which provided that CEQA challenges to so called "environmental leadership projects" would be brought directly to the Court of Appeal and that project applicants would pay the costs of adjudicating the case. (See Assembly Bill 900 (Stats. 2011, ch. 354.) To

implement the required appellate court fees in AB 900, the council adopted the predecessor to rule 8.705.

In 2013, the Legislature eliminated the provision requiring that a CEQA challenge to an environmental leadership project be brought directly in the Court of Appeal and instead required the Judicial Council to adopt rules[1] requiring that actions or proceedings, including any appeals, be resolved within 270 days of certification of the record of proceedings. (See Senate Bill 743 (Stats. 2013, ch. 386.) SB 743 also provided that CEQA challenges to an additional project (the Sacramento basketball arena) would receive expedited judicial review. To implement SB 743, the council adopted rules 3.2220–3.2231 and 8.700–8.705, which in addition to providing expedited review for the specified projects also set out certain pleading and service requirements and incentives to help streamline judicial review.

In 2016, Senate Bill 836 (Stats. 2016, ch. 31) added another set of projects to receive expedited CEQA review—"capitol building annex projects." Thereafter, the council amended the trial court and appellate rules governing expedited CEQA review to include such projects.

In 2018 and 2020, the Legislature enacted four bills relating to CEQA review. Each of those bills added additional projects to receive expedited CEQA review: Assembly Bill 734 (Stats. 2018, ch. 959) (Oakland ballpark projects); Assembly Bill 987 (Stats. 2018, ch. 961) (Inglewood arena projects); Assembly Bill 1826 (Stats. 2018, ch. 40) (expanded capitol building annex projects); and Assembly Bill 2731 (Stats. 2020, ch. 291) (San Diego Old Town Center projects). AB 734 and AB 987 also provided that the person or entity that applied for certification of an Oakland ballpark or an Inglewood arena project must pay for "any additional costs incurred by the courts in hearing and deciding any [CEQA] case." (§§ 21168.6.7(d)(6), 21168.6.8(b)(6).)[2] Accordingly, earlier this year the council amended rules governing expedited CEQA review to: (1) include the four new projects to receive expedited CEQA review; (2) require applicants of Oakland ballpark and Inglewood arena projects to pay trial and appellate court fees based on "additional" court costs; and (3) refer to the "statutorily prescribed" time and not "270 days."[3]

The Proposal

This proposal seeks to implement two additional bills enacted by the Legislature related to expedited CEQA review. Senate Bill 7 (Stats 2021, ch. 19)[4] reenacts with certain changes the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 (initially enacted by AB 900), which was repealed by its own terms January 1, 2021. Both the prior and reenacted law provide for certification and expedited CEQA review of certain large projects that replace old facilities, reduce pollution, and generate jobs. (See §§ 21178 et seq.) Such projects are referred to as "environmental leadership development projects." Senate Bill 44 (Stats 2021, ch. 633)[5] adds

[1] All rules references are to the California Rules of Court.
[2] All further statutory references are to the Public Resources Code unless otherwise noted.
[3] Link to council report earlier this year.
[4] Senate Bill 7, available at *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB7*.
[5] Senate Bill 44, available at *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB44*.

sustainable public transit projects in Los Angeles in preparation for the 2028 Summer Olympic and Paralympic Games to the list of projects to receive expedited CEQA review. (See § 21168.6.9.) These projects are referred to as "environmental leadership transit projects." Both bills require project applicants to pay trial and appellate court costs fees for adjudication of CEQA challenges.

Accordingly, the proposed rule amendments would conform the rules to recent legislative changes adding environmental leadership transit projects as a type of project that receives expedited judicial review and setting trial and appellate court fees for both types of projects.

Amendments to add environmental leadership transit projects

Several of the proposed rule amendments simply add statutory citations or list "environmental leadership transit project" within an existing rule to implement SB 44's provision that such projects receive expedited CEQA review. (See, e.g. proposed rules 3.2200, 3.2220, 8.700.) No amendments are needed to include environmental leadership development projects (SB 7) in the type of projects that receive expedited CEQA review. Such projects were added to the rules in 2012 to implement the original environmental leadership act, AB 900.

New fees for trial and appellate courts

Existing rule 8.705(1) requires the person or entity that applied for certification of a project as an environmental leadership development project to pay a fee to the Court of Appeal. The rule is based on previous section 21183(e) (in effect until December 31, 2020), which provided that such persons or entities agree to "pay the costs of the Court of Appeal in hearing and deciding any [CEQA] case" and did not provide any such fee for trial courts.

Amended section 21183(f) now provides that the person or entity that applied for certification of a project as an environmental leadership development must "pay the costs of the *trial court and the court of appeal* in hearing and deciding any case challenging" the project under CEQA. (Emphasis added.) Similarly, newly added section 21168.6.9 provides an identical requirement for environmental leadership transit project applicants.

Accordingly, the proposal amends rule 8.705 to require environmental leadership transit project applicants to pay a fee to the Court of Appeal. This proposal also amends rule 3.2240 to require the payment of a fee to the trial court by the person or entity that applied for certification of a project as an environmental leadership development project and to require the payment of a fee to the trial court by the project applicant of an environmental leadership transit project.

New and amended fee amounts

Existing fee amounts

To implement former section 21183(e), which required a person or entity that applied for certification of the project as an environmental leadership project "to pay the costs of the Court of Appeal," rule 8.705(1) requires payment of a fee of $100,000 to the Court of Appeal for streamlined

review of a CEQA case.[6] The $100,000 amount was set in 2012 and was based on an estimate that the amount of time to adjudicate a CEQA case at the Court of Appeal would be: 108 hours by the justice assigned to prepare a draft decision; 10 hours by each of the other two justices on the panel; 230 hours by research attorneys; and 31 hours by judicial assistants. In addition to those hours, estimates for other staff time, benefits, and overhead were included in calculating the total fee.[7]

The fees in current rules 3.2240(1) and 8.705(2) for Oakland ballpark and Inglewood arena projects were adopted by the council this year and require payments of $120,000 to the trial court and $140,000 to the Court of Appeal.[8] The statutes for both such projects require the person or entity that applied for certification to pay a fee for the "additional costs" to the courts providing expedited review. "Additional costs," as opposed to "costs," were determined based on the cost to the courts of taking these cases out of normal processing and devoting one full-time judicial officer and one research attorney in each court to reach disposition within the statutorily prescribed time. The council did not include other staff time, other judicial officer time, benefits, or overhead when it used the hours estimate to determine the applicable fees. In setting those amounts, the council considered the 2012 report that adopted the current fee in rule 8.705(1), a report to the Legislature on the amount of time to adjudicate a CEQA challenge to the Warriors' Mission Bay project,[9] and anecdotal evidence from a CEQA challenge to the Sunset Boulevard project in Los Angeles.[10] As described in the March 2022 report to the council, the 2012 estimate of time to adjudicate a CEQA case in the Court of Appeal fell far short of reality. Rather, the data collected regarding the time required to complete expedited review of CEQA challenges to the Warriors' Mission Bay and Sunset Boulevard projects suggest that a more accurate estimate of the required time for adjudication in both trial court and the Court of Appeals is 91 full-time working days for each of the following positions: trial court judge, trial court research attorney, appellate justice, and appellate court research attorney.[11] The $120,000 and $140,000 fee amounts are based on these time estimates.

Proposed fees amounts

New sections 21183(f) and 21168.6.9(b)(3) require the person or entity that applied for certification of an environmental leadership development project and environmental leadership transit project applicants, respectively, to pay the costs of the trial court *and* the Court of Appeal in "a form and manner specified by the Judicial Council, as provided in the California Rules of Court." To

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[6] Rule 8.705 also requires that the person or entity that applied for certification of a project as environmental leadership development, an Oakland ballpark, or an Inglewood arena project to pay the costs of any special master or contract personnel retained to work on the case.

[7] See Judicial Council of Cal., Advisory Com. Rep., *Appellate Procedure: Review of California Environmental Quality Act Cases Under Public Resources Code Sections 21178–21189.3* (Apr. 11, 2012), p. 8, *www.courts.ca.gov/documents/jc-20120424-itemA1.pdf*

[8] Similar to rule 8.705, rule 3.2240 also requires the payment of the costs of any special master or contract personnel retained to work on the case.

[9] Judicial Council of Cal., Jobs and Economic Improvement Through Environmental Leadership Act: Report to the Legislature Under Assembly Bill 900, Public Resources Code Section 21189.2 (Dec. 1, 2016), p. 6. The report may be viewed at *https://www.courts.ca.gov/documents/lr-2016-jobs-and-economic-improvement.pdf*.

