

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report Summary

TO: Members of the Judicial Council

FROM: Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack and Hon. Susan D. Huguenor, Cochairs
David Meyers, Senior Attorney, 916-263-2498, david.meyers@jud.ca.gov

DATE: April 11, 2007

SUBJECT: Juvenile Law: Procedure Regarding Appointments of Appellate Attorneys for Children in Juvenile Dependency Appeals (adopt rule 5.661, amend rule 8.412, and approve form JV-810) (Action Required)

Issue Statement

Assembly Bill 2480 (Evans); Stats. 2006, ch. 385, provides that in all dependency cases in which the child is the appellant, the Court of Appeal shall appoint a separate attorney for the child. In cases where the child is not the appellant, the Court of Appeal shall have discretion to determine whether a separate attorney is necessary. In order to assist the Court of Appeal in its decision, the bill also states that the child's trial counsel or guardian ad litem shall make a recommendation to the Court of Appeal, "in any case in which the trial counsel or guardian ad litem determines that, for the purposes of the appeal, the child's best interests cannot be protected without the appointment of separate counsel." The bill requires the Judicial Council to adopt a rule of court implementing the legislation by July 1, 2007. Proposed rule 5.661 is intended to guide the child's trial counsel or guardian ad litem in how counsel should participate in an appeal and make recommendations to the Court of Appeal regarding the appointment of separate counsel on appeal.

Recommendation

The committee recommends that the Judicial Council, effective July 1, 2007, adopt rule 5.661, amend rule 8.412, and approve form JV-810 to provide guidance to a child's trial counsel or guardian ad litem in determining how counsel should participate in a juvenile dependency appeal.

Rationale for Recommendation

Assembly Bill 2480 (Evans); Stats. 2006, ch. 385 (codified as Welf. & Inst. Code section 395 (b)(1)), requires the Judicial Council to adopt a rule of court implementing the legislation by July 1, 2007. The committee recommends that the Judicial Council adopt

rule 5.661, amend rule 8.412, and approve form JV-810 to provide guidance to a child's trial counsel or guardian ad litem in determining how counsel should participate in a juvenile dependency appeal.

To assist in the drafting of this proposal, the committee formed a working group composed of trial and appellate attorneys and chaired by an appellate court justice. In addition, the committee worked with the Judicial Council's Appellate Advisory Committee, the Administrative Presiding Justices Advisory Committee, and the Appellate Indigent Defense Oversight Advisory Committee (AIDOAC). Each of these groups had the opportunity to provide input to the committee both before and after the public comment process, and their input is reflected in the substance of the rule and articulated within the content of this report. The committee also considered the cases of *In re Josiah Z.*, (2005) 36 Cal.4th 664, *In re Mary C.*, (1995) 41 Cal.App.4th 71, and *In re Zeth S.*, (2003) 31 Cal.4th 396.

Committee staff has also met with the Appellate Clerk Administrators regarding the legislative mandate to report back by July, 2008 regarding implementation of this bill. The clerks have advised that it is relatively simple to modify their new case management system to meet the data collection requirements and provide the necessary information.

Rule 5.661

Subdivision (a), entitled "Definition," clarifies that "guardian ad litem," as used in this proposal, refers to a person designated as the child's Child Abuse Prevention and Treatment Act (CAPTA) guardian ad litem as defined in rule 5.662 (CAPTA GAL). This is to distinguish between a CAPTA GAL and a conventional guardian ad litem.

Subdivision (b), "Child as Appellant," directs trial counsel, the CAPTA GAL, or the child to file a notice of appeal in cases where the child is seeking appellate relief from a trial court's judgment or order.

Subdivision (c), "Recommendation from trial counsel or guardian ad litem" states that in cases where a party other than the child files a notice of appeal, the child's trial counsel or CAPTA GAL must file a recommendation in the Court of Appeal recommending separate counsel in cases where the child's trial counsel or the CAPTA GAL concludes that, for purposes of the appeal, the child's best interests cannot be protected without the appointment of separate counsel on appeal. Subdivision (c)(2) directs the recommending person to follow the procedures outlined in subdivisions (d)–(g). The committee developed subdivision (c)(1) to track the language of Welfare and Institutions Code section 395(b)(1). This language identifies the situations where child's trial counsel or the CAPTA GAL must file a recommendation for separate appellate counsel with the Court of Appeal, namely when "the child's best interests cannot be protected without the appointment of separate counsel on appeal."

Subdivision (d), “Time for trial counsel or guardian ad litem to file the recommendation,” states that a recommendation may be filed at any time, but absent good cause, must be filed no later than 20 days after the filing of the last appellant’s opening brief. The committee devoted a considerable amount of discussion to the question of when a recommendation should be filed. Given CAPTA’s directive that a CAPTA GAL may file a recommendation “at any time,” the committee recognized that this subdivision could not contain an absolute restriction. The committee was also mindful of rule 8.416 requiring appeals arising from the termination of parental rights to be rendered within 250 days. The groups were also mindful of the concerns raised by trial counsel that in a minority of cases, it will not become known that a recommendation will be needed until after the opening briefs are reviewed.¹

Subdivision (e), “Service of recommendation,” directs the recommending party to serve a copy of the recommendation on the district appellate project. Given that in most cases the district appellate project will be involved in the appointment process if such a request is granted, serving notice of a request upon the project appears appropriate as a time-saving device.

Subdivision (f) contains a list of the factors to be considered by trial counsel or a CAPTA GAL in making a recommendation to the Court of Appeal. This list of factors for trial counsel to consider was the central focus of nearly all of the commentators, as well as the topic of most of the discussion among all of the committees and groups that reviewed and considered this proposal. After considerable discussion, the committee came to a consensus on most of the proposed factors.² The rationale for the inclusion of each individual factor is articulated in the full report to the council at pages 8–10.

Subdivision (g), “Form of recommendation,” states that counsel may use form JV-810 in making a recommendation to the Court of Appeal, and in any event, must include the information contained in that form when making a recommendation, must state a factual basis for the recommendation, and must submit it under penalty of perjury.

Form JV-810

The committee proposes the approval of new form JV-810 to provide a simple way for trial counsel, CAPTA GALs, or children to request appointed counsel. The form itself is modeled after the rule in that it lists the factors to be considered. In addition, the form calls for basic information from the requesting party, asks for a factual basis for the request, and contains a proof of service listing the district appellate project.

Rule 8.412

Finally, in order to evaluate the need to make a recommendation to the Court of Appeal,

¹ Given the number of no-issue letter-briefs filed in dependency cases, it was noted that at times, waiting to review the opening briefs could also serve to avoid filing unnecessary recommendations.

² A minority of the working group disagreed with the use of “or” as used in subdivision (f)(3)(A) (see further discussion below). The committee recommends the use of “or” as used in subdivision (f)(3)(A).

the committee recommends modifying rule 8.412. This proposal would require that child's trial counsel or the CAPTA GAL, in the absence of trial counsel, receive all appellate briefs. The committee received no objections to this proposed amendment.

Alternative Actions Considered

Given the legislative mandate to adopt a rule of court, the committee did not consider the alternative of not drafting a rule. However, the original proposal would have placed the rule in the rules of court applicable to appellate proceedings, but after further consideration, the committee decided the rule was more appropriately placed within the juvenile rules.

Comments From Interested Parties

The invitation to comment on the proposal was circulated from December 18, 2006, through January 26, 2007, to the standard mailing list for family and juvenile law proposals, as well as to the regular rules and forms mailing list. This distribution includes appellate justices, trial court judges, court administrators, attorneys, social workers, probation officers, mediators, and other family and juvenile law professionals. In addition, the proposal was sent to members of the AOC's court-appointed counsel mailing list and to attorneys known to specialize in juvenile appellate practice.

The comments are summarized in the attached chart at pages 22–43. There were a total of thirty five (35) commentators. Thirteen of the thirty five agreed with the proposal in its entirety, while the remaining twenty two agreed if modifications were made.

Implementation Requirements and Costs

Implementation of this proposal will create additional time demands and expense for trial counsel or CAPTA GALs, as well as the possibility of an increase in the number of counsel appointed for children on appeal. The Judicial Council has submitted a request for additional funding for the trial and appellate courts in order to implement the new legislative mandates.

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Report

TO: Members of the Judicial Council

FROM: Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack and Hon. Susan D. Huguenor, Cochairs
David Meyers, Senior Attorney, 916-263-2498, david.meyers@jud.ca.gov

DATE: April 11, 2007

SUBJECT: Juvenile Law: Procedure Regarding Appointments of Appellate Attorneys for Children in Juvenile Dependency Appeals (adopt rule 5.661, amend rule 8.412, and approve form JV-810 (Action Required))

Issue Statement

Assembly Bill 2480 (Evans); Stats. 2006, ch. 385, provides that in all dependency cases in which the child is the appellant, the Court of Appeal shall appoint a separate attorney for the child. In cases where the child is not the appellant, the Court of Appeal shall have discretion to determine whether a separate attorney is necessary. In order to assist the Court of Appeal in its decision, the bill also states that the child's trial counsel or guardian ad litem shall make a recommendation to the Court of Appeal, "in any case in which the trial counsel or guardian ad litem determines that, for the purposes of the appeal, the child's best interests cannot be protected without the appointment of separate counsel." The bill requires the Judicial Council to adopt a rule of court implementing the legislation by July 1, 2007. Proposed rule 5.661 is intended to guide the child's trial counsel or guardian ad litem in how counsel should participate in an appeal and make recommendations to the Court of Appeal regarding the appointment of separate counsel on appeal.

Recommendation

The committee recommends that the Judicial Council, effective July 1, 2007, adopt rule 5.661, amend rule 8.412, and approve form JV-810 to provide guidance to a child's trial counsel or guardian ad litem in determining how counsel should participate in a juvenile dependency appeal.

The text of the proposed rules and form are attached at pages 15-21.

Rationale for Recommendation

Assembly Bill 2480 (Evans); Stats. 2006, ch. 385 (codified as Welf. & Inst. Code Section 395 (b)(1)) requires the Judicial Council to adopt a rule of court implementing the legislation by July 1, 2007. The committee recommends that the Judicial Council adopt rule 5.661, amend rule 8.412, and approve form JV-810 to provide guidance to a child's trial counsel or guardian ad litem in determining how counsel should participate in a juvenile dependency appeal.

To assist in the drafting of this rule, the committee formed a working group comprised of trial and appellate attorneys and chaired by an appellate court justice. In addition, the committee worked with the Judicial Council's Appellate Advisory Committee, the Administrative Presiding Justices Advisory Committee, and the Appellate Indigent Defense Oversight Advisory Committee (AIDOAC). Each of these groups had the opportunity to provide input to the committee both prior to and following the public comment process, and their input is reflected in the substance of the rule and articulated within the content of this report. The committee also considered the cases of *In re Josiah Z.*, (2005) 36 Cal.4th 664, *In re Mary C.*, (1995) 41 Cal.App4th 71, and *In re Zeth S.*, (2003) 31 Cal.4th 396.

