

**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  
Hon. Joyce L. Kennard, Chair  
Heather Anderson, Senior Attorney, 415-865-7691

DATE: August 13, 2004

SUBJECT: Appellate Procedure: Designation and Preparation of the Record (amend  
Cal. Rules of Court, rules 4, 5, and 5.1) (Action Required)

Issue Statement

In cases in which multiple appeals arise from the same trial, when a trial court receives a notice designating the record on appeal it is sometimes difficult for the court to identify the particular appeal for which that designation was filed. This difficulty causes delay in preparation of the record.

In addition, under rule 5.1, a party who is preparing an appendix instead of a clerk's transcript can include in this appendix copies of exhibits from the trial court proceeding. Sometimes, however, an exhibit is held by one of the parties. A party who is trying to prepare an appendix for an appeal may have difficulty obtaining a copy of an exhibit that is being held by an opposing party.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council effective January 1, 2005, amend rules 4, 5, and 5.1 of the California Rules of Court to:

1. Require that the party designating the record provide the date on which the notice of appeal was filed; and
2. Establish a new procedure that a party preparing an appendix could use to request an exhibit from another party.

The text of the proposed amendments to the rules is attached at pages 5–7.

## Rationale for Recommendation

### *Including date notice of appeal was filed in the designation of the record*

In response to a suggestion submitted by an appellate court clerk, the Appellate Advisory Committee recommends that rules 4, 5, and 5.1 of the California Rules of Court be amended to require that the party designating the record provide the date on which the notice of appeal was filed. Having that date will make it easier for trial court staff to identify the correct appeal for which the designation is being filed when multiple appeals arise from the same trial. This will assist in avoiding delay in preparation of the record.

### *Procedure for obtaining copies of exhibits held by another party*

Rule 5.1 sets out the procedure for a party to prepare an appendix instead of a clerk's transcript for the record in an appeal. Under this rule, a party can include in its appendix copies of exhibits from the trial court proceeding (see subdivisions (b)(1)(B) and (b)(5)). Currently, however, this rule does not address situations in which exhibits are held by parties.

Rule 5, which sets out the procedure for the superior court clerk to prepare a clerk's transcript, has a provision to address situations in which exhibits are held by parties. Rule 5(a)(5) provides that, when a party has designated an exhibit for inclusion in the clerk's transcript, the party who has that exhibit has a duty to deliver the exhibit to the superior court clerk.

The Appellate Advisory Committee recommends that rule 5.1 be amended to establish a new procedure, similar to that in rule 5, that a party preparing an appendix could use to request an exhibit from another party. The party possessing the exhibit would be required to deliver that exhibit to either the requesting party or the Court of Appeal.

## Alternative Actions Considered

As discussed below, the Appellate Advisory Committee considered, but ultimately rejected, the idea of eliminating the option for delivering a requested exhibit to the reviewing court. The committee also considered, but ultimately rejected, the idea of permitting delivery of a requested exhibit to the superior court rather than the reviewing court. The committee concluded that, since the superior court is not involved in preparing the record when an appendix is being used in lieu of a clerk's transcript, it was preferable for a requested exhibit to be delivered to the reviewing court in these circumstances.

## Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2004 comment cycle.

Eleven individuals or organizations submitted comments on this proposal.<sup>1</sup> Of these, six commentators agreed with the proposal; however, one of these six also suggested changes. The remaining five commentators agreed with the proposal only if modified; however, one of these five did not suggest any changes to the proposal. No commentators disagreed with the proposal.

*Including date notice of appeal was filed in the designation of the record*

The State Bar of California’s Committee on Appellate Courts suggested that the proposal should be modified to clarify, in cases where there is a cross-appeal, whether the date that must be included on the designation is the date of the original notice of appeal or that of the cross-appeal. The council’s advisory committee does not believe it is necessary to amend the proposal as suggested, since the date of either the original notice of appeal or the date of the cross-appeal would help the superior court clerk to identify the appeal for which a record is being requested.

*Procedure for obtaining copies of exhibits held by another party*

Three commentators—the State Bar of California’s Committee on Appellate Courts, the Los Angeles County Bar Association’s Appellate Court Committee, and Mr. Kevin Lane, the Assistant Clerk/Administrator for the Court of Appeal, Fourth Appellate District—suggested that the word “promptly,” which was used in the circulated proposal to indicate the time within which a party possessing an exhibit must respond to a request for delivery of the exhibit and the time within which an exhibit must be returned to the possessing party, was vague. Two of these commentators suggested that “promptly” should be replaced with “within 10 days.” The advisory committee agrees with the commentators and has modified the proposal to set the more specific 10-day time frame for the parties to comply with the notice and to return exhibits to the original holder.