[10] *L.A. Conservancy v. City of L.A.; Fix the City, Inc. v. City of Los Angeles* (Mar. 23, 2018, B284093) [nonpub. opn.].

[11] Link to council report earlier this year.

implement these statutory requirements, the committees propose a new fee for trial court costs and an updated fee for appellate court costs.

The committees used the time estimates in the March 2022 council report as the basis for the new and updated fee amounts in this proposal. Specifically, the proposed fees amounts are derived from the estimate that the amount of time to adjudicate expedited CEQA cases is 91 full-time working days of a judicial officer and a research attorney in each of the courts. Additionally, since sections 21168.6.9(b)(3) and 21183(f) require project applicants to pay the cost to the courts without any limitation of such costs to "additional costs," estimates for benefits, overhead, clerical time, and the time of other appellate justices assigned to the panel (none of which were included in the fees set for Oakland ballpark and Inglewood arena projects) were included in determining the proposed court fees.

The estimated cost to trial courts for expedited review of a CEQA case is $180,000, which was calculated with the following components:

- The estimated cost of salary and benefits for 91 full-time working days for a trial court judge;
- The estimated cost of salary and benefits for 91 full-time working days for a trial court research attorney; and
- An estimate for overhead and clerical time in the trial court.

The estimated costs to the Court of Appeal for expedited review of a CEQA case is $215,000, which was calculated with the following components:

- The estimated cost of salary and benefits for 91 full-time working days for the appellate justice primarily assigned to the case;
- The estimated cost of salary and benefits for 20 hours[12] for each of the other two appellate justices assigned to the case;
- The estimated cost of salary and benefits for 91 full-time working days for an appellate court research attorney; and
- An estimate for overhead and clerical time in the Court of Appeal.

The committees thus propose that the above amounts be charged for the expedited review by the trial court and the Court of Appeal, respectively. (See proposed rules 3.2240 and 8.705.) As permitted by the statutes, the proposed rules also allow for costs for any special master required for the matter to be charged directly to the project developer, as is currently provided in the environmental leadership development cases as well as those concerning Oakland ballpark or Inglewood arena projects.

[12] The fee set in 2012 included an estimate of 10 hours of time for each of the other two justices on the panel. The committees concluded that, in cases of this size and complexity, a more realistic estimate would be 20 hours by each of the non-authoring justices.

Alternatives Considered

Because the new rules and fees are mandated by the Legislature, the committees did not consider the alternative of no rules.

Fiscal and Operational Impacts

Implementing the new legislation requiring expedited review of CEQA challenges to new project types may generate costs and operational impacts for both the trial court and the Court of Appeal in which the proceedings governed by these statutes are filed. This is a policy decision made by the Legislature, not the result of the proposed rule amendments. The committees do not anticipate that this rule proposal will result in any additional costs to other courts.

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?

The advisory committees also seek 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, rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705, at pages 7–15
2. Link A: Senate Bill 7, *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB7*
3. Link B: Senate Bill 44, *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB44*

Rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705 of the California Rules of Court would be amended, effective January 1, 2023, to read:

Rule 3.2200. Application

Except as otherwise provided in chapter 2 of the rules in this division, which govern actions under Public Resources Code sections 21168.6.6–21168.6.~~8~~9, 21178–21189.3, 21189.50–21189.57, and 21189.70–21189.70.10, the rules in this chapter apply to all actions brought under the California Environmental Quality Act (CEQA) as stated in division 13 of the Public Resources Code.

Chapter 2. California Environmental Quality Act Proceedings Involving Streamlined CEQA Projects

Article 1. General Provisions

Rule 3.2220. Definitions and application

(a) Definitions

As used in this chapter:

(1) A "streamlined CEQA project" means any project within the definitions stated in (2) through ~~(7)~~(8).

(2) An "environmental leadership development project" or "leadership project" means a project certified by the Governor under Public Resources Code sections 21182–21184.

(3) The "Sacramento entertainment and sports center project" or "Sacramento arena project" means an entertainment and sports center project as defined by Public Resources Code section 21168.6.6, for which the proponent provided notice of election to proceed under that statute described in section 21168.6.6(j)(1).

(4) An "Oakland sports and mixed-use project" or "Oakland ballpark project" means a project as defined in Public Resources Code section 21168.6.7 and certified by the Governor under that section.

(5) An "Inglewood arena project" means a project as defined in Public Resources Code section 21168.6.8 and certified by the Governor under that section.

Rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705 of the California Rules of Court would be amended, effective January 1, 2023, to read:

(6) An "expanded capitol building annex project" means a state capitol building annex project, annex project–related work, or state office building project as defined by Public Resources Code section 21189.50.

(7) An "Old Town Center transit and transportation facilities project" or "Old Town Center project" means a project as defined in Public Resources Code section 21189.70.

(8) An "environmental leadership transit project" means a project as defined in Public Resources Code section 21168.6.9.

(b) Proceedings governed

The rules in this chapter govern actions or proceedings brought to attack, review, set aside, void, or annul the certification of the environmental impact report or the grant of any project approvals for a streamlined CEQA project. Except as otherwise provided in Public Resources Code sections 21168.6.6–21168.6.~~8~~9, 21178–21189.3, 21189.50–21189.57, and 21189.70–21189.70.10 and these rules, the provisions of the Public Resources Code and the CEQA Guidelines adopted by the Natural Resources Agency (Cal. Code Regs., tit. 14, § 15000 et seq.) governing judicial actions or proceedings to attack, review, set aside, void, or annul acts or decisions of a public agency on the grounds of noncompliance with the California Environmental Quality Act and the rules of court generally apply in proceedings governed by this rule.

(c) Complex case rules

* * *

Rule 3.2221. Time

(a) Extensions of time

* * *

(b) Extensions of time by parties

If the parties stipulate to extend the time for performing any acts in actions governed by these rules, they are deemed to have agreed that the statutorily prescribed time for resolving the action may be extended by the number of days by which the performance of the act has been stipulated to be extended, and to that extent to have waived any objection to noncompliance with the deadlines for

Rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705 of the California Rules of Court would be amended, effective January 1, 2023, to read:

completing review stated in Public Resources Code sections 21168.6.6–21168.6.~~8~~9, 21185, 21189.51, and 21189.70.3. Any such stipulation must be approved by the court.

(c) Sanctions for failure to comply with rules

If a party fails to comply with any time requirements provided in these rules or ordered by the court, the court may issue an order to show cause as to why one of the following sanctions should not be imposed:

(1)–(2) * * *

(3) If the failure to comply is by respondent or a real party in interest, removal of the action from the expedited procedures provided under Public Resources Code sections 21168.6.6–21168.6.~~8~~9, 21185, 21189.51, and 21189.70.3, and these rules; or

(4) * * *

Rule 3.2223. Petition

In addition to any other applicable requirements, the petition must:

(1) On the first page, directly below the case number, indicate that the matter is a "Streamlined CEQA Project";

(2) State one of the following:

(A) The proponent of the project at issue provided notice to the lead agency that it was proceeding under Public Resources Code section 21168.6.6, 21168.6.7, ~~or~~ 21168.6.8, or 21168.6.9 (whichever is applicable) and is subject to this rule; or

(B) The project at issue was certified by the Governor as an environmental leadership development project under Public Resources Code sections 21182–21184 and is subject to this rule; or

(C) The project at issue is an expanded capitol building annex project as defined by Public Resources Code section 21189.50 and is subject to this rule; or

Rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705 of the California Rules of Court would be amended, effective January 1, 2023, to read:

(D) The project at issue is an Old Town Center project as defined by Public Resources Code section 21189.70 and is subject to this rule;

(3) If an environmental leadership development, Oakland ballpark, or Inglewood arena project, provide notice that the person or entity that applied for certification of the project as such a ~~leadership~~ project must make the payments required by rule 3.2240 and, if the matter goes to the Court of Appeal, ~~make~~ the payments required by rule 8.705;

(4) If an environmental leadership transit project ~~Oakland ballpark or Inglewood arena project,~~ provide notice that the ~~person or entity that applied for certification of the project as an Oakland ballpark or Inglewood arena~~ project applicant must make the payments required by rule 3.2240 and, if the matter goes to the Court of Appeal, the payments required by rule 8.705; and

(5) * * *

Rule 3.2240. Trial Court Costs in ~~Oakland Ballpark and Inglewood Arena~~ certain streamlined CEQA Projects

In fulfillment of the provisions in Public Resources Code sections 21168.6.7 ~~and~~ 21168.6.8, 21168.6.9, and 21183 regarding payment of trial court costs with respect to cases concerning ~~certain streamlined CEQA~~ environmental leadership development, environmental leadership transit, Oakland ballpark, and Inglewood arena projects:

(1) Within 10 days after service of the petition or complaint in a case concerning an environmental leadership development project, the person or entity that applied for certification of the project as an environmental leadership development project must pay a fee of $180,000 to the court.