Committee staff has also met with the Appellate Clerk Administrators regarding the legislative mandate to report back by July, 2008 regarding implementation of this bill. The clerks have advised that it is relatively simple to modify their new case management system to meet the data collection requirements and provide the necessary information.

Rule 5.661

The committee drafted proposed rule 5.661 to provide guidance to a child's trial counsel or guardian ad litem as mandated by AB 2480. When it circulated for comment, rule 5.661 was numbered as rule 8.402. However, given that this proposal has been mandated to provide guidance directly to trial counsel in juvenile dependency cases, the committee determined the appropriate placement should be within Title 5, at chapter 11, "Advocates for Children in Juvenile Proceedings."

Subdivision (a), entitled "Definition," clarifies that "guardian ad litem," as used in this proposal, refers to a person designated as the child's Child Abuse Prevention and Treatment Act (CAPTA) guardian ad litem as defined in rule 5.662 (hereinafter "CAPTA GAL"). This is to distinguish between a CAPTA GAL and a conventional guardian ad litem.

Subdivision (b), "Child as Appellant," directs trial counsel, CAPTA GAL, or the child to file a notice of appeal in cases where the child is seeking appellate relief from a trial court's judgment or order. The committee devoted significant

discussion to distinguishing the circumstances in which the child should seek appellate relief versus those circumstances in which the child is truly placed in the position of a respondent.¹ The committee recommends adopting this subdivision in order to clearly direct those who represent minors to carefully consider in a given case whether the child should be in the role of appellant or respondent. As such, the committee recommends adopting language stating that in cases where appellate relief is sought by the minor child, the child's representative, or the child, must file a notice of appeal.

Subdivision (c), "Recommendation from trial counsel or guardian ad litem" states that in cases where a party other than the child files a notice of appeal, the child's trial counsel or CAPTA GAL must file a recommendation in the Court of Appeal recommending separate counsel in cases where the trial counsel or CAPTA GAL concludes that, for purposes of the appeal, the child's best interests cannot be protected without the appointment of separate counsel on appeal. Subdivision (c)(2) directs the recommending person to follow the procedures outlined in subdivisions (d)-(g). The committee developed subdivision (c)(1) to track the language of Welfare and Institutions Code section 395(b)(1). This language identifies the situations where trial counsel or CAPTA GAL must file a recommendation for separate appellate counsel with the Court of Appeal, namely when "the child's best interests cannot be protected without the appointment of separate counsel on appeal."

Subdivision (d), "Time for trial counsel or guardian ad litem to file the recommendation," states that a recommendation may be filed at any time, but absent good cause, must be filed no later than 20 days after the filing of the last appellant's opening brief. The committee devoted a considerable amount of discussion to the question of when a recommendation should be filed. Given CAPTA's directive that a CAPTA GAL may file a recommendation "at any time," the committee recognized that this subdivision could not contain an absolute restriction. The committee was also mindful of rule 8.416 requiring appeals arising from the termination of parental rights to be rendered within 250 days. The groups were also mindful of the concerns raised by trial counsel that in a minority of cases, it will not become known that a recommendation will be needed until after the opening briefs are reviewed.²

Subdivision (e), "Service of recommendation" directs the recommending party to serve a copy of the recommendation upon the district appellate project. Given that in most cases the district appellate project will be involved in the appointment

¹ Many of the factors contained in subdivision (f) were amended or eliminated as a result of this distinction.

² Given the number of no-issue letter-briefs filed in dependency cases, it was noted that at times, waiting to review the opening briefs could also serve to avoid filing unnecessary recommendations.

process if such a request is granted, serving notice of a request upon the project appears appropriate as a time-saving device.

Subdivision (f) contains a list of the factors to be considered by trial counsel or CAPTA GAL in making a recommendation to the Court of Appeal. This list of factors for trial counsel to consider was the central focus of nearly all of the commentators, as well as the majority of the discussion amongst all of the groups that reviewed and considered this proposal. After considerable discussion, the committee and the working group came to a consensus on most of the proposed factors.³ The rationale for the inclusion of each individual factor is summarized below.

Subdivision (f)(1)

This factor states, “An actual or potential conflict exists between the interests of the child and the interests of any respondent.” This factor tracks the language in 395(b)(1), and is consistent with the language in *In re Mary C.*, (1995) 41 Cal.App.4th 71. There were no public comments regarding the inclusion of this factor.

Subdivision (f)(2)

This subdivision states, “The child did not have an attorney serving as his or her guardian ad litem in the trial court.” Rule 5.660 currently allows, under rare circumstances, for a dependency action to proceed without the child represented by an attorney. Given this possibility, the committee recommends the inclusion of subdivision (f)(2), where a CAPTA GAL could make a recommendation for separate counsel on appeal. There were no public comments regarding the inclusion of this factor.

Subdivision (f)(3)

This factor states, “The child is of a sufficient age or development such that he or she is able to understand the nature of the proceedings; and (A) the child expresses a desire to participate in the appeal; or (B) the child’s wishes differ from his or her trial counsel’s position.” The committee recognized that dependency proceedings profoundly affect the lives of the children, and for those who are able to understand the nature of the proceedings, the committee recognized the importance of allowing them the ability to provide direction to their attorneys. A minority of the working group and one commentator, while in agreement with the above-stated principle, recommended that subdivisions (f)(3)(A) and (B) should both be present for the factor to apply. In other words, the minority believed a minor’s expression of a desire to participate was not sufficient, and recommended

³ A minority of the working group disagreed with the use of “or” as used in subdivision (f)(3)(A) (see further discussion below). The committee recommends the use of “or” as used in subdivision (f)(3)(A).

that the fact that the child's wishes diverged from trial counsel must also be present. The committee recommends adoption of this factor as stated.

Subdivision (f)(4)

This subdivision states, "The child took a legal position in the trial court adverse to that of one of his or her siblings, and an issue has been raised in the appellant's opening brief regarding the siblings' adverse positions." All participants recognized the importance of including a factor recognizing the potential conflicts created by sibling relationships. The committee drafted this factor to address these potential conflicts as they relate to the legal issues raised in a given appeal. The committee adopted the recommendation of the one comment received regarding this factor, which added the second clause to the sentence, thus relating the legal issue on appeal to the conflict.

Subdivision (f)(5)

Many commentators urged the council to adopt a rule pertaining to situations in which the legal issue on appeal directly relates to the child. In these special situations, which include determinations of parentage, educational rights, inheritance rights, privileges as identified in division eight of the Evidence Code, consent to treatment, and determination of tribal membership, the child is essentially the "real party in interest"⁴ and as such, trial counsel should consider recommending the appointment of separate counsel. While this factor did not circulate for comment, because it was suggested as an addition by numerous commentators, the committee believes it provides critical guidance and therefore proposes inclusion of this factor.

Subdivision (f)(6)

Given the fluid nature of dependency cases, the proposal generated much comment about the effects of post-judgment evidence. The committee was mindful that this proposal should not expand the Supreme Court's holding in *In re Zeth S.*, (2003) 31 Cal.4th 396. However, the committee believes it necessary to provide additional guidance to trial counsel. As such, the committee recommends the adoption of both subdivision (f)(6), which tracks the language in *Zeth S.*, as well as the advisory comment, which refers counsel to the applicable case law. The committee recognizes that in situations involving changes of circumstances, actions other than the filing of a recommendation for separate counsel may be appropriate.

Subdivision (f)(7)

The committee, the working group, and several commentators recognized that situations exist in which co-respondents do not adequately represent or protect the

⁴ See *Ruddock v. Ohls*, (1979) 91 Cal.App.3rd 271, 277-278

best interests of the child. These situations occur where the agency changes its position on appeal, or child's counsel believes that given the complex nature of a given appeal, the agency attorney lacks the necessary expertise to advocate in the Court of Appeal. While this factor did not circulate for comment, because it was suggested as an addition by numerous commentators, the committee believes it provides critical guidance and proposes inclusion of this factor.

Subdivision (f)(8)

The committee believes it is critical to include a catch-all provision to remind trial counsel or CAPTA GALs that they have discretion to consider other factors relevant to the child's best interest when determining whether to make a recommendation.

Subdivision (g)

Subdivision (g), "Form of recommendation" states that counsel may use form JV-810 in making a recommendation to the Court of Appeal, and in any event, must include the information contained in that form when making a recommendation, specify a factual basis for the recommendation, and be submitted under penalty of perjury.

Form JV-810

The committee proposes the approval of new form JV-810 to provide a simple way for trial counsel, CAPTA GALs or children to request appointed counsel. The form itself is modeled after the rule in that it lists the factors to be considered. In addition, the form calls for basic information from the requesting party, asks for a factual basis for the request, and contains a proof of service listing the district appellate project.

Rule 8.412

Finally, in order to evaluate the need to make a recommendation to the Court of Appeal, the committee recommends modifying Rule 8.412. This proposal would require that child's trial counsel or the CAPTA GAL, in the absence of trial counsel, receive all appellate briefs. The committee received no objections to this proposed amendment.

Alternative Actions Considered

Given the legislative mandate to adopt a rule of court, the committee did not consider the alternative of not drafting a rule. However, the original proposal would have placed the rule in the rules of court applicable to appellate proceedings, but after further consideration, the committee decided the rule was more appropriately placed within the juvenile rules.

Comments from Interested Parties

The invitation to comment on the proposal was circulated from December 18, 2006 through January 26, 2007, to the standard mailing list for family and juvenile law proposals, as well as the regular rules and forms mailing list. This distribution includes appellate justices, trial court judges, court administrators, attorneys, social workers, probation officers, mediators, and other family and juvenile law professionals. In addition, the proposal was sent to members of the AOC's court-appointed counsel mailing list as well as to attorneys known to specialize in juvenile appellate practice.

This proposal was circulated for comment with rule 5.661 initially proposed as rule 8.402. In addition, the committee proposed amendments to rule 8.408 that have been withdrawn as discussed below. While comments were received on the prior version of the rules, the substance of the comments is discussed below as they relate to the new rule and subdivision numbering.

The comments are summarized in the attached chart at pages 22–43. There were a total of thirty five (35) commentators. Thirteen of the thirty five agreed with the proposal in its entirety, while the remaining twenty two agreed if modifications were made.

The committee reviewed and considered the comments from the public as well as the recommendations from the working group and those of the other interested committees named above.

Rule 5.661

Subdivision (a) – Definition

Two commentators noted that the proposal as previously worded could potentially create confusion between a CAPTA GAL and a conventional guardian ad litem. The committee recommends this section be adopted to avoid any such confusion.

Subdivision (b)

There were no public comments relating to this subdivision.

