



Judicial Council of California · Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 26, 2012

Title	Agenda Item Type
Appellate Procedure: Transmission of Administrative Records on Appeal	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rule 8.123	January 1, 2013
Recommended by	Date of Report
Appellate Advisory Committee Hon. Kathryn Doi Todd, Chair	July 25, 2012
	Contact
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Executive Summary

The Appellate Advisory Committee recommends amending the rule on the record of administrative proceedings to provide that if an administrative record that was admitted in evidence, refused, or lodged in the superior court was returned to a party and is subsequently designated for inclusion in the record on appeal, the party in possession of the administrative record, rather than the clerk of the superior court, is responsible for transmitting that record to the reviewing court. The amendment would provide costs savings and efficiencies for superior courts.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council amend rule 8.123 of the California Rules of Court, effective January 1, 2013, to:

1. Provide that when the superior court has returned an administrative record to a party and that administrative record is subsequently designated for inclusion in the record on appeal, the party to whom the administrative record has been returned must lodge the administrative

record with the reviewing court by the date the last respondent's brief is due, rather than sending the administrative record to the superior court;

2. Require that the party in possession of the designated administrative record must make that record available to the other parties in the case for copying within 15 days after the notice designating the record on appeal is served;
3. Establish procedures to address situations in which the party to whom an administrative record was returned does not provide other parties with appropriate access to the returned records; and
4. Provide that when remittitur is issued, the reviewing court must return an administrative record that was lodged by a party to that party, rather than to the superior court.

The text of the proposed amendments to rule 8.123 is attached at pages 5–6.

Previous Council Action

The Judicial Council adopted new rule 8.123, effective January 1, 2008, to establish a procedure for designating and transmitting to the reviewing court administrative records that were presented to the trial court.

Rationale for Recommendation

This proposal is based on a suggestion submitted by the California Appellate Court Clerks Association.

Rule 8.123 of the California Rules of Court addresses records of administrative proceedings that were admitted in evidence, refused, or lodged in the superior court and that are subsequently designated for inclusion in the record in a civil appeal in the Court of Appeal. Under the current rule, when the superior court returns an administrative record to a party and that administrative record is subsequently designated for inclusion in the record on appeal, the party in possession of that record must send it to the superior court and the superior court must submit it to the Court of Appeal. The rule also requires the Court of Appeal to return administrative records to the superior court when remittitur is issued, and the superior court is then responsible if an administrative record needs to be returned to a party. Performing these responsibilities uses superior court clerk time and resources.

The proposed amendments to rule 8.123 are intended to provide significant cost savings and efficiencies for the superior courts by alleviating the superior court clerk of responsibilities associated with administrative records that were returned to a party. They would provide that when the superior court has returned an administrative record to a party and that administrative record is subsequently designated for inclusion in the record on appeal, the party to whom the administrative record has been returned must send that administrative record directly to the Court

of Appeal. The amendments would also provide that the Court of Appeal must return that record directly to that party on issuance of remittitur. This procedure is similar to the one in rule 8.224 for transmission to the Court of Appeal of exhibits that were returned to a party.

Under these proposed amendments, rule 8.123 will require that a party make the designated administrative record available to the other parties in the case for copying within 15 days after the notice designating the record on appeal is served and lodge the administrative record with the Court of Appeal at the time the last respondent's brief is due. The amendments will also establish procedures—similar to those in rule 8.124(c) relating to copying documents needed for an appendix—to address situations in which the party to whom an administrative record was returned does not provide other parties with appropriate access to the returned administrative record.

Comments, Alternatives Considered, and Policy Implications

Comments

This proposal was circulated for public comment between April 17 and June 20, 2012, as part of the regular spring 2012 comment cycle. Eight individuals or organizations submitted comments on this proposal. Six commentators agreed with the proposal, one agreed with the proposal if modified, and one did not indicate a position on the proposal. The full text of the comments received and the committee responses are set out in the attached comment chart at pages 7–9. The main substantive comments and the committee's responses are also discussed below.

Making the administrative record available to other parties

As circulated for public comment, the proposal included a provision requiring that the party to whom an administrative record is returned provide other parties with access to that record. The committee specifically sought comments on whether the rule should include additional provisions—similar to those in rule 8.124(c) relating to copying documents needed for an appendix—to address situations in which the party to whom an administrative record was returned does not provide other parties with appropriate access to that administrative record. Two commentators specifically recommended that the rule include these additional provisions. Another commentator's concern that an opponent would not likely comply with a requirement to provide access to such a record also supported including these provisions in the rule. Based on these comments, the committee revised the proposal to include language modeled on rule 8.124(c) that provides parties who want to copy an administrative record held by another party with a procedure for serving and filing a notice in the reviewing court requesting that the administrative record be sent to either the requesting party or the reviewing court.