(2) Within 10 days after service of the petition or complaint in a case concerning an environmental leadership transit project, the project applicant must pay a fee of $180,000 to the court.

~~(1)~~(3) Within 10 days after service of the petition or complaint in a case concerning an Oakland ballpark project or an Inglewood arena project, the person or entity that applied for certification of the project as a streamlined CEQA project must pay a fee of $120,000 to the court.

~~(2)~~(4) If the court incurs the costs of any special master appointed by the court in the case or of any contract personnel retained by the court to work on the case, the person or

Rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705 of the California Rules of Court would be amended, effective January 1, 2023, to read:

entity that applied for certification of the project or the project applicant must also pay, within 10 days of being ordered by the court, those incurred or estimated costs.

~~(3)~~(5) If the party fails to timely pay the fee or costs specified in this rule, the court may impose sanctions that the court finds appropriate after notifying the party and providing the party with an opportunity to pay the required fee or costs.

~~(4)~~(6) Any fee or cost paid under this rule is not recoverable.

Chapter 1. Review of California Environmental Quality Act Cases Involving Streamlined CEQA Projects

Rule 8.700. Definitions and application

(a) Definitions

As used in this chapter:

(1) A "streamlined CEQA project" means any project within the definitions stated in (2) through ~~(7)~~(8).

(2) An "environmental leadership development project" or "leadership project" means a project certified by the Governor under Public Resources Code sections 21182–21184.

(3) The "Sacramento entertainment and sports center project" or "Sacramento arena project" means an entertainment and sports center project as defined by Public Resources Code section 21168.6.6, for which the proponent provided notice of election to proceed under that statute described in section 21168.6.6(j)(1).

(4) An "Oakland sports and mixed-use project" or "Oakland ballpark project" means a project as defined in Public Resources Code section 21168.6.7 and certified by the Governor under that section.

(5) An "Inglewood arena project" means a project as defined in Public Resources Code section 21168.6.8 and certified by the Governor under that section.

(6) An "expanded capitol building annex project" means a state capitol building annex project, annex project–related work, or state office building project as defined by Public Resources Code section 21189.50.

Rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705 of the California Rules of Court would be amended, effective January 1, 2023, to read:

(7) An "Old Town Center transit and transportation facilities project" or "Old Town Center project" means a project as defined in Public Resources Code section 21189.70.

(8) An "environmental leadership transit project" means a project as defined in Public Resources Code section 21168.6.9.

(b) * * *

Rule 8.702. Appeals

(a) * * *

(b) Notice of appeal

(1) * * *

(2) *Contents of notice of appeal*

The notice of appeal must:

(A) State that the superior court judgment or order being appealed is governed by the rules in this chapter;

(B) Indicate whether the judgment or order pertains to a streamlined CEQA project; ~~and~~

(C) If the judgment or order being appealed pertains to an environmental leadership development project, an Oakland ballpark project, or an Inglewood arena project, provide notice that the person or entity that applied for certification or approval of the project as such a project must make the payments required by rule 8.705~~.~~; and

(D) If the judgment or order being appealed pertains to an environmental leadership transit project, provide notice that the project applicant must make the payments required by rule 8.705.

(c)–(e) * * *

(f) Briefing

Rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705 of the California Rules of Court would be amended, effective January 1, 2023, to read:

(1)–(3) * * *

(4) *Extensions of time to file briefs*

If the parties stipulate to extend the time to file a brief under rule 8.212(b), they are deemed to have agreed that the statutorily prescribed time for resolving the action may be extended by the number of days by which the parties stipulated to extend the time for filing the brief and, to that extent, to have waived any objection to noncompliance with the deadlines for completing review stated in Public Resources Code sections 21168.6.6–21168.6.~~8~~9, 21185, 21189.51, and 21189.70.3 for the duration of the stipulated extension.

(5) * * *

(g) * * *

Advisory Committee Comment

Subdivision (b). It is very important to note that the time period to file a notice of appeal under this rule is the same time period for filing most postjudgment motions in a case regarding the Sacramento arena project, and in a case regarding any other streamlined CEQA project, the deadline for filing a notice of appeal may be earlier than the deadline for filing a motion for a new trial, a motion for reconsideration, or a motion to vacate the judgment.

Rule 8.703. Writ proceedings

(a) * * *

(b) Petition

(1) * * *

(2) *Contents of petition*

In addition to any other applicable requirements, the petition must:

(A) State that the superior court judgment or order being challenged is governed by the rules in this chapter;

(B) Indicate whether the judgment or order pertains to a streamlined CEQA project; ~~and~~

Rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705 of the California Rules of Court would be amended, effective January 1, 2023, to read:

(C) If the judgment or order pertains to an environmental leadership development project, an Oakland ballpark project, or an Inglewood arena project, provide notice that the person or entity that applied for certification of the project as such a project must make the payments required by rule 8.705.; and

(D) If the judgment or order pertains to an environmental leadership transit project provide notice project applicant must make the payments required by rule 8.705.

Rule 8.705. Court of Appeal costs in certain streamlined CEQA projects

In fulfillment of the provisions in Public Resources Code sections 21168.6.7, 21168.6.8, 21168.6.9, and 21183 regarding payment of the Court of Appeal's costs with respect to cases concerning environmental leadership development, environmental leadership transit, Oakland ballpark, and Inglewood arena projects:

(1) Within 10 days after service of the notice of appeal or petition in a case concerning an environmental leadership development project, the person or entity that applied for certification of the project as an environmental leadership development project must pay a fee of $215,000 to the Court of Appeal.

(2) Within 10 days after service of the notice of appeal or petition in a case concerning an environmental leadership transit project, the project applicant must pay a fee of $215,000 to the Court of Appeal.

(2)(3) Within 10 days after service of the notice of appeal or petition in a case concerning an Oakland ballpark project or Inglewood arena project, the person or entity that applied for certification of the project as an Oakland ballpark project or Inglewood arena project must pay a fee of $140,000 to the Court of Appeal.

(3)(4) If the Court of Appeal incurs the costs of any special master appointed by the Court of Appeal in the case or of any contract personnel retained by the Court of Appeal to work on the case, the person or entity that applied for certification of the project or the project applicant ~~as a leadership project, an Oakland ballpark project, or an Inglewood arena project~~ must also pay, within 10 days of being ordered by the court, those incurred or estimated costs.

(4)(5) If the party fails to timely pay the fee or costs specified in this rule, the court may impose sanctions that the court finds appropriate after notifying the party and providing the party with an opportunity to pay the required fee or costs.

Rules 3.2200, 3.2220, 3.2221, 3.2223, 3.2240, 8.700, 8.702, 8.703, and 8.705 of the California Rules of Court would be amended, effective January 1, 2023, to read:

(~~5~~)(6) Any fee or cost paid under this rule is not a recoverable cost.

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
February 18, 2022

To
Members of the Rules Subcommittee of the Appellate Advisory Committee

From
Christy Simons
Attorney, Legal Services

Subject
New Right of Appeal from Orders Transferring a Minor from Juvenile Court to a Court of Criminal Jurisdiction

Action Requested
Please review

Deadline
February 22, 2022

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

Introduction

This is a joint project with the Family and Juvenile Law Advisory Committee to implement legislative changes described in the invitation to comment. This memo will focus on the appellate rules portion of the proposal. It will describe two different approaches to implementing the new right of appeal of a transfer order and will identify specific questions for the subcommittee's consideration. The draft invitation to comment includes only the minimal approach described herein, i.e., amending only rule 8.406. If the committee prefers the broader approach, staff will modify the ITC.

Discussion

In 2021, the legislature enacted section 801[1] to provide a right to an immediate appeal for youth subject to an order for transfer of jurisdiction from juvenile court to criminal court provided that the notice of appeal is filed within 30 days of the transfer order.[2] That legislation required the council to adopt rules of court to ensure that the youth is advised of the appellate rights, the record is promptly prepared and transmitted after a notice of appeal is filed, and adequate time requirements allow counsel and court personnel to comply with the objectives of the section. Under subdivision (c), "[t]he appeal shall have precedence in the court to which the appeal is taken and shall be determined as soon as practicable after the notice of appeal is filed." Subdivision (e) of section 801 states: "It is the intent of the Legislature that this section provides for an expedited review on the merits by the appellate court of an order transferring the minor from the juvenile court to a court of criminal jurisdiction."[3]

Amendments to rule 5.770 of the juvenile rules are being proposed to implement the requirements for the juvenile court. There are two potential approaches to amending the appellate rules.