Subdivision (c)

Several comments emphasized the importance of the statute's distinction between its articulation of the appellate court standard and the mandate to trial counsel. Specifically, the appellate court must appoint counsel in cases where the child is the appellant and may appoint in any other case if it concludes that appointment would benefit the child. Trial counsel are mandated, however, to file a recommendation for separate counsel on appeal in cases where "the child's interests cannot be protected without the appointment of separate counsel." Several commentators requested the adoption of different standards, or clarifying

language. Following much discussion, the rule has been amended to both track the language of the statute and clearly reflect the distinction amongst the standards.

One commentator recommended amending this subdivision to reflect that the recommendation can also come from any party or amicus curiae. The committee considered adding “any party” or “the child” to be consistent with existing law. Because this rule is directed at child’s trial counsel and CAPTA GAL, the committee did not believe it was necessary.

Subdivision (d)

Several commentators believed that a deadline should be imposed, or that a good cause exception be added into the proposal. The committee devoted a considerable amount of discussion to the question of when a recommendation should be filed. Given CAPTA’s directive that a CAPTA GAL may file a recommendation “at any time,” the committee recognized that this subdivision could not contain an absolute restriction. The committee was mindful of the public comments which highlighted the appellate court rule requiring decisions to be rendered within 250 days of the filing of a notice of appeal. These groups were also mindful of the concerns raised by trial counsel that in a minority of cases, it will not become known that a recommendation will be needed until after the opening briefs are reviewed. The committee therefore recommends adopting the proposed language. Inclusion of the word “must” will serve as a notice to trial counsel to act as quickly as possible, while insertion of the good cause exception will continue to allow a CAPTA GAL to file “at any time.”

Subdivision (e)

Two commentators noted the importance of service upon the district appellate project. Given that in most cases the district appellate project will be involved in the appointment process if such a request is granted, serving notice of a request upon the project appears appropriate as a time-saving device.

Subdivision (f) – generally

This list of factors for trial counsel to consider was the central focus of the majority of the commentators, and comprised the majority of the discussion amongst all of the groups who reviewed and considered this proposal. Nearly all of the comments relating to the list of recommended factors have been discussed in the “Rationale” section above and are therefore not repeated.

Several commentators, as well as a minority of the working group advocated for the inclusion of a factor relating to cases of first impression or the existence of recurring legal issues. The committee likened this factor to a situation where the child wished to serve in an amicus role or advocate for law reform. The committee believes, however, that the statute itself does not allow for a child to simply have a

voice in the appeal absent the presence of additional information such as those included in the listed factors (e.g., a child expresses a desire to participate in the appeal or a co-respondent is unable to adequately protect or represent the child's interests). In addition, given that subdivision (f) is limited to situations where the child is not seeking appellate relief (e.g., the child earned a favorable ruling from the trial court), it is not possible for a child to earn a more favorable decision from the Court of Appeal. Therefore, the committee does not propose inclusion of this factor.

Two commentators recommended the inclusion of a factor relating to an "ethical" conflict, but the committee believes this factor is adequately contemplated by subdivision (f)(1).

Subdivision (g) and form JV-825

One commentator requested that the child be included as a possible person making the recommendation. A check box has been added so that a child can use this form to request appointment of appellate counsel.

Rule 8.408

The proposal as circulated for comment included a recommendation to change one of the parties to whom the superior court clerk must immediately send a copy of the record. Currently the rule requires the clerk to send a copy to appellate counsel for the minor. The proposal included a recommendation that this be changed to require a copy be served on the child's guardian ad litem or trial counsel. This proposal generated comments relating to the clerks' duties to make and send additional copies of the record, as well as storage concerns for child's trial counsel. Several commentators disagreed with the recommendation to have trial counsel receive the record, though others believed this recommendation was appropriate. Given the fact that trial counsel will be receiving the appellate briefs and this proposal would create additional work load for court staff, the committee does not recommend this amendment.

Rule 8.412

Eight commentators made recommendations regarding this proposal to require service of briefs by parties and amici curiae on the child's guardian ad litem or trial counsel. Several commentators believed the briefs should be served on both trial counsel and CAPTA GAL; however, the committee believed this created an undue burden on appellate counsel. One commentator noted that the provision should apply to amicus briefs, and the committee believes the rule encompasses this principle. The committee proposes requiring service on the child's trial counsel or in the absence of trial counsel, on the CAPTA GAL. In addition, one commentator pointed out that the proposal erroneously sought to change subdivision (d) rather than subdivision (e), and that error has been fixed.

Additional Comments

Several commentators requested amendments to the sections in 8.402 that referenced the Court of Appeal. Given that the rule has been placed in the juvenile rules, the committee removed the sections that previously applied to the Court of Appeal. The committee noted that those sections of the rule that referenced the Court of Appeal were simply restatements of existing law and were not appropriately contained in rule 5.661.

The committee also considered comments that it deemed outside the scope of the legislative mandate. Specifically, the committee considered two comments requesting that a rule be adopted mandating demonstration of special competence in juvenile law, one requesting clarifying language as to “who controls the case,” and one requesting a change in the time a notice of appeal can be filed from 60 to 30 days. Two commentators recommended this proposal be expanded to allow other parties to make a recommendation to the Court of Appeal, but the committee noted that this is outside the express provision of the statute as well.

Implementation Requirements and Costs

Implementation of this proposal will create additional time demands and expense for trial counsel or CAPTA GAL’s, as well as the possibility of an increase in the number of counsel appointed for children on appeal. The Judicial Council has submitted a request for additional funding for the trial and appellate courts in order to implement the new legislative mandates.

Attachments

Rule 5.661 is added to the California Rules of Court and rule 8.412 is amended, effective July 1, 2007, to read:

1 **Rule 5.661 Representation of the child on appeal**

2
3 **(a) Definition**

4
5 For purposes of this rule, “guardian ad litem” means a person designated as
6 the child’s Child Abuse Prevention and Treatment Act (CAPTA) guardian ad
7 litem as defined in rule 5.662.

8
9 **(b) Child as appellant**

10
11 A notice of appeal on behalf of the child must be filed by the child’s trial
12 counsel, guardian ad litem, or the child if the child is seeking appellate relief
13 from the trial court’s judgment or order.

14
15 **(c) Recommendation from child’s trial counsel or guardian ad litem**

16
17 (1) In any juvenile dependency proceeding in which a party other than the
18 child files a notice of appeal, if the child’s trial counsel or guardian ad
19 litem concludes that, for purposes of the appeal, the child’s best
20 interests cannot be protected without the appointment of separate
21 counsel on appeal, the child’s trial counsel or guardian ad litem must
22 file a recommendation in the Court of Appeal requesting appointment
23 of separate counsel.

24
25 (2) A child’s trial counsel or guardian ad litem who recommends
26 appointment of appellate counsel for a child who is not an appellant
27 must follow the procedures outlined in subdivisions (d)–(g).

28
29 **(d) Time for trial counsel or guardian ad litem to file the recommendation**
30 **with the Court of Appeal**

31
32 A recommendation from the child’s trial counsel or guardian ad litem may be
33 filed at any time after a notice of appeal has been filed, but absent good
34 cause, must be filed in the Court of Appeal no later than 20 calendar days
35 after the filing of the last appellant’s opening brief.

36
37 **(e) Service of recommendation**

38
39 Child’s trial counsel or guardian ad litem must serve a copy of the
40 recommendation filed in the Court of Appeal on the district appellate project.

1
2 **(f) Factors to be considered**
3

4 The following are factors to be considered by a child’s trial counsel or
5 guardian ad litem in making a recommendation to the Court of Appeal:
6

7 (1) An actual or potential conflict exists between the interests of the child
8 and the interests of any respondent;
9

10 (2) The child did not have an attorney serving as his or her guardian ad
11 litem in the trial court;
12

13 (3) The child is of a sufficient age or development such that he or she is
14 able to understand the nature of the proceedings and,
15

16 (A) The child expresses a desire to participate in the appeal, or
17

18 (B) The child’s wishes differ from his or her trial counsel’s position;
19

20 (4) The child took a legal position in the trial court adverse to that of one of
21 his or her siblings, and an issue has been raised in an appellant’s
22 opening brief regarding the siblings’ adverse positions;
23

24 (5) The appeal involves a legal issue regarding a determination of
25 parentage, the child’s inheritance rights, educational rights, privileges
26 identified in division 8 of the Evidence Code, consent to treatment, or
27 tribal membership;
28

29 (6) Postjudgment evidence completely undermines the legal underpinnings
30 of the juvenile court's judgment under review, and all parties recognize
31 this and express a willingness to stipulate to reversal of the juvenile
32 court's judgment;
33

34 (7) The child’s trial counsel or guardian ad litem, after reviewing the
35 appellate briefs, believes that the legal arguments contained in the
36 respondents’ briefs do not adequately represent or protect the best
37 interests of the child; and
38

39 (8) The existence of any other factors relevant to the child’s best interests.
40

41 **(g) Form of recommendation**
42

1 **Rule 8.412 Briefs by parties and amici curiae**

2
3 (a)–(d) ***

4
5 (e) **Additional service requirements**

6
7 (1) A copy of each brief must be served on the superior court clerk for
8 delivery to the superior court judge.

9
10 (2) A copy of each brief must be served on the child’s trial counsel, or if
11 the child is not represented by trial counsel, on the child’s guardian ad
12 litem appointed under rule 5.662.

13
14 ~~(2)~~(3) If the Court of Appeal has appointed counsel for any party:

15
16 (A) The county child welfare department and the People must serve
17 two copies of their briefs on that counsel; and

18
19 (B) Each party must serve a copy of its brief on the district appellate
20 project.

21
22 ~~(3)~~(4) In delinquency cases the parties must serve copies of their briefs on
23 the Attorney General and the district attorney. In all other cases the
24 parties must not serve copies of their briefs on the Attorney General or
25 the district attorney unless that office represents a party.

26
27 ~~(4)~~(5) The parties must not serve copies of their briefs on the Supreme
28 Court under rule 8.44(b)(1).
29

TO BE FILED IN THE COURT OF APPEAL

JV-810

COURT OF APPEAL, _____ APPELLATE DISTRICT, DIVISION _____	Court of Appeal Case Number:
	Superior Court Case Number:
ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, State Bar number, and address</i>): _____ TELEPHONE NO.: _____ FAX NO. (<i>Optional</i>): _____ E-MAIL ADDRESS (<i>Optional</i>): _____ ATTORNEY FOR (<i>Name</i>): _____	<p align="center"><i>FOR COURT USE ONLY</i></p> <p align="center">Draft 21 03/23/07 xyz Not approved by the Judicial Council</p>
APPELLANT: RESPONDENT:	
<p align="center">RECOMMENDATION FOR APPOINTMENT OF APPELLATE ATTORNEY FOR CHILD (California Rules of Court, Rule 5.661)</p>	

INSTRUCTIONS—READ CAREFULLY

- Read the entire form *before* completing any items.
- This form must be clearly handprinted in ink or typed.
- Complete all applicable items in the proper spaces. If you need additional space, add an extra page and check the "Additional pages attached" box on page 2.
- If you are filing this form in the Court of Appeal, file the original and 4 copies.
- If you are filing this form in the California Supreme Court, file the original and 10 copies.
- A copy must be served on the local district appellate project.
- Notify the clerk of the court in writing if you change your address after filing your form.

