

NEWS ALERT

To: Panel Attorneys for the Fourth Appellate District

From: Appellate Defenders, Inc., Elaine A. Alexander, Executive Director

**Re: CHANGES TO CALIFORNIA RULES OF COURT
EFFECTIVE JANUARY 1, 2007**

Major changes to the California Rules of Court went into effect on January 1, 2007. The most noticeable is the complete reorganization and renumbering of the rules. The newly numbered rules have the same language and content, for the most part, as the former rules. Conversion charts are available at <http://www.courtinfo.ca.gov/rules/>.

Other, substantive changes were adopted after the Judicial Council approved the renumbering. Part I of this memo highlights those and is accompanied by a chart. Part II describes the new numbering and organizational system.

Counsel must immediately familiarize themselves with these changes, conform to all new requirements, and be alert to make any necessary alterations when using form pleadings and briefbank materials.

I. SUBSTANTIVE CHANGES EFFECTIVE JANUARY 1, 2007

This section of the news alert reviews the principal rule changes adopted on October 20, 2006 (after the reorganization and renumbering were approved) that affect appointed appellate counsel. The accompanying chart lists those, as well as a few other substantive appellate changes that primarily affect the duties of court clerks and civil appellate practitioners.

A. General Provisions

Non-conforming documents (rule 8.18): “Briefs” are deleted from the list of documents not to be filed if they do not conform to the rules. Rule 8.204(e) has specific provisions governing non-conforming briefs.

Address and telephone number of record (rule 8.32): A new provision is that the address and phone number used on the first document filed in a case will be the attorney’s address and number of record for the case. The court will use that unless notice of a

change is filed. If notice of a change is filed, the court will use the new information for all of the attorney's cases, pending or closed, unless the notice specifies otherwise. If an attorney has several offices, only one may be used as address of record for a given case.

B. Proceedings in Court of Appeal

Attachments to briefs (rule 8.204(d)): Whereas the former rule limited attachments to orders, exhibits, and other matters in the record, attachments now may include relevant citable regulations, out-of-state rules and statutes, and other materials not readily accessible. Attachments may not exceed a combined total of 10 pages unless the presiding justice permits more. The page limit does not include opinions required by rule 8.1115(c) – those available only in a computer-based source of decisional law.

Combined briefs (rule 8.216): Under rule 8.216(b)(1), a party who is both an appellant and a respondent must file a combined opening and respondent's brief, or combined respondent's and reply brief, as appropriate under the briefing sequence approved by the court under rule 8.216(a). An amendment to rule 8.216(b)(2) requires a party to confine the reply portion of a combined brief, as well as a stand-alone reply brief, to points raised in the party's own appeal.

Transmittal of exhibits (rule 8.224(a)(1)): A party wanting the court to consider admitted, refused, or lodged exhibits must designate them, unless they are already copied in the clerk's transcript or appendix.

Calendar preference (rule 8.240): A definition of "calendar preference" is added to rule 8.240: it is "an expedited appeal schedule, which may include expedited briefing and preference in setting the date of oral argument."

C. Criminal Appeals

Cross-appeals (rule 8.308(b)): Rule 8.308(b) now provides specifically for cross-appeals in criminal cases. This topic had inadvertently been omitted when the criminal rules were revised a few years ago. If one party files a notice of appeal, any other party has 30 days from the date notice of that appeal is mailed to file an appeal. (See provisions of rule 8.216, above, on briefing in cases where a party is both an appellant and a respondent.)

Additions to normal record (rule 8.320): The clerk's transcript now includes documents used to prove a prior juvenile adjudication (with provisions for preserving its confidentiality). (Rule 8.320(b)(13)(C).) The reporter's transcript now includes proceedings in which any defense motion (not just one under Penal Code section 1538.5) was denied in whole or in part, except for those dealing with disqualification of a judge or

motions under Penal Code section 995, which can be reviewed only by writ. (Rule 8.320(c)(9)(A).)

Marsden transcripts (rule 8.328(b)): A transcript of a hearing under *People v. Marsden* (1970) 2 Cal.3d 118, to relieve counsel on the ground of ineffectiveness, is to be handled by these revised procedures:

- As before, a *Marsden* transcript is initially to be kept confidential. (Rule 8.328(b)(1).) It is sent only to the Court of Appeal and the defendant's attorney. (Rule 8.328(b)(2) & (3).)
- (New) If a *Marsden* issue is raised in the opening brief, appellate counsel must serve and file with the brief a notice stating whether the transcript contains confidential material not relevant to the issue and if so, identifying it by page and line. (Rule 8.328(b)(4).) If the notice says there is no such material, the appellate court clerk must send the transcript to the People; if it does identify such material, the People may move for the remaining, relevant parts of the transcript. (Rule 8.328(b)(5).)
- (New) If the appellant's opening brief raises a *Marsden* issue but does not have the notice required by (4), the People may move in writing for a copy of the transcript. A new safeguard is that the defendant has 10 days to oppose and identify irrelevant confidential information that should be excluded from the People's copy. (Rule 8.328(b)(6).)
- Needless to say, ADI's policy is that counsel should file the statement required by (4) and not rely on the safety net of (6), which is there to protect the client from counsel's default, not to give the attorney an easy way out.