Minimal approach

The requirement in section 801 that a notice of appeal of an order transferring the minor must be filed within 30 days is the only provision in the statute that requires a change in the appellate rules. Under a minimal approach, only appellate rule 8.406 governing the time to appeal would be amended. The normal time for filing a notice of appeal in a juvenile case is 60 days. Proposed amendments to the rule would add the 30-day requirement for appeals of transfer orders.

Expanded approach

The expanded approach includes the proposed amendments to rule 8.406, but goes further in providing shortened time frames for other aspects of an appeal. New rule 8.417 for appeals from transfer orders is based on rule 8.416 which provides expedited timing for appeals from terminations of parental rights. Of course, circumstances in cases involving termination of parental rights are different from those involving the transfer of a minor, something to bear in mind when considering whether some/all/any of the proposed provisions of this new rule are desirable.

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[1] Section 801 is available at: https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC&sectionNum=801.

[2] AB 624, Juveniles: transfer to court of criminal jurisdiction: appeals (Bauer-Kahan; Stats. 2021, ch. 195.)

[3] The statute governing transfer, section 707, is available at: https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=707.&lawCode=WIC.

Under new rule 8.417:

- (b)(2) requires specific language on the cover of the record;
- (c) adds additional items to the normal record on appeal;
- (d) includes the requirement that the record on appeal be prepared within 15 days of the filing of a notice of appeal, one of the new amendments to rule 5.770 approved by the Family and Juvenile Law Advisory Committee;
- (e) provides shorter time frames for augmenting or correcting the record;
- (f) requires that appellant's opening brief be filed within 30 days after the record is filed, rather than the normal 40 days;
- (g) allows the court to grant extensions of time only on an "exceptional showing of good cause;"
- (h) shortens the grace period following a party's failure to timely file a brief;
- (i) provides shortened time periods related to oral argument and submission.

In particular, the subcommittee should consider the possible limitations that would be imposed on the Court of Appeal under subdivision (i). Circumstances in cases involving termination of parental rights are different from those involving the transfer of a minor. Some or all of these restricted time frames may not be necessary or helpful.

Adding new rule 8.417 would require that a number of other rules be amended to include cross-references. These other rules (rules 8.50, 8.60, 8.63, 8.409, and 8.412) are included in the rules document in these materials.

In addition, the rules document includes a proposed new advisory committee comment to rule 8.404. The rule provides "The court must not stay an order or judgment pending an appeal unless suitable provision is made for the maintenance, care, and custody of the child." The new advisory committee comment is intended to clarify that this rule has no bearing on a superior court's order under section 801 (and rule 5.770(e)(2)) staying the criminal court proceedings during the pendency of an appeal of an order transferring the minor from juvenile court to a court of criminal jurisdiction. The subcommittee should consider whether this is a helpful clarification.

Subcommittee Task

The subcommittee should review the draft invitation to comment and draft rules and be prepared to discuss the proposal. The subcommittee may:

- Approve the proposal as presented and recommend to the full committee that it seek approval from RUPRO to circulate the proposal for public comment;
- Modify the proposal and recommend to the full committee that it seek approval from RUPRO to circulate the modified proposal for public comment;
- Recommend to the full committee that it reject the proposal; or
- Ask staff or committee members for further information/analysis.

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR-__

Title
Appellate Procedure and Juvenile Law: Transfer of Jurisdiction to Criminal Court

Proposed Rules, Forms, Standards, or Statutes
Adopt Cal. Rules of Court, rule 8.417; amend rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, and 8.412; and revise form JV-710

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

Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

Action Requested
Review and submit comments by May 13, 2022

Proposed Effective Date
January 1, 2023

Contact
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Executive Summary and Origin

In 2018 the legislature passed Senate Bill 1391 (Lara; Stats. 2018, ch. 1012) which amended Welfare and Institutions Code section 707 to provide that a child must be at least 16 years of age to be considered for transfer of jurisdiction to criminal court unless the individual for whom transfer is sought was 14 or 15 at the time of the offense, the offense is listed in section 707(b), and the individual was not apprehended until after the end of juvenile court jurisdiction. The Judicial Council took action to implement these age-related changes in the jurisdiction of the juvenile court in 2019, but revoked that action when a split of authority within the California Courts of Appeal arose as to whether these changes were enacted in a constitutional manner. That split was resolved by the California Supreme Court in 2021 in favor of the constitutionality of the legislation. Additionally, legislation was enacted in 2021 to provide an expedited review on the merits from an order granting a motion to transfer. The Appellate Advisory Committee and the Family and Juvenile Law Advisory Committee propose adopting a new rule of court, amending several other rules, and revising one form pertaining to the transfer-of-jurisdiction process and juvenile appeals to reflect both of these legislative changes to the transfer statutes.

Background

On November 8, 2016, the people of the State of California enacted Proposition 57, the Public Safety and Rehabilitation Act of 2016, effective November 9, 2016. Proposition 57 amended existing law to require that the juvenile court consider a motion by the district attorney or other appropriate prosecuting officer to transfer the minor to the jurisdiction of the criminal court before a juvenile can be prosecuted in a criminal court. To that end, the proposition repealed Welfare and Institutions Code section 602(b),[1] which had provided that certain serious and violent felonies were to be prosecuted in criminal court, as well as section 707(d), which had authorized the district attorney to directly file an accusatory pleading involving certain minors in criminal court. In addition, the proposition eliminated a set of presumptions that applied in determining whether a case should be transferred and instead provided the court with broad discretion to determine whether the child should be transferred to a court of criminal jurisdiction, taking into account numerous factors and criteria.

SB 1391 further amended these provisions to limit the transfer of cases involving offenders ages 14 and 15 to those in which the alleged offender is not apprehended until after reaching adulthood and the offense is one listed in section 707(b). On February 25, 2021, the California Supreme Court resolved a split of opinion within the Courts of Appeal and upheld the constitutionality of SB 1391 in *O.G. v. Superior Court*, 11 Cal.5th 82, making clear that the limitations on the age of youth who could be transferred to criminal court jurisdiction enacted by SB 1391 were a permissible revision to the provisions in Proposition 57.

In 2021, the legislature enacted section 801 to provide a right to an immediate appeal for youth subject to an order for transfer of jurisdiction from juvenile court to criminal court provided that the notice of appeal is filed within 30 days of the transfer order.[2] That legislation required the council to adopt rules of court to ensure that the youth is advised of the appellate rights, the record is promptly prepared and transmitted after a notice of appeal is filed, and adequate time requirements allow counsel and court personnel to comply with the objectives of the section. Subdivision (e) of section 801 states: "It is the intent of the Legislature that this section provides for an expedited review on the merits by the appellate court of an order transferring the minor from the juvenile court to a court of criminal jurisdiction."

Prior Circulation

The Family and Juvenile Law Advisory Committee circulated a proposal for comment in 2019 to implement the provisions of SB 1391and a revised version of that proposal was adopted by the Judicial Council on September 24, 2019 with an effective date of January 2, 2020. That action was then revoked on November 25, 2019 after the Court of Appeal, Second Appellate District filed an opinion on September 30, 2019, finding that the provisions of SB 1391 were not consistent with the voters' intent in enacting Prop. 57 and thus holding that the amendments to

[1] Hereinafter, all statutory references are to the Welfare and Institutions Code unless otherwise specified.

[2] AB 624, Juveniles: transfer to court of criminal jurisdiction: appeals (Bauer-Kahan; Stats. 2021, ch. 195.)

section 707 were an unconstitutional exercise of legislative authority.[3] The proposal circulated here includes the changes approved by the council in 2019 with minor style revisions, as well as new changes to implement section 801, the new appellate provisions on transfer.

The Proposal

To implement the new jurisdictional provisions of SB 1391, the transfer rules and form would be modified. In addition, rules 5.770 and 8.604 would be amended to implement the appellate provisions of section 801.

Transfer rules 5.766, 5.768, and 5.770

The current rules of court governing the process for transfer of jurisdiction from juvenile to criminal court provide that transfer can occur when the subject of the petition is age 14 or 15 and is alleged to have committed an offense listed in section 707(b) or is 16 years of age or older and is alleged to have committed a felony. These rules would be amended to provide that a transfer petition may be considered only for those who were 14 or 15 years of age at the time of the offense when the individual who is the subject of the petition was apprehended after the end of juvenile court jurisdiction. In addition, the legislative changes to section 707 require that code references in the rules be updated to reflect the new structure of the statute. Finally, all three rules are proposed to be amended to use the term youth instead of child consistent with rule 5.502.

