

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
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Report

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Hon. Kathryn Doi Todd, Chair
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DATE: August 8, 2006

SUBJECT: Appellate Procedure: Appeals in Felony Cases (amend Cal. Rules of Court, rules 8.304 and 8.308) (Action Required)¹

Issue Statement

Rule 8.304 establishes the requirements for notices of appeal in felony cases. Among other things, based on the definition in Penal Code section 691(f), this rule defines a “felony case” as a criminal action in which a felony is “charged.” In a recent case, *People v. Nickerson* (2005) 128 Cal.App.4th 33, the Court of Appeal clarified when a felony is considered “charged” under Penal Code section 691, and thus under rule 8.304. Rule 8.304 should be amended to reflect this case.

Rule 8.308 establishes the time within which a notice of appeal must be filed in a felony case. Currently, neither rule 8.308 nor any of the other rules relating to felony appeals specify the time within which a cross-appeal may be filed. This may cause confusion about when any such cross-appeal must be filed.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2007:

1. Amend rule 8.304 to clarify that a felony is not considered charged until an information or indictment is filed or a complaint is certified to the superior court under Penal Code section 859a; and

¹ At the June 30, 2006, meeting, the Judicial Council approved the reorganization and renumbering of the California Rules of Court and Standards of Judicial Administration, effective January 1, 2007. Under the reorganization, rule 30 has been renumbered as rule 8.304 and rule 30.1 has been renumbered as rule 8.308, and new format conventions have been adopted. Hence, the proposed amendments to rule 30 and 30.1 are shown throughout this proposal as amendments to rule 8.304 and 8.308, respectively, which will become effective January 1, 2007.

2. Amend rule 8.308 to provide that any cross-appeal in a felony case must be filed within 30 days after the superior court clerk mails notification of the first appeal.

The text of the proposed rule amendments is attached at pages 4–5.

Rationale for Recommendation

Rule 8.304 provides that, for purposes of determining in which court—the Court of Appeal or Appellate Division—an appeal must be filed, a “felony case” means any criminal action in which a felony is charged, regardless of the outcome. In *People v. Nickerson*, the court held that a felony is not charged until an information or indictment is filed or a complaint is certified to the superior court under Penal Code section 859a. The proposed amendment to rule 30 would incorporate into the rule a definition of “charged” that is based on the holding in the *Nickerson* case.

Before the rules relating to criminal appeals were amended in January 2004, former rule 30 provided that the rules on civil appeals governed appeals in criminal cases “except where express provision is made to the contrary, or where the application of a particular rule would be clearly impracticable or inappropriate.” Under this former provision, litigants and the courts could look to the rule on cross-appeals in civil cases—rule 3²—for guidance regarding the time to file such appeals. Former rule 30 was repealed in 2004, but no new provision addressing cross-appeals was added to the rules on appeals in criminal cases. This amendment would incorporate into rule 8.308 a new provision regarding cross-appeals in felony cases, similar to the provision now applicable to civil appeals under rule 3(e).³ Under this new provision, however, if the defendant or the People file an appeal, any other party will have 30 days from the filing of that first notice of appeal to file a cross-appeal, rather than 20 days as is provided for cross-appeals in civil cases. The additional 10 days is intended to address delays associated with prison mail.

Alternative Actions Considered

The committee considered recommending that parties in criminal cases have the same amount of additional time to file a cross-appeal as in civil cases. Ultimately, however, the committee decided to recommend that parties in criminal cases be given an additional 10 days to file a cross-appeal, in order to address the delays associated with prison mail that might impact how long it takes for a defendant to receive notice that the People have filed an appeal and how long it might take for such a defendant to thereafter file a cross-appeal.

Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2006 comment cycle. Thirteen individuals or organizations submitted comments on this proposal. All of the commentators agreed with the proposal to amend rule 8.304 and all except one agreed

² Effective January 1, 2007, this rule will be renumbered 8.108.

³ *Ibid.*

with the proposal to amend rule 8.308. The full text of the comments received and the committee's responses is attached at pages 6–10.