The State Bar of California’s Committee on Appellate Courts also suggested that the proposal should be modified to delete the provision allowing a party to deliver a requested exhibit to the reviewing court. The State Bar committee expressed concern that the exhibit might get lost in the court file, as it will be “disconnected from the rest of the record” and that the requesting party would have to go to the reviewing court to make use of the exhibit. The Appellate Advisory Committee’s view is that the party holding an exhibit should be given the option of delivering that exhibit to either the reviewing court or to the requesting party. The committee believes that there are circumstances under which a party in possession of an original exhibit may not want that original to be in the possession of the opposing party but would prefer that the original be in the court’s custody and available for copying by the requesting party. Under this proposal, the original exhibit delivered to the court is not intended to be used as part of the record; rather, the court is simply holding the original exhibit so that the requesting party can

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<sup>1</sup> The full text of the comments and the committee responses to these comments are set forth on the accompanying comment chart on pages 8–13.

come to the court, make a copy of the exhibit, and then include that copy in the appendix. The courts now receive original exhibits from parties under both rules 5 and 8, and the committee is not aware of any difficulty experienced by the courts in keeping track of these exhibits.

However, based upon concerns about the specificity of the proposal raised by the State Bar Committee and by Ms. Merry Mayes, the committee has amended the proposal to (1) clarify that the party preparing the appendix must request that the party possessing the exhibit either provide a copy of the exhibit or lend the exhibit for copying, (2) clarify that the party in possession of the exhibit determines whether to deliver the exhibit to the requesting party or to the reviewing court, and (3) provide for notice to the requesting party when an exhibit is delivered to the court so that the requesting party can quickly go to the reviewing court to copy the exhibit. In addition, the committee has amended the proposal to address the return of exhibits that were delivered to the court and to divide the rule into shorter subdivisions.

#### Implementation Requirements and Costs

Implementing this proposal may impose some additional costs on the Courts of Appeal associated with receiving and making an exhibit available for copying in cases in which exhibits are delivered to the court, rather than the requesting party. But the number of cases in which this occurs is likely to be small.

Attachments

Rules 4, 5, and 5.1 of the California Rules of Court are amended, effective January 1, 2005, to read:

1 **Rule 4. Reporter’s transcript**

2  
3 **(a) Notice**

4  
5 (1)–(3) \* \* \*

6  
7 (4) A notice designating a reporter’s transcript must state the date the  
8 notice of appeal was filed and specify the date of each proceeding to  
9 be included in the transcript, and may specify portions of designated  
10 proceedings that are not to be included.

11  
12 (5)–(6) \* \* \*

13  
14 **(b)–(g) \* \* \***

15  
16 **Rule 5. Clerk’s transcript**

17  
18 **(a) Notice of designation–**

19  
20 (1)–(3) \* \* \*

21  
22 (4) A notice designating a clerk’s transcript must state the date the notice  
23 of appeal was filed and identify each designated document by its title  
24 and filing date or, if the filing date is not available, the date it was  
25 signed. The notice may specify portions of designated documents that  
26 are not to be included in the transcript. For minute orders or  
27 instructions, it is sufficient to collectively designate all minute orders  
28 or all minute orders entered between specified dates, or all written  
29 instructions given, refused, or withdrawn.

30  
31 (5) \* \* \*

32  
33 **(b)–(d) \* \* \***

34  
35  
36 **Rule 5.1 Appendixes instead of clerk’s transcript**

37  
38 **(a) Notice of election**

1 (1) Within 10 days after the notice of appeal is filed, any party electing  
2 to proceed by an appendix under this rule instead of by clerk's  
3 transcript under rule 5 must serve and file a notice of election in  
4 superior court. The notice must state the date the notice of appeal  
5 was filed. This rule then governs unless the superior court orders  
6 otherwise on a motion served and filed within 10 days after the  
7 notice of election is served.

8  
9 (2)–(4) \* \* \*

10  
11 (b) \* \* \*

12  
13 **(c) Exhibit held by other party**

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15 If a party preparing an appendix wants it to contain a copy of an exhibit  
16 in the possession of another party:

17  
18 (1) The party must first ask the party possessing the exhibit to provide  
19 a copy or lend it for copying. All parties should reasonably  
20 cooperate with such requests.

21  
22 (2) If the attempt under (1) is unsuccessful, the party may serve and  
23 file in the reviewing court a notice specifying the exhibit's trial  
24 court designation and requesting the party possessing the exhibit to  
25 deliver it to the requesting party or, if the possessing party prefers,  
26 to the reviewing court. The possessing party must comply with the  
27 request within 10 days after the notice was served.

28  
29 (3) If the party possessing the exhibit sends it to the requesting party,  
30 that party must copy and return it to the possessing party within 10  
31 days after receiving it.

