

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Justice Joyce L. Kennard, Chair
Heather Anderson, Senior Attorney, 415-865-7691

DATE: August 5, 2004

SUBJECT: Appellate Procedure: Filing Brief by Mail (amend Cal. Rules of Court, rule 40(k)) (Action Required)

Issue Statement

In subdivision (k), rule 40 of the California Rules of Court provides, among other things, that an appellate brief is timely filed if it is sent by certified mail or overnight carrier on the date the brief is due. Certified mail, however, is relatively slow; briefs sent by certified mail can take up to a week or more to reach the court. While overnight carriers provide quicker delivery, they are also relatively expensive.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2005, amend rule 40 of the California Rules of Court to provide a relatively quick and low-cost delivery option for appellate briefs by replacing subdivision (k)'s option of filing an appellate brief by certified mail with the option of sending the brief by Priority Mail.

The text of the amended rule is attached at page 4.¹

Rationale for Recommendation

Rule 40(k) of the California Rules of Court defines the date of filing of an appellate brief. It provides, among other things, that a brief is timely if it is sent by certified or express mail or by overnight carrier on the date the brief is due. This provision gives appellate litigants who cannot easily hand-deliver their briefs to the court additional time to complete these briefs; they can mail a brief on the due date rather than having to mail it days ahead so that it will arrive at the court before the time for filing expires. As noted

¹ Please note that rule 40 would be further revised and renumbered to be rule 40.1 as part of the fourth installment of the revisions to the appellate rules proposed by the Appellate Advisory Committee. This proposed fourth installment is also before that Judicial Council as a separate agenda item.

above, however, certified mail is relatively slow and overnight carriers are relatively expensive.

The Appellate Advisory Committee recommends that the option of filing a brief by certified mail be replaced with an option of using Priority Mail. Information provided by the U.S. Postal Service indicates that Priority Mail is typically delivered in one to three days, considerably faster than certified mail. Priority Mail also costs less than certified mail. Priority Mail up to a pound costs \$3.85; for certified mail weighing a pound, a party would have to pay the Priority Mail postage of \$3.85 and an additional \$2.30 for the certification. Thus, replacing certified mail with Priority Mail will provide for quicker delivery while providing an even lower-cost delivery option under rule 40(k). If a party wants to obtain proof of the date of mailing (beyond a postmark), the Postal Service will now provide a certificate of mailing for an additional \$.90 with Priority Mail.

Alternative Actions Considered

The committee previously considered a proposal to remove, rather than replace, the certified mail option from rule 40(k), but this proposal was rejected based on concerns about maintaining a low-cost option for delivery of briefs. The committee also considered requiring use of a certificate of mailing for proof of the mailing date, but determined that this was not necessary as the method for dating such a certificate is similar to that used for a regular postmark.

Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2004 comment cycle. Nine individuals or organizations submitted comments on this proposal.² Of these, eight commentators agreed with the proposal, one of whom also suggested changes. The ninth commentator agreed with the proposal only if modified.

Ms. Elaine Alexander, writing on behalf of four of the California appellate projects, made several suggestions. First, she suggested that the rule should also be amended to permit delivery by first-class mail. The committee is not recommending this change because most packages of briefs sent to the courts for filing are likely to fall above the 13-ounce weight limit for first-class mail. A single brief in a civil case may be up to 14,000 words in length, or the equivalent of 50 double-spaced pages, not including the required cover and tables and up to 10 pages of exhibits. Briefs in criminal cases may be even longer; a single brief in a criminal case may be up to 25,500 words in length. A sample 14,000-word brief filed in the Court of Appeal weighed 12.3 ounces. A sample of a shorter brief, 7,590 words, weighed 5.2 ounces. Under rule 44, a party must file the original and four copies of each brief with the Court of Appeal. A package containing five copies of a 14,000-word brief, with a 1-ounce envelope, would weigh 3.9 pounds, and a package containing five copies of a 7,590-word brief would weigh approximately 1.7 pounds. Even if a brief is extremely short, a package with five copies is likely to weigh at least 13

² The full text of the comments and the committee responses to these comments is set forth on the accompanying comment chart, beginning on page 5.

ounces or be so close to that weight that the difference in postage between first-class and Priority Mail is minimal.³

Second, Ms. Alexander suggested that the rule should be amended to permit delivery by common carrier pledging delivery within three days. The committee ultimately decided not to recommend this change. The committee believes it is important to emphasize that briefs must be sent to the court in the most expeditious way possible. Although this goal is balanced against the goal of providing a low-cost option for litigants in the case of the Priority Mail option, the committee did not support authorizing later delivery to the court when the delivery method did not provide an offsetting benefit in the form of lower costs.