Time for lodging an administrative record with the reviewing court

As circulated for public comment, the proposal required a party possessing a designated administrative record to lodge that record with the reviewing court at the time that party files its opening brief. One commentator suggested that the administrative record should instead be lodged with the reviewing court later—when the last respondent's brief is due—because it is easier for parties to access the record from another party than from the reviewing court. Because

the Court of Appeal generally does not begin reviewing briefs until the respondent's briefs are filed, the committee concluded that delaying the lodging of the administrative record until the last respondent's brief is due was a reasonable approach. The committee therefore modified the proposal to incorporate this suggested deadline.

Alternatives

In addition to the alternative considered in connection with the public comments, the committee considered not including a provision requiring that the party to whom an administrative record is returned provide other parties with access to that record and instead simply allowing other parties to access the administrative record after it is lodged with the Court of Appeal. However, the committee decided against this approach because it might make it difficult for those other parties to timely prepare their briefs and would burden the Court of Appeal with providing parties access to administrative records after they are lodged.

The committee also considered not recommending any amendments to rule 8.123 at this time. The committee concluded, however, that it was preferable to recommend these amendments to rule 8.123 at this time to provide costs savings and efficiencies for superior courts.

Implementation Requirements, Costs, and Operational Impacts

This proposal should impose no significant implementation burdens on the superior courts or Courts of Appeal and should provide significant cost savings for the superior courts. The reviewing court may see some additional work associated with receiving notices requesting access to administrative records that were returned to a party and with providing parties with access to any such administrative records that are delivered to the reviewing court. However, the committee anticipates that adoption of the notice provision alone will serve as an encouragement for parties to cooperate in the copying of administrative records held by a party and that the number of cases in which such notices are actually served and filed or in which administrative records are delivered to the reviewing court will likely be small.

Relevant Strategic Plan Goals and Operational Plan Objectives

This proposal will further the Judicial Council's Strategic Plan Goal: III. Modernization of management and administration and Operational Plan Objective: 5. Develop and implement effective trial and appellate case management rules, procedures, techniques, and practices to promote the fair, timely, consistent, and efficient processing of all types of cases.

Attachments

1. Cal. Rules of Court, rule 8.123, at pages 5–6
2. Comment chart, at pages 7–9

Rule 8.123 of the California Rules of Court is amended, effective January 1, 2013, to read:

Title 8. Appellate Rules

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

Chapter 2. Civil Appeals

Article 2. Record on Appeal

Rule 8.123. Record of administrative proceedings

(a) – (b) * * *

~~(d)~~(c) Transmittal to the reviewing court

Except as provided in (d), if any administrative record is designated by a party, the superior court clerk must transmit the original administrative record with any clerk’s or reporter’s transcript sent to the reviewing court under rule 8.150. If the appellant has elected under rule 8.121 to use neither a clerk’s transcript nor a reporter’s transcript, the superior court clerk must transmit any administrative record designated by a party to the reviewing court no later than 45 days after the respondent files a designation under (b)(2) or the time for filing it expires, whichever first occurs.

~~(e)~~(d) Administrative records returned to parties

- (1) If the superior court has returned a designated administrative record to a party, the party in possession of the administrative record must ~~deliver it to the superior court clerk~~ make that record available to the other parties in the case for copying within 15 days after the notice designating the record on appeal is served and lodge the record with the clerk of the reviewing court at the time the last respondent’s brief is due.
- (2) A party seeking an administrative record that was returned to another party must first ask the possessing party to provide a copy or lend it for copying. The possessing party should reasonably cooperate with such requests.
- (3) If the request under (2) is unsuccessful, the requesting party may serve and file in the reviewing court a notice identifying the administrative record and requesting that the possessing party deliver the administrative record to the requesting party or, if the possessing party prefers, to the reviewing court. The possessing party must comply with the request within 10 days after the notice was served.
- (4) If the possessing party sends the administrative record to the requesting party, that party must copy and return it to the possessing party within 10 days after receiving it.

1 (5) If the possessing party sends the administrative record to the reviewing court, that
2 party must:

3
4 (A) Accompany the administrative record with a copy of the notice served by the
5 requesting party; and

6
7 (B) Immediately notify the requesting party that it has sent the administrative
8 record to the reviewing court.