Individual Courts of Appeal or the Supreme Court may require documents other than or in addition to this form. Contact the clerk of the reviewing court for local requirements.

APPELLATE CASE TITLE:	APPELLATE CASE NUMBER:
-----------------------	------------------------

1. Trial counsel, court-appointed guardian ad litem for the child under rule 5.662, or the child in the above-captioned case:
 - a. Name:
 - b. I am the trial counsel guardian ad litem child
 - c. Address:

 - d. Telephone number:

2. I recommend that an appellate attorney be appointed for the child in this case.

3. The child's best interests cannot be protected without the appointment of counsel on appeal for the following reasons (*check all that apply*):
 - a. An actual or potential conflict exists between the interests of the child and the interests of any respondent.
 - b. The child did not have an attorney serving as his or her guardian ad litem in the trial court.
 - c. The child is of a sufficient age or development such that he or she is able to understand the nature of the proceedings, and
 - (1) The child expresses a desire to participate in the appeal; or
 - (2) The child's wishes differ from his or her trial counsel's position.
 - d. The child took a legal position in the trial court adverse to that of one of his or her siblings, and an issue has been raised in an appellant's opening brief regarding the siblings' adverse positions.
 - e. The appeal involves a legal issue regarding a determination of parentage, the child's inheritance rights, educational rights, privileges identified in division 8 of the Evidence Code, consent to treatment, or tribal membership.
 - f. Postjudgment evidence completely undermines the legal underpinnings of the juvenile court's judgment under review, and all parties recognize this and express a willingness to stipulate to reversal of the juvenile court's judgment.
 - g. The child's trial counsel or guardian ad litem, after reviewing the appellate briefs, believes that the legal arguments contained in the respondents' briefs do not adequately represent or protect the best interests of the child.
 - h. The existence of any other factors relevant to the child's best interests (*specify*):

4. State the facts that support your recommendation:

Additional pages attached

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, except for matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

(TYPE OR PRINT NAME)

▶

(SIGNATURE OF APPLICANT)

APPELLATE CASE TITLE: _____	APPELLATE CASE NUMBER:
------------------------------------	--------------------------------

PROOF OF SERVICE

I served a copy of the foregoing *Recommendation for Appointment of Appellate Attorney for Child* on the following by personally delivering a copy to the person served, OR by delivering a copy to a competent adult at the usual place of residence or business of the person served and thereafter mailing a copy by first-class mail to the person served at the place where the copy was delivered, OR by placing a copy in a sealed envelope and depositing the envelope directly in the United States mail with postage prepaid or at my place of business for same-day collection and mailing with the United States mail, following our ordinary business practices with which I am readily familiar:

1. Respondent court

a. Name and address:

b. Date of service:

c. Method of service:

2. District appellate project

a. Name and address:

a. Name and address:

b. Date of service:

b. Date of service:

c. Method of service:

c. Method of service:

3. Child *(if 10 years of age or older)*

a. Name and address:

Child's trial counsel *(if trial counsel is not submitting this request)*

a. Name and address:

b. Date of service:

b. Date of service:

c. Method of service:

c. Method of service:

WINTER 07-05

Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

GENERAL POSITIONS AND COMMENTS – Appointment of Appellate Counsel for Children in Juvenile Dependency Cases¹

List of All Commentators and Their Overall Positions on the Proposal

	Commentator	Position	Comment on behalf of group?	Please see comment excerpts and summaries under specific topic headings below	Please see committee responses under specific topic headings below
1	Appellant Indigent Defense Oversight Advisory Committee (AIDOAC)	AM	Y		
2	Ms. Elaine Alexander Executive Director Appellate Defenders, Inc.	AM	Y		
3	Ms. Grace Andres Program Manager Superior Court of Solano County	A	Y		
4	Administrative Presiding Justices California Courts of Appeal	AM	Y		
5	Hon. Craig E. Arthur Commissioner Superior Court of Orange County	AM	N		
6	Hon. Patricia Bresee (Ret.) Superior Court of San Mateo County	AM	N		
7	Mr. Reginald Carter Department of Children and Family Services Pasadena, California	A	Y		
8	Mr. Roger Chan San Francisco County Public Defender	A	N		
9	Mr. Curtis Child National Center for Youth Law	AM	Y		

¹ The principle proposed rule originally circulated as proposed rule 8.402. Following the public comment period, the committee determined its placement within the juvenile rules was more appropriate. The comments address the rule as originally circulated as well as the proposed modifications.

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

10	Ms. Krystina Cifuentez Deputy Court Administrator Superior Court of Kings County	A	Y		
11	Hon. Tari Cody Superior Court of Ventura County	A	N		
12	Ms. Lisa Cooney San Diego County Bar Association	AM	Y		
13	Ms. Ana Espana San Diego County Public Defender	AM	Y		
14	Ms. Deena Fawcett Clerk/Administrator Court of Appeal, Third Appellate District	AM	Y		
15	Mr. Robert Fellmeth Executive Director Children's Advocacy Institute	AM	Y		
16	Ms. Donna Furth Northern California Association of Counsel for Children	A	N		
17	Mr. Rob Gendreau Deputy Public Defender Contra Costa County	AM	N		
18	Ms. Pauline Hirose; Ms. Kimberly Hasler; Mr. Michael Burns; Mr. Charles Casey Juvenile Defense Panel Riverside County	AM	N		
19	Mr. Dennis Jones Executive Officer Superior Court of Sacramento County	A	Y		
20	Ms. Nancy Kendrick Senior Research Attorney Court of Appeal, Fourth Appellate	AM	N		

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

	District				
21	Ms. Miriam Krinsky; Ms. Martha Matthews Children’s Law Center of Los Angeles	AM	Y		
22	Mr. Chris Massod, Attorney at Law AFC San Joaquin County	AM	Y		
23	Hon. Judith McConnell Administrative Presiding Justice Court of Appeal, Fourth Appellate District	AM	N		
24	Ms. Tricia McCoy Executive Officer Superior Court of Kern County	AM	Y		
25	Hon. Linda McFadden Presiding Juvenile Judge Superior Court of Stanislaus County	A	Y		
26	Ms. Debbie Mochizuki Lead Dependency Attorney Court of Appeal, Fifth Appellate District	AM	N		
27	Ms. Andrea Nelson Director of Operations Butte County Superior Court	A			
28	Ms. Susan O’Brien Attorney at Law	AM	N		
29	Mr. William W. Patton Professor of Law Whitter College of Law	AM	N		
30	Mr. Mike Roddy Executive Officer Superior Court of San Diego County	A	Y		
31	Mr. Gary Seiser	AM	Y		

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

	Senior Deputy County Counsel Office of County Counsel San Diego County, Juvenile Dependency Division				
32	Ms. Jan Sherwood Attorney at Law	AM	N		
33	Darla Sterios Senior District Attorney Fresno County District Attorney	A			
34	Mr. Ben Stough Executive Officer Superior Court of Mendocino County	A	N		
35	Hon. Paul Turner Court of Appeal, Second Appellate District	A	N		

GENERAL COMMENTS ABOUT THE PROPOSAL

Commentator	Position	Comment Excerpt or Summary:	Committee Response
Ms. Elaine Alexander Executive Director Appellate Defenders, Inc.	A	Grateful that AB 2480 gives children expanded opportunities to participate in a process that will profoundly affect their lives. Recommend considering a provision expressly stating that minor who is dissatisfied with the judgment should file a notice of appeal.	No response required. Modified to be included as proposed subdivision (b).
Ms. Grace Andres Program Manager Superior Court of Solano County	A	In light of 8.416(e), 30 day filing requirement is restrictive. Suggests providing a longer filing time. Current Appointment Procedures acceptable.	Addressed in proposed subdivision (d), by modifying time to file recommendation to 20 days following filing of last appellant's brief absent good cause.

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

Ms. Ana Espana San Diego County Public Defender	A	Children should have a voice in legal proceedings that affect their lives.	No response required.
Mr. Robert Fellmeth Executive Director Children’s Advocacy Institute	A	Co-sponsored the legislation in order to codify the notion already existing in the trial court, namely the acknowledgement that children are parties with distinct interests in pending dependency cases and a right to be heard and present information at every level of the proceedings	No response required.
Ms. Donna Furth Northern California Association of Counsel for Children	AM	8.402 should be amended to distinguish references between a GAL and a CAPTA GAL.	New subdivision (a) defines GAL as a CAPTA GAL as defined in rule 5.662.
Mr. Rob Gendreau Deputy Public Defender Contra Costa County	AM	Noted that trial counsel for the child can and should remain as appellate counsel as well.	Legislation mandated a rule to provide guidance in situations where trial counsel will recommend separate counsel on appeal. The committee notes that nothing in the statute or rule requires deviation from any current practice relating to trial counsel also serving as appellate counsel in appropriate cases.
Ms. Miriam Krinsky; Ms. Martha Matthews Children’s Law Center of Los Angeles	A	Co-sponsor of AB 2480. Believes that children are parties with distinct interests in pending dependency cases and a right to be heard and present information at every level of the proceedings	No response required.
Mr. Chris Massod, Attorney at Law AFC San Joaquin County	AM	Attorneys should be appointed to minors in every case.	No response required.
Ms. Tricia McCoy Executive Officer Superior Court of Kern County	AM	Comments made on behalf of Kern County Superior Court, County Counsel, Public Defender and Indigent Attorney Panel.	No response required.
Mr. William W. Patton Professor of Law Whitter College of Law	AM	Presumption should be that appellate counsel be appointed; presumption that the standard not be high.	No response required
Mr. Gary Seiser Senior Deputy County Counsel	A	Children’s appellate counsel is a significant benefit to the child and the appellate process so	No response required.