Transfer order form JV-710

Order to Transfer Juvenile to Criminal Court Jurisdiction (form JV-710), for optional use, would be revised to update item three to include the limitation on transferring individuals who were age 14 or 15 at the time of the offense to those situations in which apprehension of the subject of the petition occurred after the end of juvenile court jurisdiction, and to update item four to renumber the statutory reference from 707(a)(2) to 707(a)(3), consistent with the changes enacted by SB 1391. In addition, the form is proposed to be revised to use the term youth instead of child.

Amendments to rules 5.770 and 8.406 to implement new appellate rights

Section 801 provides youth subject to a transfer of jurisdiction order with the right to an immediate appeal if a notice of appeal is filed within 30 days of the transfer order and requires that the juvenile court grant a stay of the criminal court proceedings upon request of the youth if an appeal is filed. In addition, it requires the court to advise the youth of their appellate rights, the steps and time for taking an appeal, and the right to appointed counsel. Finally, it requires that the court prepare the record and transmit it to the court of appeal in a timely manner so that the appeal can be heard expeditiously. The committees propose amending rule 5.770 to reflect these new requirements and provisions and rule 8.406 on the timing of juvenile appeals to reflect the different timing requirements for these appeals.

[3] *O.G. v. Superior Court*, 40 Cal.App.5th 626 (2019).

Alternatives Considered

The Family and Juvenile Law Advisory Committee considered moving the prior transfer proposal forward without recirculating it for comment, but determined that it would be preferable, in light of AB 624, to amend these rules once and at the same time to update the rules to use the term "youth" consistent with the council's current practice. The committees did not consider the alternative of proposing no rule amendments because section 801 creates a new right of appeal and requires the Judicial Council to adopt implementing rules.

Fiscal and Operational Impacts

The restrictions on the use of transfer to criminal court for juvenile offenders ages 14 and 15 will result in the filing of fewer transfer petitions for these youth and, thus, fewer hearings on those petitions. These impacts are the result of legislative changes. Similarly, the new appellate rights in section 801 will likely result in more appeals being filed in the Courts of Appeal, also the result of the legislative change rather than the provisions of this proposal.

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 the proposed rules on appellate review of transfer orders specify what should be included in the record on appeal and if so, what should be specified?
- Do juvenile referees hear these motions in a capacity other than as a temporary judge such that the rules need to include timing for review of their orders by a superior court judge or can those provisions be removed from the rules?

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 four 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 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, 8.412, and 8.417, at pages 5–9
2. Form JV-710, at page 10
3. Link A: Senate Bill 1391, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB1391*

4. Link B: Assembly Bill 624, *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB624*

Rule 8.417 would be adopted, and rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, and 8.412 of the California Rules of Court would be amended, effective January 1, 2023, to read:

Rule 5.766. General provisions

(a) Hearing on transfer of jurisdiction to criminal court (§ 707)

A ~~child~~ youth who is the subject of a petition under section 602 and who was 14 years or older at the time of the alleged felony offense may be considered for prosecution under the general law in a court of criminal jurisdiction. The district attorney or other appropriate prosecuting officer may make a motion to transfer the ~~child~~ youth from juvenile court to a court of criminal jurisdiction, in one of the following circumstances:

(1) The ~~child~~ individual was 14 or 15 years ~~or older~~ of age at the time of the alleged offense listed in section 707(b) and was not apprehended before the end of juvenile court jurisdiction.

(2) The ~~child~~ youth was 16 years or older at the time of the alleged felony offense.

(b) * * *

(c) Prima facie showing

On the ~~child~~ youth's motion, the court must determine whether a prima facie showing has been made that the offense alleged is an offense that makes the ~~child~~ youth subject to transfer as set forth in subdivision (a).

(d) Time of transfer hearing—rules 5.774, 5.776

The transfer of jurisdiction hearing must be held and the court must rule on ~~the~~ the request to transfer jurisdiction before the jurisdiction hearing begins. Absent a continuance under rule 5.776 or the ~~child~~ youth's waiver of the statutory time period to commence the jurisdiction hearing, the jurisdiction hearing must begin within the time limits under rule 5.774.

Rule 5.768. Report of probation officer

(a) Contents of report (§ 707)

The probation officer must prepare and submit to the court a report on the behavioral patterns and social history of the ~~child~~ youth being considered. The report must include information relevant to the determination of whether the ~~child~~

Rule 8.417 would be adopted, and rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, and 8.412 of the California Rules of Court would be amended, effective January 1, 2023, to read:

youth should be retained under the jurisdiction of the juvenile court or transferred to the jurisdiction of the criminal court, including information regarding all of the criteria in section 707(a)~~(2)~~(3). The report must also include any written or oral statement offered by the victim pursuant to section 656.2.

(b) Recommendation of probation officer (§§ 281, 707)

If the court, under section 281, orders the probation officer to include a recommendation, the probation officer must make a recommendation to the court as to whether the ~~child~~ youth should be retained under the jurisdiction of the juvenile court or transferred to the jurisdiction of the criminal court.

(c) Copies furnished

The probation officer's report on the behavioral patterns and social history of the ~~child~~ youth must be furnished to the ~~child~~ youth, the parent or guardian, and all counsel at least two court days before commencement of the hearing on the motion. A continuance of at least 24 hours must be granted on the request of any party who has not been furnished the probation officer's report in accordance with this rule.

Rule 5.770. Conduct of transfer of jurisdiction hearing under section 707

(a) * * *

(b) Criteria to consider (§ 707)

Following receipt of the probation officer's report and any other relevant evidence, the court may order that the ~~child~~ youth be transferred to the jurisdiction of the criminal court if the court finds:

(1) The ~~child~~ youth was 16 years or older at the time of any alleged felony offense, or the ~~child~~ individual was 14 or 15 years of age at the time of an alleged felony offense listed in section 707(b) and was not apprehended prior to the end of juvenile court jurisdiction; and

(2) The ~~child~~ youth should be transferred to the jurisdiction of the criminal court based on an evaluation of all of the criteria in section 707(a)~~(2)~~(3) as provided in that section. The court must document on the record the basis for its decision, detailing how it weighed the evidence and identifying the specific factors that persuaded the court to reach its decision.

Rule 8.417 would be adopted, and rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, and 8.412 of the California Rules of Court would be amended, effective January 1, 2023, to read:

(d) Procedure following findings

(1) If the court finds the ~~child~~ youth should be retained within the jurisdiction of the juvenile court, the court must proceed to jurisdiction hearing under rule 5.774.

(2) If the court finds the ~~child~~ youth should be transferred to the jurisdiction of the criminal court, the court must make orders under section 707.1 relating to bail and to the appropriate facility for the custody of the ~~child~~ youth, or release on own recognizance pending prosecution. The court must set a date for the ~~child~~ youth to appear in criminal court and dismiss the petition without prejudice upon the date of that appearance.

(3) When the court rules on the request to transfer the ~~child~~ youth to the jurisdiction of the criminal court, the court must advise all parties present ~~that~~ regarding appellate review of the order ~~must be by petition for extraordinary writ~~ as provided in subdivision (g) of this rule. The advisement may be given orally or in writing when the court makes the ruling. The advisement must include the time for filing the petition for extraordinary writ or the notice of appeal as set forth in subdivision (g) of this rule. The court must advise the youth of the right to appeal, of the necessary steps and time for taking an appeal, and of the right to the appointment of counsel if the youth is unable to retain counsel.

(e) Continuance ~~to seek~~ or stay pending review

(1) If the prosecuting attorney informs the court orally or in writing that a review of the court's decision not to transfer jurisdiction to the criminal court will be sought and requests a continuance of the jurisdiction hearing, the court must grant a continuance for not less than two judicial days to allow time within which to obtain a stay of further proceedings from the reviewing judge or appellate court.

(2) If the youth informs the court orally or in writing that a notice of appeal of the court's decision to transfer jurisdiction to the criminal court will be filed and requests a stay, the court must issue a stay of the criminal court proceedings until a final determination of the appeal. The court retains jurisdiction to modify or lift the stay upon request of the youth.

Rule 8.417 would be adopted, and rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, and 8.412 of the California Rules of Court would be amended, effective January 1, 2023, to read:

(f) Subsequent role of judicial officer

Unless the ~~child~~ youth objects, the judicial officer who has conducted a hearing on a motion to transfer jurisdiction may participate in any subsequent contested jurisdiction hearing relating to the same offense.

