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INVITATION TO COMMENT

SPR11-07

Title	Action Requested
Appellate Procedure: Respondent's Election to Use Appendix	Review and submit comments by Monday, June 20, 2011
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rule 8.124	January 1, 2012
Proposed by	Contact
Appellate Advisory Committee Hon. Kathryn Doi Todd, Chair	Heather Anderson, 415-865-7691 heather.anderson@jud.ca.gov

Discussion

As a general rule, in a civil appeal, the appellant designates the form of the record that is used. However, rule 8.124 of the California Rules of Court currently allows a respondent in an appeal in an unlimited civil case to elect that an appendix be used as the record of the documents filed in the case unless the appellant has been granted a waiver of the fee for the clerk's transcript. Because appendixes are prepared by the parties, not the trial court clerk, a respondent's election to use an appendix may place additional burdens on the appellant to gather, organize, and copy necessary documents. In addition, unlike the costs associated with preparing a clerk's transcript, which can be waived by the trial court, the costs of preparing an appendix are borne by the parties. The impact of these additional burdens may be quite substantial depending on the particular circumstances of the case, including the size of the record and the appellant's economic situation and previous experience in preparing appendixes.

As one way of addressing concerns about the burdens of requiring an appellant to prepare an appendix, rule 8.124(a) currently provides that, based on a motion filed after an election to use an appendix is served, the superior court can order that an appendix not be used. However, it is not entirely clear from this provision who can file such a motion, what criteria the superior court should consider in ruling on such a motion, and what happens if such a motion is granted.

This proposal would amend rule 8.124 to change the current respondent's election procedure to a procedure in which the respondent can file a motion in the trial court requesting that an appendix be the form of the record used in the case. The intent of this change is to simplify the procedure

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

and to better align it with the general rule that the appellant is responsible for the form of the record in civil appeals.

The respondent would be required to file any motion to use an appendix within 10 days after the appellant serves and files his or her designation of the record. This timing would allow the appellant to select the form of the record, including potentially an appendix, before the respondent decides whether to file a motion. If the respondent chooses to file such a motion, as the moving party, the respondent would bear the burden of showing why the court should grant the motion. In addition, the proposal would add a list of factors that the superior court must consider in deciding whether to grant a respondent's motion, including the burden on the appellant of preparing an appendix and the appellant's ability to undertake this burden. The committee would particularly appreciate comments about whether the rule should specify that the respondent's motion must address these factors or whether this is sufficiently clear from the fact that the court will be considering these factors.

This proposal would also make several other clarifying changes to rule 8.124, including changing the title of subdivision (a) to more accurately reflect its content and placing current provisions relating to the clerk's duties and the use of joint or separate appendixes in their own subdivisions.

Specific Comments Requested

The committee welcomes comments on any of the changes included in this proposal. However, as noted above, the committee would particularly appreciate comments on whether the rule should specify that the respondent's motion to use an appendix must address the factors that the superior court must consider in deciding whether to grant the motion or whether this is sufficiently clear from the fact that the court will be considering these factors.

Rule 8.124 of the California Rules of Court would be amended, effective January 1, 2012, 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 8.124. Appendixes

(a) ~~Notice of election~~ Application; respondent's motion

- (1) ~~Unless the superior court orders otherwise on a motion served and filed within 10 days after the notice of election is served~~ This rule governs if the use of an appendix as the record of the written documents from the superior court proceedings and applies if either of following occurs:
- (A) The appellant elects to use an appendix ~~under this rule~~ in the notice designating the record on appeal under rule 8.121; or
 - (B) The respondent serves and files a ~~notice motion~~ in the superior court electing to use to designate an appendix under this rule as the form of the record within 10 days after the filing of the appellant's notice of appeal is filed designating the record, and no waiver of the fee for a clerk's transcript is granted to the appellant the superior court grants the motion.
- (2) The superior court may not grant a respondent's motion under (1)(B) if the appellant is granted a waiver of the fee for a clerk's transcript.
- (3) The superior court will consider the following factors in deciding whether to grant a respondent's motion under (1)(B):
- (A) The estimated time necessary to complete preparation of the record if an appendix is used compared to the form of the record elected by the appellant;
 - (B) The burden on the respondent associated with using the form of the record elected by the appellant;

- (C) The burden on the appellant of preparing an appendix;
- (D) The appellant’s ability to undertake the burden of preparing an appendix;
- (E) The respondent’s willingness to assist in preparing an appendix; and
- (F) Any offer by the respondent to share the appellant’s costs of preparing an appendix.

~~(2)~~**(b) Clerk’s duties**

When ~~a party~~ an appellant files a notice electing to use an appendix or the superior court grants a respondent’s motion to use an appendix under this rule, the superior court clerk must promptly send a copy of the register of actions, if any, to the attorney of record for each party and to any unrepresented party.

~~(3)~~**(c) Joint or separate appendixes**

The parties may prepare separate appendixes, but are encouraged to stipulate to a joint appendix.