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

Office of County Counsel San Diego County, Juvenile Dependency Division		long as counsel is qualified.	
Ms. Darla Sterios Senior District Attorney Fresno County District Attorney	A	Rule provides sufficient guidance to trial counsel and will assist them in determining how to participate in appeal.	No response required.
Hon. Paul Turner Court of Appeal, Second Appellate District	A	“Well done.”	No response required

COMMENTS ABOUT SPECIFIC RULES AND FORMS

Circulated rule 8.402(a)–Appointment (generally), now partially withdrawn and partly contained in 5.661(b)

Commentator	Position	Comment Excerpt or Summary:	Committee Response
Ms. Elaine Alexander Executive Director Appellate Defenders, Inc.	AM	Proposed language would improperly restrict statutory command of Welfare and Institutions Code § 395.	Subdivisions (b) and (c) now distinguish cases where children are seeking appellant relief versus where they are seeking separate counsel as a respondent. Removed references to court of appeal, give rule placement in juvenile rules.
Administrative Presiding Justices California Courts of Appeal	AM	Delete, “An order or judgment in”	Modified as proposed.
Mr. Robert Fellmeth Executive Director Children’s Advocacy Institute	AM	Proposed language confuses the floor prescribed for trial counsel with the standard in the court of appeal. Must add language to clarify and suggests adding an (a)(3): “A recommendation by the child’s trial counsel or guardian ad litem appointed under rule 5.662 that the child would benefit shall create a presumption that the appointment of appellate counsel would benefit the child.”	Recommended language added to the extent it is consistent with the language of the statute. See above comment.

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

Mr. Gary Seiser Senior Deputy County Counsel Office of County Counsel San Diego County, Juvenile Dependency Division	AM	Recommends adding provision stating court of appeal may appoint if the court finds the child would benefit or such appointment is otherwise in the child’s best interest.	Given the move of the rule to section five, language directed to the court of appeal no longer necessary.
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Circulate rule 8.402(a)(1)–Appointment, now contained partially within 5.661 (b) and (c)

Commentator	Position	Comment Excerpt or Summary:	Committee Response
Appellant Indigent Defense Oversight Advisory Committee (AIDOAC)	AM	Amend to: The child is an appellant seeking appellate relief from the trial court’s judgment. In such a situation, trial counsel or a guardian ad litem appointed pursuant to Rule 5.662, must file a notice of appeal on behalf of the child.”	Modified as recommended.
Ms. Elaine Alexander Executive Director Appellate Defenders, Inc.	AM	Recommend, “If the child is the appellant.”	Subdivisions (b) and (c) now distinguish cases where children are seeking appellant relief versus where they are seeking separate counsel as a respondent. Removed references to court of appeal, give rule placement in juvenile rules.
Appellate Administrative Presiding Justices California Courts of Appeal	AM	Delete, “If” and “...and trial counsel or the guardian ad litem appointed under rule 5.662 wishes to seek appellate relief.”	Modified as recommended.
Mr. Curtis Child National Center for Youth Law	AM	Anytime child is appellant, counsel should be appointed; Recommend, “If the child is the appellant.”	Subdivisions (b) and (c) now distinguish cases where children are seeking appellant relief versus where they are seeking separate counsel as a respondent. Removed references to court of appeal, give rule placement in juvenile rules.
Ms. Lisa Cooney San Diego County Bar Association	AM	Anytime child is appellant, counsel should be appointed; Recommend, “If the child is the appellant.”	Same as above.
Ms. Donna Furth Northern California Association of Counsel for Children	AM	Recommends counsel be appointed anytime a notice of appeal has been filed “by or on behalf” of the child.	The rule is intended only to implement AB 2480 by directing trial counsel or a child’s CAPTA GAL to the child’s trial counsel, guardian ad litem or the child.

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

Ms. Miriam Krinsky; Ms. Martha Matthews Children’s Law Center of Los Angeles	AM	Recommend, “If the child is the appellant.”	Subdivisions (b) and (c) now distinguish cases where children are seeking appellant relief versus where they are seeking separate counsel as a respondent. Removed references to court of appeal, give rule placement in juvenile rules.
Hon. Judith McConnell Administrative Presiding Justice Fourth District Court of Appeal	AM	Recommend, “If the child is the appellant.”	Same as above.
Ms. Debbie Mochizuki Lead Dependency Attorney Fifth District Court of Appeal	AM	Should amend language to reflect inadvertent omissions in proposal	Same as above.
Ms. Jan Sherwood Attorney at Law	AM	Recommend, “If the child is the appellant.”	Same as above.

Circulated rule 8.402(a)(2)–Appointment, proposal partially withdrawn and partially included as Rule 5.661 (c)

Commentator	Position	Comment Excerpt or Summary:	Committee Response
AIDOAC Appellant Indigent Defense Oversight Advisory Committee	AM	Amend last word to “child.”	Modified as recommended.
Ms. Elaine Alexander Executive Director Appellate Defenders, Inc.	AM	Recommend, “If the child is not an appellant and the Court of Appeal determines that appointment of counsel would benefit the child.”	Subdivisions (b) and (c) now distinguish cases where children are seeking appellant relief versus where they are seeking separate counsel as a respondent. Removed references to court of appeal, give rule placement in juvenile rules.
Administrative Presiding Justices California Court of Appeals	AM	Recommends grammatical changes	Modified as recommended.
Hon. Craig E. Arthur Commissioner Superior Court of Orange County	AM	Recommend amending to reflect that the recommendation can also come from any party.	The rule is intended only to implement AB 2480 by directing trial counsel or a child’s CAPTA GAL.

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

Hon. Patricia Bresee (Ret.) Superior Court of San Mateo	AM	Recommends changing to, “A child’s trial counsel or guardian ad litem who recommends appointment of appellate counsel for a child who is not an appellant must follow the procedures described in subdivisions (c)-(e)	Subdivisions (b) and (c) now distinguish cases where children are seeking appellant relief versus where they are seeking separate counsel as a respondent. Removed references to court of appeal, give rule placement in juvenile rules.
Ms. Lisa Cooney San Diego County Bar Association	AM	Recommend, “If the child is not an appellant and the Court of Appeal determines that appointment of counsel would benefit the child.”	Same as above.
Ms. Donna Furth Northern California Association of Counsel for Children	AM	Recommend amending to reflect that the recommendation can also come from any party or amicus curiae as well.	The rule is intended only to implement AB 2480 by directing trial counsel or a child’s CAPTA GAL.
Ms. Pauline Hirose; Ms. Kimberly Hasler; Mr. Michael Burns; Mr. Charles Casey Juvenile Defense Panel Riverside County	AM	Recommend amending to reflect “if child’s position is adverse to the agency’s.” then separate counsel must be appointed.	Since the rule is directed to trial counsel and guardian ad litem and not the Court of Appeal, this provision has been removed from the text. The principle, however appears as a factor for trial counsel to consider in subdivision (f)(1).
Hon. Judith McConnell Administrative Presiding Justice Court of Appeal, Fourth Appellate District	AM	Proposed language confuses the floor prescribed for trial counsel with the standard in the court of appeal. Should delete everything after, “would benefit the child.”	Subdivisions (b) and (c) now distinguish cases where children are seeking appellant relief versus where they are seeking separate counsel as a respondent. Removed references to court of appeal, give rule placement in juvenile rules.
Mr. William W. Patton Professor of Law Whitter College of Law	AM	Argues that the standard of proof is unclear as to when the appellate court should appoint for minor.	Modified to be consistent with the statutory mandates and existing law regarding when appointment should occur. See comment above.
Mr. Gary Seiser Senior Deputy County Counsel Office of County Counsel San Diego County, Juvenile Dependency Division	AM	Recommend amending to reflect that the recommendation can also come from any party or amicus curiae as well.	The rule is intended only to implement AB 2480 by directing trial counsel or a child’s CAPTA GAL.

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

Circulated rule 8.402(b)-Recommendation, now proposed rule 5.661(c)

Commentator	Position	Comment Excerpt or Summary:	Committee Response.
Ms. Elaine Alexander Executive Director Appellate Defenders, Inc.	AM	Recommends that recommendation be served upon all parties and others entitled to notice as well as the appellate project.	Modified as recommended.
Hon. Patricia Bresee (Ret.) Superior Court of San Mateo County	AM	Recommends, “Whenever a notice of appeal is filed by a party other than a child, and the child’s trial counsel or guardian ad litem believes that the child’s best interests in the appeal will be protected only by the appointment of a separate counsel on appeal, the trial counsel or guardian ad litem must submit a recommendation to the Court of Appeal.”	Proposed 5.661 (c) delineates the statutory language and clarifies the directive to trial counsel to file when the interests of the child cannot be protected with appointment of a separate counsel on appeal.
Ms. Pauline Hirose; Ms. Kimberly Hasler; Mr. Michael Burns; Mr. Charles Casey Juvenile Defense Panel Riverside County	AM	Allow recommendation to be made at trial and be part of minute orders, transcripts and appellate record.	Given that the need for a recommendation may not arise until after the trial court concludes its proceedings, the committee believed a recommendation must be made directly to the Court of Appeal.
Ms. Jan Sherwood Attorney at Law	AM	Recommend amending to reflect that the recommendation can also come from any party or amicus curiae as well. Also, 8.402 be amended to distinguish references between a GAL and a CAPTA GAL.	The committee considered adding “any party” or “the child” to be consistent with existing law. Because the rule is intended only to implement AB 2480 by directing trial counsel or a child’s CAPTA GAL the committee did not believe it was necessary. Modified as recommended.

Circulated rule 8.402(c)–Time to file recommendation, now contained in 5.661(d)

Commentator	Position	Comment Excerpt or Summary:	Committee Response
Appellant Indigent Defense Oversight Advisory Committee (AIDOAC)	AM	Recommends addition of a good cause requirement.	Modified as recommended.

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

Ms. Elaine Alexander Executive Director Appellate Defenders, Inc.	AM	Recommends time be 20 days after original appeal is filed with safety valve of allowing for later time upon showing of good cause.	Mindful of the federal requirement under CAPTA that a recommendation can be filed “at any time,” the proposal balances trial counsel’s need to review the briefs and consider the issues with a case’s need for timely resolution.
Administrative Presiding Justices California Courts of Appeal	AM	Delete, “...from trial counsel or the guardian ad litem may ... at any time after a notice of appeal has been filed but should be filed...”	Same as above.
Hon. Craig E. Arthur Commissioner Superior Court of Orange County	AM	Suggests counsel have until after respondent’s brief filed to “ensure county adequately protected child’s interest.”	Incorporated as proposed factor (f)(3).
Hon. Patricia Bresee (Ret.) Superior Court of San Mateo County	AM	Recommends, time be no later than 20 days.	Mindful of the federal requirement under CAPTA that a recommendation can be filed “at any time,” the proposal balances trial counsel’s need to review the briefs and consider the issues with a case’s need for timely resolution.
Mr. Curtis Child National Center for Youth Law	AM	Recommends, time be no later than 20 days unless review of briefs reveals a need. Then 10 days following filing of final brief	Same as above.
Ms. Lisa Cooney San Diego County Bar Association	AM	Recommends time be 20 days after original appeal is filed with safety valve of allowing for later time upon showing of good cause.	Modified to include good cause requirement.
Ms. Deena Fawcett Clerk/Administrator Court of Appeal, Third Appellate District	AM	Recommends imposing a deadline.	CAPTA allows CAPTA GAL to file a recommendation, “at any time.”
Mr. Robert Fellmeth Executive Director Children’s Advocacy Institute	AM	Suggest 10 days after final brief served.	Same as above.