Finally, Ms. Alexander suggested that the proposal should be amended to permit delivery using metered mail. Because of concerns about providing reliable proof of the date of mailing, the committee is not recommending this change.

The State Bar of California's Committee on Appellate Courts suggested that there be a comment accompanying the rule indicating that parties who send a document by Priority Mail fewer than three business days before the document is due should advise the court clerk by telephone that they are relying on rule 40(k) for timely filing. Although the committee agrees that some clerks may appreciate notice that a party will be filing a brief using one of the delivery methods permitted under rule 40(k), the committee does not believe that such a practice needs to be recommended on a statewide basis.

Implementation Requirements and Costs

Implementing this proposal should reduce the cost to parties of delivering briefs to the courts. In criminal appeals, this, in turn, should translate into lower costs for the appellate courts that provide the funding for appointed appellate counsel.

Attachments

³ First-class mail for 13 ounces is \$3.13. Priority Mail for up to one pound is a flat rate of \$3.85.

Rule 40 of the California Rules of Court is amended, effective January 1, 2005, to read:

1 **Rule 40. Definitions**

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3 **(a)–(j) *****

4

5 **(k)** “Date of filing” of a brief (as defined in ~~subdivision~~ (i)) is the date of delivery to the
6 clerk’s office during normal business hours. The brief is timely, however, if the time
7 for its filing had not expired on the date of its mailing by ~~certified~~ Priority or
8 Express Mail as shown on the postmark or postal receipt ~~or postmark, or the date of~~
9 its delivery to a common carrier promising overnight delivery as shown on the
10 carrier’s receipt.

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12 **(l) *****

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(amend Cal. Rules of Court, rule 40(k))

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Ms. Elaine Alexander Appellate Defenders, Inc. San Diego	AM	Y	<p>Four of the California appellate projects - the First District Appellate Project, the California Appellate Project-Los Angeles, Appellate Defenders, Inc., and the Sixth District Appellate Program⁴--collectively offer their comments on the proposed amendment to rule 40(k) of the California Rules of Court.</p> <p>We suggest that the proposal be expanded somewhat to include provisions similar to those found in Federal Rules of Appellate Procedure. We suggest rule 40(k) permit delivery by first class mail. By allowing for filing by first class mail, the federal appellate rule provides litigants a less expensive means than express mail of filing smaller documents. In fact, priority mail is a subclass of first class mail: first class mail weighing over 13 ounces is automatically treated as priority mail. Also, first class mail does not involve the processing delays inherent to certified mail.</p>	<p>The committee is not recommending this change because most packages of briefs sent to the courts for filing are likely to fall above the 13-ounce weight limit for first-class mail. A single brief in a civil case may be up to 14,000 words in length, or the equivalent of 50 double-spaced pages, not including the required cover and tables and up to 10 pages of exhibits. Briefs in criminal cases may be even longer; a single brief in a criminal case may be up to</p>

⁴ The project for the Third and Fifth Districts, the Central California Appellate Program, is not participating in this letter because its executive director, George Bond, is a member of the Appellate Advisory Committee.

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				<p>We also suggest rule 40(k) permit filing by common carrier promising delivery within three days, rather than only those promising overnight delivery. The federal rule deems timely filed briefs deposited with third-party carriers on or before the last day of filing, if delivery is to be within three calendar days. According to the United States Postal Service, it takes two to three days for delivery of first class mail and priority mail and up to two days for the delivery of express mail. The federal rule therefore places briefs filed by commercial carriers such as Federal Express or UPS on the same footing as those delivered by the United States Post Service. There appears to be no reason for making a distinction.</p> <p>Finally, we recommend that rule 40(k) allow the use of metered mail. Most larger firms and institutional litigants and many smaller practitioners use metered mail. We acknowledge this practice poses special issues, since the date on the label is imprinted by the sender rather than the carrier and no postmark is affixed during handling; it may be difficult to verify that</p>	<p>25,500 words in length. A sample 14,000-word brief filed in the Court of Appeal weighed 12.3 ounces. A sample of a shorter brief, 7,590 words, weighed 5.2 ounces. Under rule 44, a party must file the original and four copies of each brief with the Court of Appeal. A package containing five copies of a 14,000-word brief, with a 1-ounce envelope, would weigh 3.9 pounds and a package containing five copies of a 7,590-word brief would weigh approximately 1.7 pounds. Even if a brief is extremely short, a package with five copies is likely to weigh at least 13 ounces or be so close to that weight that the difference in postage between first-class and Priority Mail is minimal.</p> <p>The committee believes it is</p>