~~(b)~~**(d) * * ***

~~(e)~~**(e) * * ***

~~(d)~~**(f) * * ***

~~(e)~~**(g) * * ***

~~(f)~~**(h) * * ***

~~(g)~~**(i) * * ***

Advisory Committee Comment

Subdivision (a). Under this provision ~~either party~~ the appellant may elect or the respondent may move to have the appeal proceed by way of an appendix. The superior court may not grant a respondent’s motion to proceed by appendix ~~if~~ if the appellant’s fees for a clerk’s transcript ~~are not have been~~ waived and the respondent timely elects to use an appendix, that election will govern unless the superior court orders otherwise. This election procedure differs from all other appellate rules governing designation of a record on appeal. In those rules, the appellant’s designation, or the stipulation of the parties, determines the type of record on appeal. Therefore, B~~efore~~ making

1 ~~this election~~ such a motion, respondents should check whether the appellant has been granted a
2 fee waiver that is still in effect. ~~If the trial court has granted appellant a fee waiver for the clerk's~~
3 ~~transcript, or grants such a waiver after the notice of appeal is filed, respondent cannot elect to~~
4 ~~proceed by way of an appendix.~~

5
6 **Subdivision (b).** ~~This S~~subdivision ~~(a)(2)~~ is intended to assist appellate counsel in preparing an
7 appendix by providing them with the list of pleadings and other filings found in the register of
8 actions or “docket sheet” in those counties that maintain such registers. (See Gov. Code,
9 § 69845.) The provision is derived from rule 10-1 of the United States Circuit Rules (9th Cir.).

10
11 **Subdivision ~~(b)~~(d).** Under subdivision ~~(b)~~(d)(1)(A), a joint appendix or an appellant’s appendix
12 must contain any register of actions that the clerk sent to the parties under subdivision ~~(a)(2)~~ (b).
13 This provision is intended to assist the reviewing court in determining the accuracy of the
14 appendix. The provision is derived from rule 30-1.3(a)(ii) of the United States Circuit Rules (9th
15 Cir.).

16
17 In support of or opposition to pleadings or motions, the parties may have filed a number of
18 lengthy documents in the proceedings in superior court, including, for example, declarations,
19 memorandums, trial briefs, documentary exhibits (e.g., insurance policies, contracts, deeds), and
20 photocopies of judicial opinions or other publications. Subdivision ~~(b)~~(d)(3)(A) prohibits the
21 inclusion of such documents in an appendix when they are not necessary for proper consideration
22 of the issues raised in the appeal. Even if a document is otherwise includable in an appendix, the
23 rule prohibits the inclusion of any substantial *portion* of the document that is not necessary for
24 proper consideration of the issues raised in the appeal. The prohibition is intended to simplify and
25 therefore expedite the preparation of the appendix, to reduce its cost to the parties, and to relieve
26 the courts of the burden of reviewing a record containing redundant, irrelevant, or immaterial
27 documents. The provision is adapted from rule 30-1.4 of the United States Circuit Rules (9th
28 Cir.).

29
30 Subdivision ~~(b)~~(d)(3)(B) prohibits the inclusion in an appendix of transcripts of oral proceedings
31 that may be made part of a reporter’s transcript. (Compare rule 8.130(e)(3) [the reporter must not
32 copy into the reporter’s transcript any document includable in the clerk’s transcript under rule
33 8.122].) The prohibition is intended to prevent a party filing an appendix from evading the
34 requirements and safeguards imposed by rule 8.130 on the process of designating and preparing a
35 reporter’s transcript, or the requirements imposed by rule 8.144(d) on the use of daily or other
36 transcripts instead of a reporter’s transcript (i.e., renumbered pages, required indexes). In
37 addition, if an appellant were to include in its appendix a transcript of less than all the
38 proceedings, the respondent would not learn of any need to designate additional proceedings
39 (under rule 8.130(a)(3)) until the appellant had served its appendix with its brief, when it would
40 be too late to designate them. Note also that a party may file a certified transcript of designated
41 proceedings instead of a deposit for the reporter’s fee (rule 8.130(b)(3)).
42

1 **Subdivision ~~(d)~~(f)**. In current practice, served copies of filed documents often bear no clerk’s
2 date stamp and are not conformed by the parties serving them. Consistently with this practice,
3 subdivision ~~(d)~~(f) does not require such documents to be conformed. The provision thereby
4 relieves the parties of the burden of obtaining conformed copies at the cost of considerable time
5 and expense and expedites the preparation of the appendix and the processing of the appeal. It is
6 to be noted, however, that under subdivision ~~(b)~~(d)(1)(A) each document necessary to determine
7 the timeliness of the appeal must show the date required under rule 8.104 or 8.108. Note also that
8 subdivision ~~(e)~~(i) of rule 8.124 provides that a party filing an appendix represents under penalty
9 of sanctions that its copies of documents are accurate.

10
11 **Subdivision ~~(e)~~(g)**. Subdivision ~~(e)~~(g)(2) requires a joint appendix to be filed with the appellant’s
12 opening brief. The provision is intended to improve the briefing process by enabling the
13 appellant’s opening brief to include citations to the record. To provide for the case in which a
14 respondent concludes in light of the appellant’s opening brief that the joint appendix should have
15 included additional documents, subdivision ~~(b)~~(d)(5) permits such a respondent to present in an
16 appendix filed with its respondent’s brief (see subd. ~~(e)~~(g)(3)) any document that could have been
17 included in the joint appendix.

18
19 Under subdivision ~~(e)~~(g)(2)–(4) an appendix is required to be filed “with” the associated brief.
20 This provision is intended to clarify that an extension of a briefing period ipso facto extends the
21 filing period of an appendix associated with the brief.

22
23 **Subdivision ~~(g)~~(i)**. Under subdivision ~~(e)~~(i), sanctions do not depend on the degree of
24 culpability of the filing party—i.e., on whether the party’s conduct was willful or negligent—but
25 on the nature of the inaccuracies and the importance of the documents they affect.

Item SPR11-07 Response Form

Title: Appellate Procedure: Respondent's Election to Use Appendix (amend Cal. Rules of Court, rule 8.124)

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ Title: _____

Organization: _____

- Commenting on behalf of an organization

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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DEADLINE FOR COMMENT: 5:00 p.m., Monday, June 20, 2011

Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee. All comments will become part of the public record of the council's action.