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

Ms. Donna Furth Northern California Association of Counsel for Children	AM	Suggest 10 days after final Brief served.	Same as above.
Ms. Pauline Hirose; Ms. Kimberly Hasler; Mr. Michael Burns; Mr. Charles Casey Juvenile Defense Panel Riverside County	AM	Give trial counsel 20 days following service of opening briefs to rescind recommendation if it no longer appears necessary.	The committee supports trial counsel having the ability to rescind recommendations, but chose not to impose any restrictions in this rule.
Ms. Nancy Kendrick Senior Research Attorney Court of Appeal, Fourth Appellate District		Recommends time be 20 days after original appeal is filed with safety valve of allowing for later time upon showing of good cause. Also allow for “other person” making recommendation.	Mindful of the federal requirement under CAPTA that a recommendation can be filed “at any time,” the proposal balances trial counsel’s need to review the briefs and consider the issues with a case’s need for timely resolution. The rule is intended only to implement AB 2480 by directing trial counsel or a child’s CAPTA GAL.
Ms. Miriam Krinsky; Ms. Martha Matthews Children’s Law Center of Los Angeles		Recommends, time be no later than 20 days unless review of briefs reveal need. Then 10 days following filing of final brief.	Mindful of the federal requirement under CAPTA that a recommendation can be filed “at any time,” the proposal balances trial counsel’s need to review the briefs and consider the issues with a case’s need for timely resolution.
Hon. Judith McConnell Administrative Presiding Justice Court of Appeal, Fourth Appellate District	AM	Encourage filing as soon as possible, within 20 days after Notice of Appeal filed, and only allow for later filings upon showing of good cause.	Same as above.
Ms. Tricia McCoy Executive Officer Superior Court of Kern County	AM	Time be extended until 10 days after service of respondent’s brief	Same as above.
Mr. William W. Patton Professor of Law Whitter College of Law	AM	Attorneys will have insufficient time to formulate and make an informed recommendation. Also, attorneys will not be able to predict what course an appeal will take from review of the	Same as above. Included as rationale for proposed subdivision (f)(7).

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

		briefs.	
Ms. Jan Sherwood Attorney at Law	AM	Suggest 10 days after final brief served.	Modified to be consistent with the statutory mandates and existing law.

Circulated rule 8.402(d)–Factors to be considered in making a recommendation, now proposed as 5.661(f)

Commentator	Position	Comment Excerpt or Summary:	Committee Response
Ms. Elaine Alexander Executive Director Appellate Defenders, Inc.	AM	Does not recommend a distinction between subdivision (1) and (2) Recommend (d)(1)(A) change to, “An actual or potential conflict of interest or substantial difference of position between the child and any respondent.” Recommend (d)(1)(B) change to, “The child did not have an attorney in the trial court.” Propose additional factor, “when the child’s circumstances are fundamentally different from those at trial.” Propose additional factor, “the case involves important issues affecting the formation of the law.”	Modified as recommended. Modified to be consistent with language in Welf. & Inst. Code § 395(a)(1). Modified as recommended. Added as part of subdivision (f)(6) and advisory comment. Rationale included in subdivision (f)(7), though amicus briefs, without presence of additional facts, insufficient as stand-alone factor.
Ms. Grace Andres Program Manager Superior Court of Solano County	A	Provides sufficient guidance.	No response required.
Hon. Patricia Bresee (Ret.) Superior Court of San Mateo County	AM	Recommends modifying phrasing of the current three factors in (d)(2).	Modified as recommended.
Mr. Curtis Child National Center for Youth Law	AM	Factors do not provide sufficient guidance, and distinction between subdivisions (1) and 2) is confusing. Recommend adding: - The child’s trial counsel, after reviewing	Added as (f)(7).

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

		<p>the briefs submitted by the appellant(s) or respondent(s), is concerned that the statements of facts or legal arguments contained in the briefs do not adequately represent and protect the interests of the child;</p> <ul style="list-style-type: none"> - The appeal involves a case of first impression, or a recurring legal issue that has evaded appellate review; - There has been a significant change in factual circumstances after the order that is the subject of appeal which affects the child’s interests; - The appeal involves a legal issue affecting the child’s liberty, privacy, property, or inheritance rights, including but not limited to issues of privilege, consent, confidentiality, parentage or tribal membership. 	<p>Rationale included in subdivision (f)(7), though the committee believed that using an appellate attorney to file something akin to an amicus briefs, without the presence of additional facts, insufficient as stand-alone factor.</p> <p>Added as (f)(5).</p>
<p>Ms. Lisa Cooney San Diego County Bar Association</p>	<p>AM</p>	<p>Recommend (d)(1)(A) change to an “ethical” conflict.</p> <p>Add:</p> <ul style="list-style-type: none"> - “The appeal involves an issue on which the child’s attorney and the respondent took opposing positions; - The child’s trial counsel has concerns with the issues raised in the appellant’s opening brief or in the brief of another respondent; - The child’s circumstances changed after the judgment” 	<p>Rationale encompassed in (f)(1).</p> <p>Rationale encompassed in (f)(1) and (f)(7).</p> <p>Added as (f)(7).</p> <p>Added as part of subdivision (f)(6) and advisory comment.</p>
<p>Ms. Ana Espana San Diego County Public Defender</p>	<p>AM</p>	<p>Do not give sufficient guidance. Recommend changing (d)(1)(A) to “ethical conflict” Also</p>	<p>Encompassed in (f)(1).</p>

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

		<p>add:</p> <ul style="list-style-type: none"> - “The child is concerned with arguments raised in the appellant’s opening brief or in the brief of another respondent, and these arguments directly affect the child’s interests; - The appeal involves an order supported by the child’s attorney, but opposed by the respondent and other parties; - The appeal involves a case of first impression; - The appeal is from an order terminating parental rights and there has been a significant change of circumstances affecting the child’s legal interest; - The appeal involves a complex factual situation and the child would benefit from separate representation.” 	<p>Added as (f)(7).</p> <p>Encompassed in (f)(1).</p> <p>Rationale included in subdivision (f)(7), though the committee believed that using an appellate attorney to file something akin to an amicus briefs, without the presence of additional facts, insufficient as stand-alone factor.</p> <p>Added as part of (f)(6).</p> <p>Added as (f)(7).</p>
<p>Mr. Robert Fellmeth Executive Director Children’s Advocacy Institute</p>	<p align="center">AM</p>	<p>Suggests “shall” instead of should; opposes a list and prefers an acceptance of the trial attorney simply certifying that appointment would benefit the child, but in the alternative agrees with suggestions proposed by the San Diego Public Defender.</p>	<p>Given the statutory mandate to guide trial counsel and adopt factors, the committee believed a list of proposed factors was necessary.</p>
<p>Ms. Donna Furth Northern California Association of Counsel for Children</p>	<p align="center">AM</p>	<p>Suggests adding Parentage as factor given, “the establishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic of constitutional rights,” and, “the child is the real party in interest in any</p>	<p>Added as (f)(5).</p>

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

		suit to establish a parent-child relationship.” [citations omitted]	
Ms. Nancy Kendrick Senior Research Attorney Court of Appeal, Fourth Appellate District	AM	Amend to allow for “other person”.	The rule is intended only to implement AB 2480 by directing trial counsel or a child’s CAPTA GAL.
Ms. Miriam Krinsky; Ms. Martha Matthews Children’s Law Center of Los Angeles	AM	Factors do not provide sufficient guidance, and two separate sets confusing. Recommend adding: - The child’s trial counsel, after reviewing briefs ... is concerned that the statement of facts or legal arguments contained in the briefs do not adequately represent and protect the interests of a child; - The appeal involves a case of first impression, or a recurring legal issue that has evaded appellate review; - There has been a significant change of factual circumstances after the order that is the subject of the appeal which affects the child’s legal interests; - The appeal involves a legal issue affecting the child’s liberty, privacy, property, or inheritance rights, including but not limited to issues of privilege, consent, confidentiality, parentage or tribal membership. Also, include mechanism for other party to make recommendation	Added as (f)(7). Rationale included in subdivision (f)(7), though the committee believed that using an appellate attorney to file something akin to an amicus briefs, without the presence of additional facts, insufficient as stand-alone factor. Added as (f)(6) and as part of advisory comment. Added as (f)(5). The rule is intended only to implement AB 2480 by directing trial counsel or a child’s CAPTA GAL. to the child’s trial counsel, guardian ad litem or the child.

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

<p>Mr. Chris Massod, Attorney at Law AFC San Joaquin County</p>	<p>AM</p>	<p>Recommend adding factors relating to:</p> <ul style="list-style-type: none"> - Parentage - Termination of Parental Rights - Property/Inheritance Rights - Tribal rights 	<p>Added as (f)(5).</p>
<p>Hon. Judith McConnell Administrative Presiding Justice Court of Appeal, Fourth Appellate District</p>	<p>AM</p>	<p>Two parts (1) and (2) confusing. Subdivision (a)(1) should be amended to include a difference in position between the child and any respondent. Recommends adding additional factors:</p> <ul style="list-style-type: none"> - There has been a significant change of factual circumstances after the order that is the subject of the appeal which affects the child’s legal interests; - The appeal involves a case of first impression, or a recurring legal issue that has evaded appellate review; 	<p>Modified as recommended.</p> <p>Added as (f)(6).</p> <p>Rationale included in subdivision (f)(7), though the committee believed that using an appellate attorney to file something akin to an amicus briefs, without the presence of additional facts, insufficient as stand-alone factor.</p>
<p>Ms. Debbie Mochizuki Lead Dependency Attorney Court of Appeal, Fifth Appellate District</p>	<p>AM</p>	<p>Should amend proposed factor to reflect child’s wishes diverged from trial counsel’s position and child expressed a desire to appeal.</p> <p>Sibling position only relevant if one of those siblings appealed, therefore should add this phrase or “and an issue has been raised in the appellant’s opening brief regarding the sibling’s adverse positions.”</p> <p>Should also encourage trial counsel to file letter briefs instead of recommendations for separate counsel.</p>	<p>Committee believes that a child’s wishes sufficient to trigger making a recommendation.</p> <p>Modified as recommended.</p> <p>This is consistent with existing law, and the committee agreed that the advisory comment should reference existing case law to provide this kind of direction to trial counsel.</p>

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

Ms. Susan O'Brien Attorney at Law	AM	Add: - When trial counsel know their county counsel is not adequately trained, or unable to adequately brief the issues; - Trial counsel believes the child's interests will not adequately be represented by the county, regardless of whether their positions conflict.	Added as part of (f)(7). Added as part of (f)(7).
Mr. William W. Patton Professor of Law Whitter College of Law	AM	Amend to read, "The child took a position in the trial court or currently takes a legal position adverse to that of one of his or her siblings	Modified as part of (f)(4).
Mr. Gary Seiser Senior Deputy County Counsel Office of County Counsel San Diego County, Juvenile Dependency Division	AM	Recommends adding: - The appeal involves a complex factual situation and the child would benefit from separate representation." - A new or novel issue of law was raised at the trial court and is likely to be raised in the appeal by the appellant, or advocating for the right in any response may result in a more favorable decision for the child by the Court of Appeal.	Added as part of (f)(7). Rationale included in subdivision (f)(7), though amicus briefs, without presence of additional facts, insufficient as stand-alone factor.
Ms. Jan Sherwood Attorney at Law	AM	Suggests adding Parentage as additional factor	Added as part of (f)(5).