32  
33 (4) If the party possessing the exhibit sends it to the reviewing court,  
34 that party must:

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36 (A) accompany the exhibit with a copy of the notice served by the  
37 requesting party, and

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39 (B) immediately notify the requesting party that it has sent the  
40 exhibit to the reviewing court.

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(5) On request, the reviewing court may return an exhibit to the party that sent it. When the remittitur issues, the reviewing court must return all exhibits to the party that sent them.

~~(e)~~(d) \* \* \*

~~(d)~~(e) \* \* \*

~~(e)~~(f) \* \* \*

~~(f)~~(g) \* \* \*

**SPR04-02**  
**Appellate Procedure: Designation and Preparation of the Record**  
**(amend Cal. Rules of Court, rules 4, 5, and 5.1)**

	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Proposed Committee Response</b>
1.	Mr. Saul Bercovitch Committee on Appellate Courts, The State Bar of California San Francisco	AM	Y	<p>The committee endorses both proposals in principle, but suggests that some clarifying language is needed.</p> <p><u>Rules 4, 5, and 5.1</u>  The proposed amendments do not make it clear what date should be designated when there is a cross-appeal: is it the date of filing the notice of cross-appeal or the date of filing the original notice of appeal? If the purpose of including the notice of appeal date in the record designation is to help the clerk determine that the record designation is timely, then the date of filing the cross-appeal would seem to be the proper date to use. But if the purpose of including the notice of appeal date is to help the clerk determine the appeal for which the record is being requested, then the date of the original notice of appeal would seem appropriate, since the clerk will be assembling a single record for both the appeal and cross-appeal and including the date of the original appeal would allow the clerk to determine quickly which appellant’s record will include any additional documents designated by a cross-appellant. It might be appropriate to require a cross appellant to include both dates so that the clerk can quickly make both determinations. The proposed amendments should be modified to include language clarifying this point.</p> <p><u>Rule 5.1(b)</u>  The committee recommends that the rule be modified to delete the provision that would allow the party in possession to deliver a requested exhibit to the</p>	<p>The purpose of this amendment is to help the superior court clerk identify the appeal for which a record is being requested, not to help determine if the designation is timely. For this intended purpose, the date of either the original notice of appeal or the notice of the cross-appeal will provide the necessary information. Therefore the committee does not believe it is necessary to amend the rule to address this comment.</p> <p>The committee believes that the party holding an exhibit should be given the</p>

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				<p>reviewing court. The party in possession should be required to deliver it to the requesting party only.</p> <p>When an appellant requests that an exhibit that has been returned to the parties be included in a clerk’s transcript, rule 5(a)(5) requires the party in possession of the exhibit to deliver it promptly “to the superior court clerk.” The purpose is to allow the clerk to transmit the exhibit to the reviewing court with the other documents that make up the clerk’s transcript. Similarly, when a party elects to proceed by appendix and requests an exhibit that was returned to an opponent, the exhibit should be delivered to the requesting party so that it can be transmitted to the reviewing court with the other documents that comprise the appendix. Otherwise, the exhibit could end up lying around loose in the reviewing court’s files, disconnected from the rest of the record, and the party who requested it would have to go to the reviewing court clerk’s office to view the exhibit and make use of it.</p> <p>The committee also notes that the proposed amendment is vague on many details. The party who wishes to use an exhibit held by another party “must first attempt to obtain the exhibit from the party possessing it.” What constitutes an attempt? Would an oral request suffice? Must it be written? If so, would a letter be enough or would a demand have to be in the form of a pleading? When must the attempt be made? Once it is made, how long must the</p>	<p>option of delivering that exhibit to either the court or to the requesting party. There are circumstances under which a party in possession of an original exhibit may not want that original to be in the possession of the opposing party, but would prefer that the original be in the court’s custody and available for copying by the requesting party. Under this proposal, the original exhibit delivered to the court is not intended for use as part of the record; rather, the court is simply holding the original exhibit so that the requesting party can come to the court, make a copy of the exhibit, and then include that copy in the requesting party’s appendix. The committee is not aware of any difficulty experienced by the courts in keeping track of exhibits delivered to them under either rule 5 or rule 18. However, the committee is recommending inclusion of an additional provision clarifying when the exhibit will be returned to the party that sent it to the court.</p> <p>The committee revised the proposal to clarify that the party’s request to the possessing party must either for a copy of the exhibit or to lend the exhibit for copying. However, the committee does not believe it is necessary to specify additional</p>