(g) Review of determination on a motion to transfer jurisdiction to criminal court

(1) Except as provided in (2), an ~~An~~ order granting or denying a motion to transfer jurisdiction of a ~~child~~ youth to the criminal court is not an appealable order. Appellate review of the order is by petition for extraordinary writ. A notice of intent to file a writ petition for review must be filed no later than 20 days after the order on the transfer motion. ~~Any petition for review of a judge's order to transfer jurisdiction of the child to the criminal court, or denying an application for rehearing of the referee's determination to transfer jurisdiction of the child to the criminal court, must be filed no later than 20 days after the child's first arraignment on an accusatory pleading based on the allegations that led to the transfer of jurisdiction order.~~

(2) An order granting a motion to transfer jurisdiction of a youth to the criminal court is an appealable order subject to immediate review if a notice of appeal is filed within 30 days of the order transferring jurisdiction or 30 days after the referee's order becomes final under rule 5.540(c) or after the denial of an application for rehearing of the referee's decision to transfer jurisdiction of the youth to the criminal court. If a notice of appeal is timely filed, the court must prepare and submit the record to the court of appeal within 15 court days.

(h) ***

Rule 8.50. Applications

(a) * * *

(b) Contents

The application must state facts showing good cause–or making an exceptional showing of good cause, when required by these rules–for granting the application and must identify any previous application filed by any party.

(c) * * *

Rule 8.417 would be adopted, and rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, and 8.412 of the California Rules of Court would be amended, effective January 1, 2023, to read:

Advisory Committee Comment

Subdivision (a). * * *

Subdivision (b). An exceptional showing of good cause is required in applications in certain juvenile proceedings under rules 8.416, 8.417, 8.450, 8.452, and 8.454.

Rule 8.60. Extending time

(a) * * *

(b) Extending time

Except as these rules provide otherwise, for good cause–or on an exceptional showing of good cause, when required by these rules–the Chief Justice or presiding justice may extend the time to do any act required or permitted under these rules.

(c) Application for extension

(1) * * *

(2) The application must state:

(A)(C) * * *

(D) Good cause–or an exceptional showing of good cause, when required by these rules–for granting the extension, consistent with the factors in rule 8.63(b).

(d)(f) * * *

Advisory Committee Comment

Subdivisions(b) and (c): An exceptional showing of good cause is required in applications in certain juvenile proceedings under rules 8.416, 8.417, 8.450, 8.452, and 8.454.

Rule 8.63. Policies and factors governing extensions of time

(a) Policies

Rule 8.417 would be adopted, and rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, and 8.412 of the California Rules of Court would be amended, effective January 1, 2023, to read:

(1) The time limits prescribed by these rules should generally be met to ensure expeditious conduct of appellate business and public confidence in the efficient administration of appellate justice.

(2) The effective assistance of counsel to which a party is entitled includes adequate time for counsel to prepare briefs or other documents that fully advance the party's interests. Adequate time also allows the preparation of accurate, clear, concise, and complete submissions that assist the courts.

(3) For a variety of legitimate reasons, counsel may not always be able to prepare briefs or other documents within the time specified in the rules of court. To balance the competing policies stated in (1) and (2), applications to extend time in the reviewing courts must demonstrate good cause–or an exceptional showing of good cause, when required by these rules–under (b). If good cause is shown, the court must extend the time.

(b) Factors considered

In determining good cause–or an exceptional showing of good cause, when required by these rules–the court must consider the following factors when applicable:

(1)(11) * * *

Advisory Committee Comment

An exceptional showing of good cause is required in applications in certain juvenile proceedings under rules 8.416, 8.417, 8.450, 8.452, and 8.454.

Rule 8.404. Stay pending appeal[SC1]

The court must not stay an order or judgment pending an appeal unless suitable provision is made for the maintenance, care, and custody of the child.

Advisory Committee Comment

This rule does not preclude a court's order under rule 5.770(e)(2) staying the criminal court proceedings during the pendency of an appeal of an order transferring the minor from juvenile court to a court of criminal jurisdiction.

Rule 8.417 would be adopted, and rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, and 8.412 of the California Rules of Court would be amended, effective January 1, 2023, to read:

Rule 8.406. Time to appeal

(a) Normal time

(2) In matters heard by a referee not acting as a temporary judge, a notice of appeal must be filed within 60 days after the referee's order becomes final under rule 5.540(c).

(3) When an application for rehearing of an order of a referee not acting as a temporary judge is denied under rule 5.542, a notice of appeal from the referee's order must be filed within 60 days after that order is served under rule 5.538(b)(3) or 30 days after entry of the order denying rehearing, whichever is later.

(A) Except as provided in (B) and (C), a notice of appeal must be filed within 30 days of the making of the order.

(B) If the matter is heard by a referee not acting as a temporary judge, a notice of appeal must be filed within 30 days after the referee's order becomes final under rule 5.540(c).

(C) When an application for rehearing of an order of a referee not acting as a temporary judge is denied under rule 5.542, a notice of appeal from the referee's order must be filed within 30 days after entry of the order denying rehearing.

(b)(d) * * *

Rule 8.409. Preparing and sending the record

(a) Application

This rule applies to appeals in juvenile cases except cases governed by rules 8.416 and 8.417.

Rule 8.417 would be adopted, and rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, and 8.412 of the California Rules of Court would be amended, effective January 1, 2023, to read:

(b) * * *

(c) Preparing and certifying the transcripts

Except in cases governed by rule 8.417, ~~W~~within 20 days after the notice of appeal is filed:

(1) The clerk must prepare and certify as correct an original of the clerk's transcript and one copy each for the appellant, the respondent, the child's Indian tribe if the tribe has intervened, and the child if the child is represented by counsel on appeal or if a recommendation has been made to the Court of Appeal for appointment of counsel for the child under rule 8.403(b)(2) and that recommendation is either pending with or has been approved by the Court of Appeal but counsel has not yet been appointed; and

(2) The reporter must prepare, certify as correct, and deliver to the clerk an original of the reporter's transcript and the same number of copies as (1) requires of the clerk's transcript.

(d)(e) * * *

Advisory Committee Comment

Subdivision (a). Subdivision (a) calls litigants' attention to the fact that ~~a~~ different rules ~~(rule 8.416)~~ governs the record in appeals from judgments or orders terminating parental rights and in dependency appeals in certain counties (rule 8.416), and in appeals from orders granting a motion to transfer a minor from juvenile court to a court of criminal jurisdiction (rule 8.417).

Subdivision (b). * * *

Subdivision (c). Subdivision (c) calls litigants' attention to the fact that ~~a~~ different rule (rule 8.417) governs the record in appeals from orders granting a motion to transfer a minor from juvenile court to a court of criminal jurisdiction).

Subdivision (e). * * *

Rule 8.412. Briefs by parties and amici curiae

(a) * * *

Rule 8.417 would be adopted, and rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, and 8.412 of the California Rules of Court would be amended, effective January 1, 2023, to read:

(b) Time to file

(1) Except in appeals governed by rule 8.416 and 8.417, the appellant must serve and file the appellant's opening brief within 40 days after the record is filed in the reviewing court.

(2) The respondent must serve and file the respondent's brief within 30 days after the appellant's opening brief is filed.

(3) The appellant must serve and file any reply brief within 20 days after the respondent's brief is filed.

(4) In dependency cases in which the child is not an appellant but has appellate counsel, the child must serve and file any brief within 10 days after the respondent's brief is filed.

(5) Rule 8.220 applies if a party fails to timely file an appellant's opening brief or a respondent's brief, but the period specified in the notice required by that rule must be 30 days.

(c) Extensions of time

The superior court may not order any extensions of time to file briefs. Except in appeals governed by rules 8.416 and 8.417, the reviewing court may order extensions of time for good cause.

(d) Failure to file a brief

(1) Except in appeals governed by rules 8.416 and 8.417, if a party fails to timely file an appellant's opening brief or a respondent's brief, the reviewing court clerk must promptly notify the party's counsel or the party, if not represented, in writing that the brief must be filed within 30 days after the notice is sent and that failure to comply may result in one of the following sanctions:

(A)(B) * * *

(2)(3) * * *

(e) * * *

Advisory Committee Comment

Rule 8.417 would be adopted, and rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, and 8.412 of the California Rules of Court would be amended, effective January 1, 2023, to read:

Subdivision (b). Subdivision (b)(1) calls litigants' attention to the fact that ~~a~~ different rules ~~(rule 8.416(e))~~ govern~~s~~ the time to file an appellant's opening brief in appeals from judgments or orders terminating parental rights and in dependency appeals in certain counties (rule 8.416(e)), and in appeals from orders granting a motion to transfer a minor from juvenile court to a court of criminal jurisdiction (rule 8.417(f)).