Circulated rule 8.402(e)–Form of recommendation, now proposed as Rule 5,661(g)

Commentator	Position	Comment Excerpt or Summary:	Committee Response
Ms. Elaine Alexander Executive Director Appellate Defenders, Inc.	A	Appointment procedures need not change per 8.300(e); form should reflect final version of rule.	None required.
Hon. Patricia Bresee (Ret.) Superior Court of San Mateo County	AM	b. Boxes should be Trial Counsel, Guardian ad Litem, Both and then Other	Modified to include child, though the rule is intended only to implement AB 2480 by directing trial counsel or a child's CAPTA GAL.

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

		Delete Current item 2. Add items to check list in c. “The appellant and other parties do not adequately reflect the concerns or best interests of the child and those consistent with modified rule.	Committee believes maximum guidance to trial counsel needed, and this language assists in its provision. Adding 5.661(f)(7) allows the inclusion of this factor in the form.
Ms. Donna Furth Northern California Association of Counsel for Children	A	Appointment procedures need not change	No response required.
Ms. Nancy Kendrick Senior Research Attorney Court of Appeal, Fourth Appellate District	AM	Amend to allow for “other person” making recommendation.	The rule is intended only to implement AB 2480 by directing trial counsel or a child’s CAPTA GAL.
Ms. Tricia McCoy Executive Officer Superior Court of Kern County	A	Please clarify if form must be submitted in every case or only when making recommendation. Concerned that trial counsel will also have to serve as appellate counsel (group opposes this notion).	Clarified in subdivision (c) by articulating that the form is to be used in circumstances which meet the triggering requirements. No change in current procedure or practice recommended.
Ms. Jan Sherwood Attorney at Law	A	Current procedures adequate. Recommends an additional rule requiring demonstration of special competence in juvenile appellate law.	No response required. No change in current practice or procedure recommended at this time.

Circulated rule 8.408–Service of record, now withdrawn.

Commentator	Position	Comment Excerpt or Summary:	Committee Response
Ms. Elaine Alexander	N	Current interpretation of rule means service	Withdrawn due to unnecessary increase in workload.

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

Executive Director Appellate Defenders, Inc.		goes to appellant counsel; change would put burden on trial counsel to forward or store record.	
Mr. Reginald Carter Department of Children and Family Services Pasadena, California	A	Insuring that GAL or trial attorney are noticed is important so that the child's best interests can be served.	No response required.
Mr. Roger Chan San Francisco County Public Defender	A	Appreciate inclusion of service provisions to minor's counsel.	Withdrawn due to unnecessary increase in workload.
Ms. Lisa Cooney San Diego County Bar Association	N	See no need for proposed modification, but would support change to "trial counsel and any guardian ad litem, if appointed separately."	Withdrawn due to unnecessary increase in workload.
Ms. Donna Furth Northern California Association of Counsel for Children	AM	Include appellate project in service requirements.	Withdrawn due to unnecessary increase in workload.
Ms. Miriam Krinsky; Ms. Martha Matthews Children's Law Center of Los Angeles	AM	If child has both attorney and GAL, should send record to both.	Withdrawn due to unnecessary increase in workload.
Mr. Chris Massod, Attorney at Law AFC San Joaquin County	A	<i>No specific comment.</i>	No response required.
Hon. Judith McConnell Administrative Presiding Justice Court of Appeal, Fourth Appellate District	N	Current interpretation of rule means service goes to appellant counsel; change would put burden on trial counsel to forward or store record.	Withdrawn due to unnecessary increase in workload.
Mr. William W. Patton Professor of Law Whitter College of Law	A	Recommends an additional rule requiring demonstration of special competence in juvenile appellate law.	Committee believes this is not within the scope of this rule's proposal and AB 2480.
Mr. Gary Seiser Senior Deputy County Counsel Office of County Counsel San Diego County, Juvenile Dependency Division	A	Recommends an additional rule requiring demonstration of special competence in juvenile appellate law. Also recommends clarifying language specifying who controls the case, as stated in In	Committee believes this is not within the scope of this rule's proposal and AB 2480. Committee believes this is not within the scope of this rule's proposal and AB 2480.

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

		re: Josiah Z., and form be amended to reflect language in the rule.	
Ms. Jan Sherwood Attorney at Law	N	Current interpretation of rule means service goes to appellant counsel; change would put burden on trial counsel to forward or store record.	Withdrawn due to unnecessary workload concerns.

Circulated rule 8.412–Service of briefs

Commentator	Position	Comment Excerpt or Summary:	Committee Response
Ms. Elaine Alexander Executive Director Appellate Defenders, Inc.	AM	Change time for filing dependency notice of appeal from 60 days to 30 days.	Committee believes this is not within the scope of this committee’s mandate.
Mr. Reginald Carter Department of Children and Family Services Pasadena, California	A	Insuring that GAL or trial attorney are noticed is important so that the child’s best interests can be served.	No response required.
Ms. Deena Fawcett Clerk/Administrator Court of Appeal, Third Appellate District	AM	Should be changing section (e), not (d)	Modified to reference correct subdivision.
Ms. Donna Furth Northern California Association of Counsel for Children	AM	Include requirement that amicus curiae briefs be served upon minor’s trial counsel or GAL as well	Already encompassed in term “any brief.”
Ms. Miriam Krinsky; Ms. Martha Matthews Children’s Law Center of Los Angeles	AM	If child has both attorney and GAL, should send record to both.	Briefing parties only required to serve attorneys of record.
Mr. Chris Massod, Attorney at Law AFC San Joaquin County	A	<i>No specific comment.</i>	No response required.
Hon. Judith McConnell Administrative Presiding Justice Court of Appeal, Fourth Appellate	A	<i>No specific comment.</i>	No response required.

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Juvenile Law: Advocates for Parties and Appellate Procedure (adopt Cal. Rules of Court, rule 5.661, amend rule 8.412; approve form JV-810)

District			
Ms. Jan Sherwood Attorney at Law	AM	If child has both attorney and GAL, should send record to both.	Briefing parties only required to serve attorneys of record.

Assembly Bill No. 2480

CHAPTER 385

An act to amend Sections 317 and 395 of the Welfare and Institutions Code, relating to dependent children.

[Approved by Governor September 22, 2006. Filed with Secretary of State September 22, 2006.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2480, Evans. Dependent children: counsel.

Existing law authorizes a child or counsel for a child, with the informed consent of the child if the child is found by a court to be of sufficient age and maturity to consent, to invoke the psychotherapist-client privilege, physician-patient privilege, and clergy-penitent privilege.

This bill would provide that a child over 12 years of age shall be presumed to be of sufficient age and maturity to consent, subject to rebuttal by clear and convincing evidence.

Existing law requires the court to appoint counsel for a child in dependency proceedings at the trial level, unless the court finds that the child would not benefit from the appointment of counsel.

This bill would require the court of appeal, in any appellate proceeding in which the child is an appellant, to appoint separate counsel for the child. The bill would also require the court of appeal, if the child is not an appellant, to appoint separate counsel for the child if the court of appeal determines, after considering recommendations of the trial counsel or guardian ad litem for the child, that appointment of counsel would benefit the child. The bill would require the Judicial Council to implement this provision by promulgating a rule of court by July 1, 2007, as specified.

The bill would also require the Judicial Council to report to the Legislature, by July 1, 2008, information regarding the status of appellate representation of dependent children, the results of implementing those provisions, and other recommendations regarding the representation of dependent children in appellate proceedings.

The bill would incorporate additional changes to Section 317 of the Welfare and Institutions Code made by SB 678 and this bill to take effect if both bills are enacted and this bill becomes operative last.

The people of the State of California do enact as follows:

SECTION 1. Section 317 of the Welfare and Institutions Code is amended to read:

317. (a) When it appears to the court that a parent or guardian of the child desires counsel but is presently financially unable to afford and cannot for that reason employ counsel, the court may appoint counsel as provided in this section.

(b) When it appears to the court that a parent or guardian of the child is presently financially unable to afford and cannot for that reason employ counsel, and the child has been placed in out-of-home care, or the petitioning agency is recommending that the child be placed in out-of-home care, the court shall appoint counsel for the parent or guardian, unless the court finds that the parent or guardian has made a knowing and intelligent waiver of counsel as provided in this section.

(c) If a child is not represented by counsel, the court shall appoint counsel for the child unless the court finds that the child would not benefit from the appointment of counsel. The court shall state on the record its reasons for that finding. A primary responsibility of any counsel appointed to represent a child pursuant to this section shall be to advocate for the protection, safety, and physical and emotional well-being of the child. Counsel for the child may be a district attorney, public defender, or other member of the bar, provided that the counsel does not represent another party or county agency whose interests conflict with the child's interests. The fact that the district attorney represents the child in a proceeding pursuant to Section 300 as well as conducts a criminal investigation or files a criminal complaint or information arising from the same or reasonably related set of facts as the proceeding pursuant to Section 300 is not in and of itself a conflict of interest. The court may fix the compensation for the services of appointed counsel. The appointed counsel shall have a caseload and training that ensures adequate representation of the child. The Judicial Council shall promulgate rules of court that establish caseload standards, training requirements, and guidelines for appointed counsel for children and shall adopt rules as required by Section 326.5 no later than July 1, 2001.

(d) The counsel appointed by the court shall represent the parent, guardian, or child at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel shall continue to represent the parent or child unless relieved by the court upon the substitution of other counsel or for cause. The representation shall include representing the parent or the child in termination proceedings and in those proceedings relating to the institution or setting aside of a legal guardianship.

(e) The counsel for the child shall be charged in general with the representation of the child's interests. To that end, the counsel shall make or cause to have made any further investigations that he or she deems in good faith to be reasonably necessary to ascertain the facts, including the interviewing of witnesses, and he or she shall examine and cross-examine witnesses in both the adjudicatory and dispositional hearings. He or she may also introduce and examine his or her own witnesses, make recommendations to the court concerning the child's welfare, and participate further in the proceedings to the degree necessary to adequately

represent the child. In any case in which the child is four years of age or older, counsel shall interview the child to determine the child's wishes and to assess the child's well-being, and shall advise the court of the child's wishes. Counsel for the child shall not advocate for the return of the child if, to the best of his or her knowledge, that return conflicts with the protection and safety of the child. In addition, counsel shall investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child that may need to be protected by the institution of other administrative or judicial proceedings. The attorney representing a child in a dependency proceeding is not required to assume the responsibilities of a social worker and is not expected to provide nonlegal services to the child. The court shall take whatever appropriate action is necessary to fully protect the interests of the child.