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				<p>requesting party wait before deciding that the attempt was unsuccessful and moving to the next step, serving and filing notice in the reviewing court? Just how “promptly” must party in possession respond to a request, or the requesting party copy and return the original? Experience with rule 5(a)(5) may indicate that these are not serious problems. It may well be sufficient to let these aspects of the proposed amendment to rule 5.1 stand in the present form for the time being and make further amendments later if problems arise.</p> <p>Finally, the proposal does not include any sanction for a failure to produce an exhibit promptly, or a failure to promptly return an exhibit that has been provided. Once again, however, in light of actual experience under rule 5(a)(5), this may not be a serious concern. It may well be another issue to address another day if the need arises.</p>	<p>detail about the procedure for the required attempt to obtain the exhibit from another party. If the attempt is inadequate and the party in possession would have complied with an adequate request, then that party will presumably comply with the notice.</p> <p>The committee has modified the proposal to replace the “promptly” with specific time frames for complying with a request for an exhibit and for returning an exhibit.</p> <p>The language of the proposed amendment is consistent with the language used in both rules 5 and 18. Neither rule 5 nor rule 18 specifies sanctions for failure to promptly deliver an exhibit to the court. The committee is not aware that there have been any problems in courts receiving or returning exhibits in a timely manner under either rule 5 or rule 18.</p>
2.	B. Gilbert Court Operations Supervisor Superior Court of Butte County Oroville	A	N	Agree with proposed changes.	No response necessary.
3.	Ms. Kim Hubbard President Orange County Bar	A	Y	Agree with proposed changes.	No response necessary.

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	Association Irvine				
4.	Ms. Hannah Inouye Manager, Appeals Division Superior Court of Los Angeles County Los Angeles	A	N	The requirement to include the notice of appeal date on designations will reduce the difficulty in identifying the particular appeal for which a designation is filed in the same case. In addition, this requirement will reduce the number of defaults issued in error and the number of requests for corrections to the record pursuant to Rule 12.	No response necessary.
5.	Mr. Kevin Lane Assistant Clerk/Administrator Court of Appeal, Fourth Appellate District San Diego	A	N	Agree with identification of date. The wording for rule 5.1(b)(6) should be stronger (i.e. within 10 days instead of “promptly”). Promptly leaves room for interpretation. The clerk’s office needs specific dates to track the progress of the case.	The committee has modified the proposal as suggested to replace the “promptly” with specific time frames for complying with a request for an exhibit and for returning an exhibit.
6.	Los Angeles County Bar Association, Appellate Court Committee Los Angeles	AM	Y	We support the amendments with the following suggested modifications. We suggest that the word “promptly” be changed to within 10 days. “Promptly” may be too vague, particularly in cases where there is some rancor among the parties. Since the time for the preparation of the appendix is deep into the appellate process, requiring response in 10 days is appropriate.	See response to comments of Mr. Kevin Lane.
7.	Mr. Stephen V. Love Executive Officer Superior Court of San Diego County San Diego	AM	N	Proposed rules 4, 5, and 5.1 require that the party designating the record provide the date on which the notice of appeal was filed. The <i>Notice of Designation</i> , form APP-003, requires the date. However, if the designation is filed on pleading	No response necessary.

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				paper by counsel or by a pro per, they do not usually include the date. Having the date on this paper would be very helpful.	
8.	Ms. Nancy Marutani 15060 Ventura Blvd. Sherman Oaks	A	N	Agree with the proposed changes.	No response necessary.
9.	Ms. Merry A. Mayes Court Services Coordinator Superior Court of Stanislaus County Modesto	AM	N	<p>Rule 5.1(b)(6) – I am concerned about the option of “directing the party possessing the specified exhibit to promptly deliver it to either the requesting party or to the reviewing court”. Who determines where the exhibits are sent? Must the requesting party specify to whom the exhibits are to be delivered, or is it the sender’s choice? Does the sender have to provide notice to the reviewing court and other party that the exhibits have been sent and to whom? By what method are they sent? (overnight, regular mail, etc.)</p> <p>It would be much clearer if (b)(6) was more specific—i.e., the requestor specifies to whom the exhibits are to be sent and by what method.</p>	<p>The committee is recommending changes to the proposal to (1) clarify that the sending party may choose whether to deliver the exhibit to the requesting party or to the reviewing court and (2) provide for notice to the requesting party when an exhibit is delivered to the reviewing court.</p> <p>The committee does not believe it is necessary to specify the method of delivery to the requesting party or court. Neither rule 5 nor rule 18, which both address delivery of exhibits to courts, specify the method of the delivery</p>
10.	Mr. Leonard Sacks Attorney at Law Granada Hills	A	N	Agree with proposed changes.	No response necessary.
11.	Ms. Terri White Court Program Supervisor Superior Court of Ventura County Ventura	AM	N	There are many times that the <i>Notice of Appeal</i> and the <i>Designation</i> is filed as one document or are separate documents but filed simultaneously. When filed at the same time, the appellant will not know the date of the filing of the appeal.	If the documents are filed simultaneously, the party may so indicate on the designation. In such circumstances, it should also not be problematic for the clerk to identify the particular notice of appeal

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					associated with the designation.