Subdivision (c). Subdivision (c) calls litigants' attention to the fact that ~~a~~ different rule~~s~~ ~~(rule 8.416(f))~~ govern~~s~~ the showing required for extensions of time to file briefs in appeals from judgments or orders terminating parental rights and in dependency appeals in certain counties (rule 8.416(f)), and in appeals from orders granting a motion to transfer a minor from juvenile court to a court of criminal jurisdiction (rule 8.417(g)).

Subdivision (d). Subdivision (d) calls litigants' attention to the fact that a different rule governs the time period specified in the notice of failure to timely file an appellant's opening brief or a respondent's brief in appeals from orders granting a motion to transfer a minor from juvenile court to a court of criminal jurisdiction (rule 8.417(h)).

Rule 8.417. Appeals from orders transferring a minor from juvenile court to a court of criminal jurisdiction[SC2]

(a) Application

This rule governs appeals from orders of the juvenile court granting a motion to transfer a minor from juvenile court to a court of criminal jurisdiction.

(b) Form of record

(1) The clerk's and reporter's transcripts must comply with rules 8.45–8.47, relating to sealed and confidential records, and, except as provided in (2), with rule 8.144.

(2) The cover of the record must prominently display the title "Appeal From Order Transferring a Minor from Juvenile Court to a Court of Criminal Jurisdiction Under Welfare and Institutions Code Section 801."

(c) Record on appeal

(1) In addition to the items listed in rule 8.407(a), the clerk's transcript must contain[SC3]:

Rule 8.417 would be adopted, and rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, and 8.412 of the California Rules of Court would be amended, effective January 1, 2023, to read:

(A) Any report by the probation officer on the behavioral patterns and social history of the minor, including any oral or written statement offered by the victim under Welfare and Institutions Code section 656.2;

(B) Any other probation report or document filed with the court on the petition under Welfare and Institutions Code section 602; and

(C) Any document in written or electronic form submitted to the court in connection with the prima facie showing under rule 5.766(c) or the motion to transfer jurisdiction.

(2) In addition to the items listed in rule 8.407(b), any reporter's transcript must contain the oral proceedings at any hearings on the prima facie showing under rule 5.766(c) and the motion to transfer jurisdiction.

(d) Preparing, certifying, and sending the record

(1) Within 15 court days[SC4] after the notice of appeal is filed:

(A) The clerk must prepare and certify as correct an original of the clerk's transcript and one copy each for the appellant, the respondent, and the district appellate project; and

(B) The reporter must prepare, certify as correct, and deliver to the clerk an original of the reporter's transcript and the same number of copies as (A) requires of the clerk's transcript.

(2) When the clerk's and reporter's transcripts are certified as correct, the clerk must immediately send:

(A) The original transcripts to the reviewing court by the most expeditious method, noting the sending date on each original; and

(B) One copy of each transcript to the district appellate project and to the appellate counsel for the following, if they have appellate counsel, by any method as fast as United States Postal Service express mail:

(i) The appellant; and

(ii) The respondent.

Rule 8.417 would be adopted, and rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, and 8.412 of the California Rules of Court would be amended, effective January 1, 2023, to read:

(3) If appellate counsel has not yet been retained or appointed for the minor, when the transcripts are certified as correct, the clerk must send that counsel's copies of the transcripts to the district appellate project.

(e) Augmenting or correcting the record

(1) Except as provided in (2) and (3), rule 8.410 governs any augmentation or correction of the record.

(2) An appellant must serve and file any motion for augmentation or correction within 15 days after receiving the record. A respondent must serve and file any such motion within 15 days after the appellant's opening brief is filed.

(3) The clerk and the reporter must prepare any supplemental transcripts within 20 days, giving them the highest priority.

(4) The clerk must certify and send any supplemental transcripts as required by (d).

(f) Time to file briefs

(1) The appellant must serve and file the appellant's opening brief within 30 days after the record is filed in the reviewing court.

(2) Rule 8.412(b) governs the time for filing other briefs.

(g) Extensions of time

The superior court may not order any extensions of time to prepare the record or to file briefs; the reviewing court may order extensions of time but must require an exceptional showing of good cause.

(h) Failure to file a brief

Rule 8.412(d) applies if a party fails to timely file an appellant's opening brief or a respondent's brief, but the period specified in the notice required by that rule must be 15 days.

(i) Oral argument and submission of the cause[SC5]

Rule 8.417 would be adopted, and rules 5.766, 5.768, 5.770, 8.50, 8.60, 8.63, 8.406, 8.409, and 8.412 of the California Rules of Court would be amended, effective January 1, 2023, to read:

(1) Unless the reviewing court orders otherwise, counsel must serve and file any request for oral argument no later than 15 days after the appellant's reply brief is filed or due to be filed. Failure to file a timely request will be deemed a waiver.

(2) The court must hear oral argument within 60 days after the appellant's last reply brief is filed or due to be filed, unless the court extends the time for good cause or counsel waive argument.

(3) If counsel waive argument, the cause is deemed submitted no later than 60 days after the appellant's reply brief is filed or due to be filed.

Advisory Committee Comment

Subdivision (d). Under rule 8.71(c), the superior court clerk may send the record to the reviewing court in electronic form.

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
February 16, 2022

To
Members of the Rules Subcommittee of the Appellate Advisory Committee

From
Christy Simons
Attorney, Legal Services

Subject
Proposal to extend the retention period for reporters' transcripts in appeals affirming a felony conviction

Action Requested
Please review

Deadline
February 22, 2022

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

Introduction

As you may recall, the committee circulated a proposal in spring 2020 to amend rule 10.1028. The proposed changes would have conformed the rule to changes to Code of Civil Procedure section 271(a)[1] and extended the time for the Court of Appeal to retain reporters' transcripts in

[1] All further statutory references are to the Code of Civil Procedure. Section 271 provides:

(a) An official reporter or official reporter pro tempore shall deliver a transcript in electronic form, in compliance with the California Rules of Court, to any court, party, or person entitled to the transcript, unless any of the following apply:

(1) The party or person entitled to the transcript requests the reporter's transcript in paper form.

(2) Prior to January 1, 2023, the court lacks the technical ability to use or store a transcript in electronic form pursuant to this section and provides advance notice of this fact to the official reporter or official reporter pro tempore.

cases affirming a felony conviction. The proposal received mostly positive comments, but a court expressed concerns about storing these records for many more years. The committee withdrew the proposal to further consider implementation and cost issues. A draft revised proposal is provided for your review.

Discussion

The proposed amendments to conform the rule to changes to section 271(a) are not controversial. They are the same as originally proposed and will not be further discussed in this memo.

The original proposed extension of the retention period for reporters' transcripts in cases affirming a felony conviction from 20 to 100 years generated some strong reactions in the courts. There was concern that 100 years was an unreasonably long period of time and that the cost of storing records for all those additional years would be a hardship for the courts. The committee was urged to reconsider a tiered system under which reporters' transcripts for different types of crimes and/or different sentences would have different retention times.

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(3) Prior to January 1, 2023, the official reporter or official reporter pro tempore lacks the technical ability to deliver a transcript in electronic form pursuant to this section and provides advance notice of this fact to the court, party, or person entitled to the transcript.

(b) If a paper transcript is delivered in lieu of an electronic transcript described in subdivision (a), within 120 days of the official reporter or official reporter pro tempore filing or delivering the paper transcript, the official reporter or official reporter pro tempore shall provide, upon request, a copy of the original transcript in full text-searchable portable document format (PDF) if the proceedings were produced with computer-aided transcription equipment. The copy of the original transcript in full text-searchable PDF format shall not be deemed to be an original transcript.

(c) Nothing in this section changes any requirement set forth in Section 69950 or 69954 of the Government Code, regardless of whether a transcript is delivered in electronic or paper form.

(d) Except as provided in subdivision (b), an electronic transcript delivered in accordance with this section shall be deemed to be an original transcript for all purposes, including any obligation of an attorney to maintain or deliver a file to a client.

(e) An electronic transcript shall comply with any format requirement imposed pursuant to subdivision (a). However, an official reporter or official reporter pro tempore shall not be required to use a specific vendor, technology, or software to comply with this section, unless the official reporter or official reporter pro tempore agrees with the court, party, or person entitled to the transcript to use a specific vendor, technology, or software. Absent that agreement, an official reporter or official reporter pro tempore may select the vendor, technology, and software to comply with this section and the California Rules of Court. In adopting transcript format requirements for the California Rules of Court, consideration shall be given on a technology-neutral basis to the availability of relevant vendors of transcript products, technologies, and software.

(f) After January 1, 2023, if new or updated rule of court format requirements for electronic transcripts necessitate a significant change in equipment or software owned by official reporters or official reporters pro tempore, the official reporters and official reporters pro tempore shall be given no less than one year to comply with the format requirements. If the change is necessary to address a security issue, then a reasonable time shall be given to comply with the new format requirements.