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				<p>the date on the label is the date of actual submission to the carrier. Additionally, in some rare instances, the label may not include a date. If there is no date or if there is some doubt about the date shown, a possible solution would be to require counsel to submit a declaration under penalty of perjury as to when the original filing was sent. The court accepts such statements in a variety of situations ready—e.g., extension requests and requests for relief from default. (See also U.S. Sup. Ct. Rules, rule 29, subd. 2 [if there is no date provided by carrier, clerk will require declaration from sender attesting as to time of filing].) We think that with this safeguard the possibility of abuse is minimal, especially when weighed against the significant benefits to practitioners.</p>	<p>important to emphasize that briefs must be sent to the court in the most expeditious way possible. While this goal is balanced against the goal of providing a low-cost option for litigants in the case of the Priority Mail option, the committee does not support authorizing later delivery to the court when the delivery method does not provide an offsetting benefit in the form of lower costs.</p> <p>The committee believes it is very important to have reliable evidence of the date of mailing of a brief. For the reasons identified by Ms. Alexander, the meter date cannot be relied upon for this purpose. Unlike for first-class or Priority Mail, a certificate of mailing is not available when items are sent</p>

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					using metered mail; the mailed item must be presented to a postal carrier. Finally, the committee believes that the potential additional time and expense associated with preparing and processing declarations attesting to the date of mailing of briefs sent using metered postage would outweigh any potential benefits in time and cost that would be associated with permitting this as an option for mailing briefs.
2.	Mr. Saul Bercovitch State Bar of California, Committee on Appellate Courts San Francisco	A	Y	<p>The Committee supports the amendment of rule 40(k) to substitute priority mail for certified mail, for the reasons stated by the Appellate Advisory Committee.</p> <p>The Committee recommends, however, that an Advisory Committee Comment be added suggesting that parties who send a document by priority mail less than three business days before the document is due advise the court clerk by</p>	<p>While the committee agrees that some clerks may appreciate notice that a party will be filing a brief using one of the delivery methods permitted under rule</p>

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				<p>telephone that they are relying on rule 40(k) for timely filing. This will forestall any notice of default that might otherwise be issued by the court before the document is received. The Committee does not know whether most courts have a policy of waiting a certain number of days before issuing a default notice, but members of the Committee have had varied experiences with rule 17(a) and 17(b) notices, some being issued the day after a brief is due, and others not being issued for several days. Priority mail is a delivery method that probably will not result in the document being received by the clerk the day after it is due, if the document is mailed on its due date. Members of the Committee have found that clerks appreciate the courtesy of being told the document is on its way, but will not arrive until sometime after the due date.</p>	<p>40(k), the committee does not believe that such a practice needs to be recommended on a statewide basis.</p>
3.	<p>Ms. Naida Castro Division Chief Superior Court of Los Angeles County Los Angeles</p>	A	N	<p>Agree with proposed changes.</p>	<p>No response necessary.</p>

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
4.	Ms. Linda Durand Court Program Manager Superior Court of Ventura County Ventura	A	N	Agree with proposed changes.	No response necessary.
5.	B. Gilbert Court Operations Supervisor Superior Court of Butte County Oroville	A	N	Agree with proposed changes.	No response necessary.
6.	Richard L. Haeussler Haeussler & Associates Attorney Newport Beach	A	N	Agree with proposed changes.	No response necessary.
7.	Ms. Kim Hubbard President Orange County Bar Association Irvine	A	Y	Agree with proposed changes.	No response necessary.
8.	Ms. Nancy Marutani 15060 Ventura Blvd. Sherman Oaks	A	N	Agree with proposed changes.	No response necessary.
9.	Ms. Sandra Mason Director of Civil	A	N	Agree with proposed changes.	No response necessary.

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
	Operations San Luis Obispo				

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