9
10 (e) **Return by reviewing court**

11
12 On request, the reviewing court may return an administrative record to the superior court
13 or, if the record was lodged by a party under (d), to the lodging party. When the remittitur
14 issues, the reviewing court must return any administrative record to the superior court or, if
15 the record was lodged by a party under (d), to the lodging party.
16

SPR12-05**Appellate Procedure: Transmission of Administrative Records on Appeal** (amend Cal. Rules of Court, rule 8.123)

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

	Commentator	Position	Comment	Committee Response
1.	Appellate Court Committee San Diego County Bar Association By: Kate Mayer Mangan, Chair,	A	Our committee supports the revisions to rule 8.123 without comment.	The committee appreciates this input.
2.	Committee on Appellate Courts State Bar of California By: Paul R. Johnson, Chair	A	<p>The Committee on Appellate Courts supports this proposal in general. However, the Committee notes that the proposed changes to rule 8.123 use the term “Court of Appeal” while the existing rule uses the more generic “reviewing court.” Additionally, the predominant view of the Committee is that the administrative record should be lodged when the last respondent’s brief is due, rather than when the possessing party files its first brief. It is much easier to access a record while still possessed by a party rather than after it is lodged with the reviewing court; waiting to lodge the record until the last respondent’s brief would permit that easier access until all parties have filed their initial briefs.</p> <p>With respect to the two items for which specific comments were requested, the Committee comments as follows: (1) The proposal appropriately addresses its stated purpose. (2) While the proposal includes deadlines and requirements for providing a record to other parties, and rule 8.124 provides more specificity for describing similar procedures, several Committee members would prefer that additional specificity be provided as to enforcement in the event a party does not provide access to the record or lodge it with the reviewing court.</p>	<p>The committee appreciates this input and has modified the proposal to use the term “reviewing court” throughout rule 8.123.</p> <p>The committee appreciates this input and has modified the proposal to make the date the last respondent’s brief is due the deadline for submitting the administrative record.</p> <p>Based on this and other comments, the committee has modified the proposal to include additional procedures, similar to those in rule 8.124, specifically 8.124(c), to address situations in which the party to who an administrative record was returned does not provide other parties with appropriate access to the returned records.</p>

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	Commentator	Position	Comment	Committee Response
3.	Court of Appeal, Fourth Appellate District, Division One By: Judith C. McConnell, Presiding Justice	A	We agree with the proposed amendments to Rule 8.123 that would require a party in possession of an administrative record to transmit that record directly to the Court of Appeal, rather than requiring the record to be first transmitted to the superior court and then transmitted by the superior court to the Court of Appeal. The rule should also provide that if the administrative record is in electronic format, it should be in addition to the hard copy.	The committee appreciates this input. The committee appreciates this suggestion and will consider it during the upcoming committee year.
4.	Barbara A. Ginsberg Attorney at Law Oakland	NI	I've reviewed the proposed rule that would relieve the clerk of responsibility to transmit the administrative record on appeal when the court has returned that record to a party. However, in a current appeal that I am involved with, I think it is almost certain that the party who will receive the returned administrative record will play games and make changes to the record (or delete certain pages) and I also think it is highly unlikely that she would make that record available even if legally required to do so. I think that problem could be avoided if the court itself were required to keep that administrative record, at least until the time to appeal has expired. In fact, I think that is what the mandate section of the CCP requires, so I'm not sure why the administrative record would be returned to a party to begin with.	Based on this and other comments, the committee has modified the proposal to include additional procedures, similar to those in rule 8.124, specifically 8.124(c), to address situations in which the party to who an administrative record was returned does not provide other parties with appropriate access to the returned records. Under Code of Civil Procedure section 1094.5(i), an administrative record received for filing in an administrative mandamus proceeding may be disposed of as provided in Code of Civil Procedure section 1952. Section 1952, in turn, permits a court to return an administrative record introduced or filed in an action to a party upon the stipulation of the parties or for good cause shown.

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	Commentator	Position	Comment	Committee Response
5.	Orange County Bar Association By: Dimetria Jackson, President	A	No additional comments.	The committee appreciates this input.
6.	Superior Court of Orange County By: Linda Daeley, Manager	AM	<p>The following information addresses the Request for Specific Comments contained in the invitation to comment:</p> <p>The proposal appropriately address the stated purpose of providing costs savings and efficiencies for superior courts by relieving the clerk of responsibility for transmitting to the Court of Appeal an administrative record that was admitted in evidence, refused, or lodged in the superior court. This rule should include additional procedures, similar to those in rule 8.124, specifically 8.124(c), to address situations in which the party to who an administrative record was returned does not provide other parties with appropriate access to the returned records.</p> <p>The proposal would provide cost savings of 1-3 hours per appeal when administrative record was admitted, refused, or lodged. The proposal should benefit courts of different sizes.</p>	<p>Based on this and other comments, the committee has modified the proposal to include additional procedures, similar to those in rule 8.124, specifically 8.124(c), to address situations in which the party to who an administrative record was returned does not provide other parties with appropriate access to the returned records.</p> <p>The committee appreciates this input.</p>
7.	Superior Court of San Diego County By: Mike Roddy, Executive Officer	A	No additional comments.	The committee appreciates this input.
8.	TCPJAC/CEAC Joint Working Rules Group	A	The working group appreciates the efforts of the advisory committee to provide for a more efficient process.	The committee appreciates this input.