Augmentation for later developments in the trial court (rule 8.340(a)): If the trial court makes any orders affecting the case after the record was certified, the superior court clerk now must file as an augmentation, not only the orders, but also any related matters required by any rules. As with the former rule, this requirement is sua sponte and so easily overlooked. Appellate counsel should be proactive about monitoring events in the trial court, so that later developments potentially relevant to the appeal are included in the record.

Failure to file brief (rule 8.360(c)): The "17(a) notice" of old said that if the opening brief is not filed in 30 days, the appeal would be dismissed. By long-established practice, recognizing that their obligation to provide effective assistance of appellate counsel in appointed cases precludes punishing the defendant for the attorney's default,

the courts have removed the attorney from the case (often without compensation) and appointed new counsel instead of dismissing the appeal.

- The new rule, the “8.360(c)(5)(A)(ii) notice,” is much harder to say but is more realistic: the notice must say that if the opening brief is not filed in 30 days, in appointed cases counsel may be relieved and new counsel appointed.
- If the appellant’s counsel is not court-appointed, the sanction is still dismissal. If the defaulting party is the respondent, the case is submitted on the record, the AOB, and any oral argument by the appellant. (8.360(c)(5)(A)(i) & (iii), (B).)

Other: More technical changes include a provision that appointments must be based on Judicial Council committee criteria (rule 8.300(b)(2)), conforming the rule to long-established practice; a revised definition of a “charged” felony (rule 8.304(a)(2)), reflecting law that, even if alleged in a complaint, a felony is not “charged” for purposes of determining appellate jurisdiction unless the complaint is certified to the superior court or an information or indictment is filed (*People v. Nickerson* (2005) 128 Cal.App.4th 33); and provisions on distribution of records (rules 8.336(c)(2) & (3), (f)(1)(B) & (C); 8.340(a)(1), (b), (c), (d)), making rules uniform and consistent with practice.

D. Juvenile Appeals

Records (rules 8.404, 8.406): The normal clerk’s transcript now includes jurisdictional and *dispositional* findings and *orders*. (Rule 8.404(a)(5).) If there are several appeals from the same judgment or order, only one record need be prepared; it is due within the time allowed for filing the record in the latest appeal. (Rule 8.406.) Provisions for requesting additional record in the trial court are also amended, but those normally are not used by appellate counsel. (Rule 8.404(c).)

Failure to file brief (rules 8.412(d), 8.416(g)): The old “17(a)” notice for appeals is replaced by a new 8.412(d)(1)(A)(i) notice like that for criminal appeals, above. For appointed non-fast track cases, it says that if the opening brief is not filed in 30 days, new counsel will be appointed. For non-appointed appellants and for respondents, the sanctions are dismissal and submission on the record and the appellant’s arguments, respectively. Under rule 8.416(g), for fast track cases (terminations of rights throughout the state and all dependency appeals from San Diego, Imperial, and Orange Counties), the same sanctions apply, but the period is 15 rather than 30 days.

E. Juvenile Writs

Time to file notice of intent to pursue juvenile writ (rule 8.450(e)): The time allowed to file a notice of intent now varies according to how and where the petitioner

was notified of an order referring the case for a permanency plan hearing. Subdivision (e)(4) provides that a notice of intent must be filed within these times from the order: (A) if the party was present when the order made – 7 days; (B) if the party was notified of the order by mail to an address within California – 12 days; (C) if the mail notice was to an address outside California but in the U.S. – 17 days; (D) if the mail notice was to an address outside the U.S. – 27 days; (E) if the order was made by a referee not acting as a temporary judge – add 10 days to applicable period (see rule 5.540(c)). Subdivision (e)(5) provides that if party is incarcerated, the notice of intent is timely if it was delivered to prison officials within time prescribed by (e)(4).

Time to file record augment request in juvenile writ proceeding under Welfare and Institutions Code section 366.26 or 366.28 (rules 8.452(f) and 8.456(f)): After receipt of the record, the petitioner must file any augment request within 5 days, or (new) 7 days if the record is more than 300 pages, or 10 days, if the record exceeds 600 pages. The respondent must file a request within five days after the petition is filed or (new) an order to show cause has issued, whichever is later. (Rules 8.452(f)(2), 8.456(f)(2).) New: The time for filing the petition is extended by the time allowed for the augment. (Rules 8.452(f)(4), 8.456(f)(4).)

D. California Supreme Court

Length of petition for review, answer, and reply (rule 8.504(d)(1) & (3)): The word count limit includes footnotes but not attachments permitted by rule 8.504(e) (next topic).

Attachments to petition for review (rule 8.504(e)): As with briefs (rule 8.204, above), attachments now may include relevant citable regulations, out-of-state rules and statutes, and other materials not readily accessible. Attachments may not exceed a combined total of 10 pages, excluding opinions required by rule 8.1115(c) – those available only in a computer-based source of decisional law.