In discussing the issues recently with the clerk/executive officers of the Courts of Appeal, there was strong support for a single retention period. It was felt that different retention times would be complicated to administer, particularly as to paper records. In addition, basing a retention schedule on the seriousness of the crime or the length of the sentence might not be the best way to ensure that a defendant who could benefit from a future change in the law would be able to access the reporter's transcript in their case.

With respect to cost, the clerk/executive officers indicated that the appellate courts are now dealing with many more records in electronic form, which are less costly to store, and that this trend will continue. In addition, there was discussion regarding digitization of paper records. Conversion of paper records to electronic format as new matters are filed is happening frequently. Conversion of paper that is already in storage would require funding, but the group was interested in prioritizing and further investigation this option.

The committee received two other comments on the original proposal. One, from the California Court Reporters Association, suggested changing references in the rule to "original" transcripts and "copies" to "certified" transcripts, which is how court reporters are labeling electronic reporters' transcripts. Staff notes that section 271 refers to originals and copies. I've included a question on this point in the draft ITC. Subcommittee members should consider whether this question should be included or whether a different question would be more likely to garner helpful feedback.

The other comment concerned conversion of paper records to electronic formatthat there be safeguards in place to ensure that the electronic versions are correct, complete, and accessible before hard copies are destroyed. Procedures for the conversion of records are beyond the scope of this project.

Subcommittee's Task

The subcommittee's task is to review the draft invitation to comment and the draft rule and provide feedback. The subcommittee may choose to:

- Approve the proposal as presented and recommend to the full committee that it seek approval from RUPRO to circulate the proposal for public comment;
- Modify the proposal and recommend to the full committee that it seek approval from RUPRO to circulate the modified proposal for public comment;
- Recommend to the full committee that it reject the proposal; or
- Ask staff or committee members for further information/analysis.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR22-__

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

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

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

Action Requested
Review and submit comments by May 13, 2022

Proposed Effective Date
January 2, 2023

Contact
Christy Simons, Attorney
415-865-7694
christy.simons@jud.ca.gov

Executive Summary and Origin

To better align the length of time reporters' transcripts must be kept with the length of time they may be needed and to conform to a recent statutory change, the Appellate Advisory Committee proposes amending the rule regarding retention of Court of Appeal records. This proposal would extend the time the Court of Appeal must keep the original or an electronic copy of the reporter's transcript in cases affirming a felony conviction from 20 years to 75 years. The rule's current 20-year retention requirement does not account for longer sentences or changes in felony sentencing laws. In addition, 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 the rule that permits the court to keep an electronic copy in lieu of an original paper reporter's transcript should be revised. This proposal originated with suggestions from a clerk/executive officer of a Court of Appeal and an attorney at the Supreme Court.

Background

Rule 10.1028 was originally adopted as rule 55 in 1975. It was renumbered as rule 70 effective January 1, 2005, and renumbered again as rule 10.1028 in 2007. Its provisions have been amended over the years, but none of those changes has bearing on this proposal. The 20-year retention time for reporters' transcripts in criminal cases has not changed since adoption.

Prior Circulation

In spring 2020, the committee circulated for public comment a similar proposal that would have extended the retention period from 20 to 100 years. The committee received eight comments on

the proposal. Four commenters agreed with the proposal; three other commenters agreed with the proposal if modified. One commenter submitted positive feedback but did not state a position.

In support of the proposed 100-year retention schedule, a bar association 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." An appellate criminal defense organization stated, "One hundred years ensures new laws can be fairly applied to anyone affected." Regarding cost, a superior court noted that keeping electronic versions of reporters' transcripts rather than hard copies would save the cost of physical storage space.

In suggesting that the proposal be modified, a Court of Appeal expressed concerns about the practicality and cost of extending the retention time to 100 years for all felonies. The court noted that it is a minority of cases in which the reporter's transcript may be needed beyond 20 years and recommended that the committee reconsider the alternative of a tiered retention schedule in which the length of retention would be based on the length of the sentence. The cost concerns were based on the increased cost of longer storage of paper transcripts.

In other comments, a court reporters association suggested modifying the text of the rule to reflect court reporters' current practice of marking electronic reporters' transcripts "certified" rather than "original" and "copy." This invitation to comment includes a question regarding this suggestion. Two other commenters 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.

In light of concerns about the length of the proposed retention time and cost, the committee withdrew the proposal to further consider these issues.

The Proposal

This revised proposal is intended to achieve the goals of improving access to justice for defendants who may need to obtain the reporter's transcript in their case more than 20 years after the conviction was upheld and conforming the rule to Code of Civil Procedure section 271(a) which no longer requires that the original transcript be in paper format.

Time to keep reporters' transcripts

Rule 10.1028 governs the preservation and destruction of Court of Appeal 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 20-year retention period is clearly 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, and reporter's transcripts may be important to the issues raised. In addition, changes in felony sentencing laws, such as Proposition 47,[1] 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 understands from the California Department of Justice, which has a longer retention schedule for reporter's transcripts, that litigants frequently request copies of reporters' transcripts in cases in which a criminal conviction was affirmed more than 20 years ago.

Having considered the issues raised in previous comments, the committee proposes adding a provision to rule 10.1028(d) to extend the time for keeping the reporter's transcript in cases affirming a felony conviction from 20 years to 75 years. 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 75 years after the decision becomes final."

This single retention time of 75 years would make transcripts available for the lifetime of most defendants and reduce the costs of the original proposal. The cost of storage, particularly of paper records, is still an area of concern, but the committee understands from the courts that electronic records have become much more common in the last couple of years and that this trend is expected to continue. In addition, courts have expressed interest in converting paper records to electronic format to reduce the amount of off-site storage space that is needed.

Statutory change

Prior to 2018, rule 10.1028 required the court to keep an original reporter's transcript, which, under the version of Code of Civil Procedure section 271[2] in effect at the time, had to be in paper format.[3] 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."

[1] Voters passed Prop. 47, "The Safe Neighborhoods and Schools Act," on November 14, 2014; it went into effect the next day.

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

[3] Former section 271 authorized courts and parties to receive, on request, copies of reporters' transcripts in "computer-readable form."

Legislation repealing and replacing section 271 also 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 statutory change, rule 10.1028 should be revised to reflect the presumption that an original reporter's transcript is in electronic format and, if a statutory exception applies and the original transcript is on paper, to provide that the court may continue to keep either the paper original or a true and correct electronic copy.

Alternatives Considered

The committee considered a number of alternatives. As in 2020, it rejected the option of taking no action because portions of the rule are based on a former version of the relevant statute and it is undisputed that a 20-year retention period is insufficient.

Originally, the committee considered proposing a retention time of 50 years rather than 100. The committee declined this option because 50 years might not be long enough in all cases. Upon reconsideration, the committee again concluded that 50 years was not enough time to ensure that all defendants who might need the reporter's transcript in their case would be able to access it.

The committee considered whether to propose extending the time for keeping the reporter's transcript only in cases involving certain sentences, such as 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 more than 20 years after a felony conviction is affirmed.

Also in 2020, 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. In addition, 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 would be simple and straightforward for the courts to implement but welcomed comments on these and other options.

Upon reconsideration of a graduated or tiered retention schedule for this proposal, including obtaining input from the courts, the committee again concluded that a single retention period for reporter's transcripts in all cases affirming a felony conviction would be preferable. A defendant's future need for a reporter's transcript does not necessarily align with the crime committed or the sentence imposed. Administering the retention and destruction of records, particularly paper transcripts, based on such a retention schedule would be complex and might not yield significant savings. The committee also took into account the courts' interest in digitizing paper records to reduce storage costs.

Fiscal and Operational Impacts

This proposal would require the Courts of Appeal to change their record retention policies and procedures for reporters' transcripts in the identified cases. Education and training of staff would also be required. As of January 1, 2023, all reporter's transcripts are required by Code of Civil Procedure section 271 to be in electronic format unless a party requests paper, and courts report that electronic filing has become much more prevalent in the last couple of years. The cost of storage of electronic records is a fraction of the cost of storing paper, and courts are looking into conversion of paper records to electronic to reduce storage costs going forward. Despite the fiscal impacts, the committee believes that the benefits of the proposal—safeguarding defendants' rights to avail themselves of changes in the law or other remedies, and thereby improving access to justice—outweigh 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 the text of the rule reflect the current practice of court reporters to mark electronic reporters' transcripts "certified" rather than "original" and "copy?"

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 6–7

Rule 10.1028 of the California Rules of Court would be amended, effective January 1, 2023, 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 75 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.