(f) Either the child or, if the child is represented by counsel, the counsel for the child, with the informed consent of the child if the child is found by the court to be of sufficient age and maturity to so consent, may invoke the psychotherapist-client privilege, physician-patient privilege, and clergy-penitent privilege; and if the child invokes the privilege, counsel may not waive it, but if counsel invokes the privilege, the child may waive it. Subject to rebuttal by clear and convincing evidence, a child over 12 years of age shall be presumed to be of sufficient age and maturity to consent. Counsel shall be holder of these privileges if the child is found by the court not to be of sufficient age and maturity to so consent. For the sole purpose of fulfilling his or her obligation to provide legal representation of the child, counsel for a child shall have access to all records with regard to the child maintained by a health care facility, as defined in Section 1545 of the Penal Code, health care providers, as defined in Section 6146 of the Business and Professions Code, a physician and surgeon or other health practitioner, as defined in former Section 11165.8 of the Penal Code, as that section read on January 1, 2000, or a child care custodian, as defined in former Section 11165.7 of the Penal Code, as that section read on January 1, 2000. Notwithstanding any other law, counsel shall be given access to all records relevant to the case which are maintained by state or local public agencies. All information requested from a child protective agency regarding a child who is in protective custody, or from a child's guardian ad litem, shall be provided to the child's counsel within 30 days of the request.

(g) In a county of the third class, if counsel is to be provided to a child at county expense other than by counsel for the agency, the court shall first utilize the services of the public defender prior to appointing private counsel, to provide legal counsel. Nothing in this subdivision shall be construed to require the appointment of the public defender in any case in which the public defender has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the public defender after making a finding of good cause and stating the reasons therefor on the record.

(h) In a county of the third class, if counsel is to be appointed for a parent or guardian at county expense, the court shall first utilize the services of the alternate public defender, prior to appointing private counsel, to provide legal counsel. Nothing in this subdivision shall be construed to require the appointment of the alternate public defender in any case in which the public defender has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the alternate public defender after making a finding of good cause and stating the reasons therefor on the record.

SEC. 1.5. Section 317 of the Welfare and Institutions Code is amended to read:

317. (a) (1) When it appears to the court that a parent or guardian of the child desires counsel but is presently financially unable to afford and cannot for that reason employ counsel, the court may appoint counsel as provided in this section.

(2) When it appears to the court that a parent or Indian custodian in an Indian child custody proceeding desires counsel but is presently unable to afford and cannot for that reason employ counsel, the provisions of subsection (b) of Section 1912 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and Section 23.13 of Title 25 of the Code of Federal Regulations are applicable.

(b) When it appears to the court that a parent or guardian of the child is presently financially unable to afford and cannot for that reason employ counsel, and the child has been placed in out-of-home care, or the petitioning agency is recommending that the child be placed in out-of-home care, the court shall appoint counsel for the parent or guardian, unless the court finds that the parent or guardian has made a knowing and intelligent waiver of counsel as provided in this section.

(c) If a child is not represented by counsel, the court shall appoint counsel for the child unless the court finds that the child would not benefit from the appointment of counsel. The court shall state on the record its reasons for that finding. A primary responsibility of any counsel appointed to represent a child pursuant to this section shall be to advocate for the protection, safety, and physical and emotional well-being of the child. Counsel for the child may be a district attorney, public defender, or other member of the bar, provided that the counsel does not represent another party or county agency whose interests conflict with the child's interests. The fact that the district attorney represents the child in a proceeding pursuant to Section 300 as well as conducts a criminal investigation or files a criminal complaint or information arising from the same or reasonably related set of facts as the proceeding pursuant to Section 300 is not in and of itself a conflict of interest. The court may fix the compensation for the services of appointed counsel. The appointed counsel shall have a caseload and training that ensures adequate representation of the child. The Judicial Council shall promulgate rules of court that establish caseload standards, training requirements, and guidelines for

appointed counsel for children and shall adopt rules as required by Section 326.5 no later than July 1, 2001.

(d) The counsel appointed by the court shall represent the parent, guardian, or child at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel shall continue to represent the parent, guardian, or child unless relieved by the court upon the substitution of other counsel or for cause. The representation shall include representing the parent, guardian, or the child in termination proceedings and in those proceedings relating to the institution or setting aside of a legal guardianship.

(e) The counsel for the child shall be charged in general with the representation of the child's interests. To that end, the counsel shall make or cause to have made any further investigations that he or she deems in good faith to be reasonably necessary to ascertain the facts, including the interviewing of witnesses, and he or she shall examine and cross-examine witnesses in both the adjudicatory and dispositional hearings. He or she may also introduce and examine his or her own witnesses, make recommendations to the court concerning the child's welfare, and participate further in the proceedings to the degree necessary to adequately represent the child. In any case in which the child is four years of age or older, counsel shall interview the child to determine the child's wishes and to assess the child's well-being, and shall advise the court of the child's wishes. Counsel for the child shall not advocate for the return of the child if, to the best of his or her knowledge, that return conflicts with the protection and safety of the child. In addition counsel shall investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child that may need to be protected by the institution of other administrative or judicial proceedings. The attorney representing a child in a dependency proceeding is not required to assume the responsibilities of a social worker and is not expected to provide nonlegal services to the child. The court shall take whatever appropriate action is necessary to fully protect the interests of the child.

(f) Either the child or, if the child is represented by the counsel, the counsel for the child, with the informed consent of the child if the child is found by the court to be of sufficient age and maturity to so consent, may invoke the psychotherapist-client privilege, physician-patient privilege, and clergy-penitent privilege; and if the child invokes the privilege, counsel may not waive it, but if counsel invokes the privilege, the child may waive it. Subject to rebuttal by clear and convincing evidence, a child over 12 years of age shall be presumed to be of sufficient age and maturity to consent. Counsel shall be holder of these privileges if the child is found by the court not to be of sufficient age and maturity to so consent. For the sole purpose of fulfilling his or her obligation to provide legal representation of the child, counsel for a child shall have access to all records with regard to the child maintained by a health care facility, as defined in Section 1545 of the Penal Code, health care providers, as defined in Section 6146 of the Business and Professions Code, a physician

and surgeon or other health practitioner, as defined in former Section 11165.8 of the Penal Code, as that section read on January 1, 2000, or a child care custodian, as defined in former Section 11165.7 of the Penal Code, as that section read on January 1, 2000. Notwithstanding any other law, counsel shall be given access to all records relevant to the case which are maintained by state or local public agencies. All information requested from a child protective agency regarding a child who is in protective custody, or from a child's guardian ad litem, shall be provided to the child's counsel within 30 days of the request.

(g) In a county of the third class, if counsel is to be provided to a child at county expense other than by counsel for the agency, the court shall first utilize the services of the public defender prior to appointing private counsel, to provide legal counsel. Nothing in this subdivision shall be construed to require the appointment of the public defender in any case in which the public defender has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the public defender after making a finding of good cause and stating the reasons therefor on the record.

(h) In a county of the third class, if counsel is to be appointed for a parent or guardian at county expense, the court shall first utilize the services of the alternate public defender, prior to appointing private counsel, to provide legal counsel. Nothing in this subdivision shall be construed to require the appointment of the alternate public defender in any case in which the public defender has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the alternate public defender after making a finding of good cause and stating the reasons therefor on the record.

SEC. 2. Section 395 of the Welfare and Institutions Code is amended to read:

395. (a) (1) A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment. However, that order or judgment shall be stayed by the appeal, unless, pending the appeal, suitable provision is made for the maintenance, care, and custody of the person alleged or found to come within the provisions of Section 300, and unless the provision is approved by an order of the juvenile court. The appeal shall have precedence over all other cases in the court to which the appeal is taken.

(2) A judgment or subsequent order entered by a referee shall become appealable whenever proceedings pursuant to Section 252, 253, or 254 have become completed or, if proceedings pursuant to Section 252, 253, or 254 are not initiated, when the time for initiating the proceedings has expired.

(3) An appellant unable to afford counsel, shall be provided a free copy of the transcript in any appeal.

(4) The record shall be prepared and transmitted immediately after filing of the notice of appeal, without advance payment of fees. If the

appellant is able to afford counsel, the county may seek reimbursement for the cost of the transcripts under subdivision (d) of Section 68511.3 of the Government Code as though the appellant had been granted permission to proceed in forma pauperis.

(b) (1) In any appellate proceeding in which the child is an appellant, the court of appeal shall appoint separate counsel for the child. If the child is not an appellant, the court of appeal shall appoint separate counsel for the child if the court of appeal determines, after considering the recommendation of the trial counsel or guardian ad litem appointed for the child pursuant to subdivision (e) of Section 317, Section 326.5, and California Rule of Court 1448, that appointment of counsel would benefit the child. In order to assist the court of appeal in making its determination under this subdivision, the trial counsel or guardian ad litem shall make a recommendation to the court of appeal that separate counsel be appointed in any case in which the trial counsel or guardian ad litem determines that, for the purposes of the appeal, the child's best interests cannot be protected without the appointment of separate counsel, and shall set forth the reasons why the appointment is in the child's best interests. The court of appeal shall consider that recommendation when determining whether the child would benefit from the appointment of counsel. The Judicial Council shall implement this provision by adopting a rule of court on or before July 1, 2007, to set forth the procedures by which the trial counsel or guardian ad litem may participate in an appeal, as well as the factors to be considered by the trial counsel or guardian ad litem in making a recommendation to the court of appeal, including, but not limited to, the extent to which there exists a potential conflict between the interests of the child and the interests of any respondent.

(2) The Judicial Council shall report to the Legislature on or before July 1, 2008, information regarding the status of appellate representation of dependent children, the results of implementing this subdivision, any recommendations regarding the representation of dependent children in appellate proceedings made by the California Judicial Council's Blue Ribbon Commission on Children in Foster Care, any actions taken, including rules of court proposed or adopted, in response to those recommendations or taken in order to comply with the Child Abuse Prevention and Treatment Act, as well as any recommendations for legislative change that are deemed necessary to protect the best interests of dependent children in appellate proceedings or ensure compliance with the Child Abuse Prevention and Treatment Act.

SEC. 3. Section 1.5 of this bill incorporates amendments to Section 317 of the Welfare and Institutions Code proposed by this bill and SB 678. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2007, (2) each bill amends Section 317 of the Welfare and Institutions Code, and (3) this bill is enacted after SB 678, in which case Section 317 of the Welfare and Institutions Code, as amended by SB 678, shall remain operative only until the operative date of

this bill, at which time Section 1.5 of this bill shall become operative, and Section 1 of this bill shall not become operative.

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