Length of briefs on the merits (rule 8.520(c)(1) & (3), (d)(2)): The word count limit includes footnotes but not attachments permitted by rule 8.520(h) (next topic).

Attachments to briefs (rule 8.520(h)): Same provisions as rule 8.504(e), on petitions for review.

II. REORGANIZATION AND RENUMBERING

The California Rules of Court are now fully renumbered. Conversion tables are included with the new rules. (See <http://www.courtinfo.ca.gov/rules/>.) This section will

sketch the basic organizational plan and point out the rules most important to appointed appellate counsel.

The new system uses a prefix number to indicate the title (broad topic), then a period, followed by a sequential numbering from 1 to 2 and so on. The major topics are subdivided into divisions, chapters, and/or articles.

Title 1 – Topics applicable to all courts, rules 1.1 to 1.150. Appellate counsel should especially familiarize themselves with chapters 1-3, which include definitions, principles of construction, timing, and filing and service. The remaining chapters deal with forms, accommodations, and access to courts.

Title 2 – Trial court rules, rules 2.1 to 2.1100. Of particular interest to appellate counsel might be the provisions on court records (2.400 et seq., 2.950 et seq.) and jury instructions (2.1050 et seq.).

Title 3 – Civil trials, rules 3.1 to 3.2120. These rules do not, for the most part, affect appointed appeals.

Title 4 – Criminal trials, rules 4.1 to 4.601. Especially important to appellate practice are the rules on sentencing (4.300 et seq. and 4.401 et seq.) and habeas corpus in the superior court (4.550 et seq.). Other topics include pretrial proceedings, venue, and trials.

Title 5 – Family and juvenile trials, rules 5.1 to 5.830. These rules cover delinquency and dependency proceedings. Family law cases are covered in divisions 1 and 2 (rule 5.5 et seq.), and delinquency and dependency cases in division 3 (rule 5.500 et seq.).

Title 6. Reserved.

Title 7 – Probate, rules 7.1 to 7.1060. Except for a rare probate conservatorship, appointed appellate counsel will have little need to consult these rules.

Title 8 – Appeals, rules 8.1 to 8.1125. Title 8, division 1, contains the main provisions governing appellate practice in the Court of Appeal and Supreme Court. It is subdivided as follows:

Chapter 1 – General, rules 8.1 to 8.68. Appellate counsel should review carefully the definitions and rules of construction (8.1 et seq.) and the provisions for service, filing, form, number of copies, address, substitution of counsel, color of cover, applications, and motions (8.25 et seq.).

Chapter 2 – Civil appeals, rules 8.100 to 8.163. This chapter covers filing a civil appeal, supersedeas, and the record.

Chapter 3 – Procedures in the Court of Appeal, rules 8.200 to 8.276. The “200” series covers briefs (8.200 et seq.); hearing, exhibits, settlements, judicial notice, and oral argument (8.224 et seq.); and decisions (8.264 et seq.). These rules govern both criminal and juvenile appeals. (8.360(a), 8.366, 8.412(a), 8.470.)

Chapter 4 – Criminal appeals, rule 8.300 to 8.388. The “300” series includes appointment of counsel (8.300), notice of appeal (8.304 et seq.), bail pending appeal (8.312), abandonment (8.316), the record (8.320 et seq.), briefs (8.360), and habeas corpus (8.380 et seq.).

Chapter 5 – Juvenile appeals and writs, rules 8.400 to 8.474. The “400” series governs juvenile appeals, both delinquency and dependency. It includes confidentiality (8.400(b)), filing an appeal (8.400(c)-(g)), record (8.404 et seq.), briefs (8.412), “fast track” cases (8.416), writs under Welfare and Institutions Code sections 366.26 and 366.28 (8.450 et seq.), and data (8.474).

Chapter 6 – Conservatorship appeals, rules 8.480, 8.482. This section deals with LPS conservatorship appeals (8.480) and sterilization appeals (8.482).

Chapter 7 – Writs, rule 8.490 et seq.: This chapter deals with writs of mandate, prohibition, and certiorari (8.490) and administrative writs (8.494 et seq.).

Chapter 8 – Supreme Court proceedings, rules 8.500 to 8.552. Petitions for review (8.500 et seq.), orders and issues re review (8.512, 8.516), briefs (8.520), argument (8.524), disposition (8.528 et seq.), requests by court of another jurisdiction (8.548), and transfers (8.552).

Other appeals. Death penalty (rule 8.600 et seq.); appellate division of superior court (8.700 et seq.); small claims (8.900 et seq.); transfer of appellate division cases to Court of Appeal (8.1000 et seq.).

Publication of appellate opinions, rules 8.1100 to 8.1152. These rules, pertaining to publication, depublication, and citability, are extremely important for the appellate practitioner. Substantive changes will go into effect on April 1, 2007.

Other titles. Title 9 deals with the practice of law, attorneys, and judges. Title 10 contains the rules for judicial administration. Also in the California Rules of Court are the Standards of Judicial Administration, Code of Judicial Ethics, arbitrators’ ethics, Judicial Council forms, parental liability for minor’s torts, and family law guidelines.