The one comment opposing the proposed amendment to rule 8.308 came from Mr. Dennis Fischer. He suggests that it is unnecessary and unwise to add a provision on “cross-appeals” to rule 8.308 because there is no correlation between the defendant’s appeals from a conviction under Penal Code section 1237 and the kinds of orders that are subject to an appeal by the People under Penal Code section 1238. While most types of orders that the People may appeal do not appear to overlap with the judgments and orders that can be appealed by a defendant, the committee concluded that there are at least some circumstances—such as if the defendant appealed his or her sentence under 1237(a) and the People appealed the same sentence, on the basis that it was unlawful, under 1238(a)(10)—in which both the People and the defendant might appeal some aspect of the same judgment or order. Given this possibility, the committee believes it is appropriate that the rule address the time for filing a cross-appeal.

Implementation Requirements and Costs

The clarification of these rules should eliminate uncertainty and thereby reduce costs.

Attachments

Rules 8.304 and 8.308 of the California Rules of Court are amended, effective January 1, 2007, to read:⁴

1 **Rule 8.304. Filing the appeal; certificate of probable cause**

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3 **(a) Notice of appeal**

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5 (1) * * *

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7 (2) As used in (1), “felony case” means any criminal action in which a felony is
8 charged, regardless of the outcome. A felony is “charged” when an
9 information or indictment accusing the defendant of a felony is filed or a
10 complaint accusing the defendant of a felony is certified to the superior court
11 under Penal Code section 859a. ~~‡~~A felony case includes an action in which
12 the defendant is charged with:

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14 (A)–(C) * * *

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16 (3)–(4) * * *

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18 **(b)–(c) * * ***

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21 **Rule 8.308. Time to appeal**

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23 **(a) Normal time**

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25 ~~Unless~~ Except as provided in (b) or as otherwise provided by law, a notice of appeal
26 must be filed within 60 days after the rendition of the judgment or the making of the
27 order being appealed. Except as provided in rule 8.66, no court may extend the
28 time to file a notice of appeal.

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30 **(b) Cross-appeal**

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32 If the defendant or the People timely appeals from a judgment or appealable order,
33 the time for any other party to appeal from the same judgment or order is extended
34 until 30 days after the superior court clerk mails notification of the first appeal.

⁴ These recommended amendments have been made to the version of this rule adopted by the Judicial Council at its June 30, 2006, business meeting and reflect the text that will be in effect on January 1, 2007. Any amendments adopted as part of this proposal will be incorporated into the text of the rule that goes into effect on January 1, 2007.

1 ~~(b)~~ **(c)** **Premature notice of appeal**

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A notice of appeal filed before the judgment is rendered or the order is made is premature, but the reviewing court may treat the notice as filed immediately after the rendition of judgment or the making of the order.

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~~(e)~~ **(d)** **Late notice of appeal**

The superior court clerk must mark a late notice of appeal “Received [date] but not filed,” notify the party that the notice was not filed because it was late, and send a copy of the marked notice of appeal to the district appellate project.

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~~(d)~~ **(e)** **Receipt by mail from custodial institution**

If the superior court clerk receives a notice of appeal by mail from a custodial institution after the period specified in (a) has expired but the envelope shows that the notice was mailed or delivered to custodial officials for mailing within the period specified in (a), the notice is deemed timely. The clerk must retain in the case file the envelope in which the notice was received.

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(amend Cal. Rules of Court, rules 8.304 [formerly 30] and 8.308 [formerly 30.1])

	Commentator	Position	Comment on behalf of a group?	Comment	Committee Response
1.	Saul Bercovitch State Bar of California Committee on Appellate Courts 180 Howard Street San Francisco, CA 94105-1639	A	Y	The proposed amendments to rule 8.304(a)(1) (formerly rule 30(a)(1)) are based directly on the holding of <i>People v. Nickerson</i> (2005) 128 Cal.App.4th 33, and correctly clarify the rule. The proposed amendments to rule 8.307 (formerly rule 30.1) add a new provision for cross-appeals in felony cases, similar existing rule 3(e) (new rule 8.308(e)) for civil cases. For the unusual criminal case in which both sides may wish to appeal, it is sensible to have a provision similar to rule 3(e) (new rule 8.308(e)).	No response needed
2.	Justice Roger W. Boren Administrative Presiding Justice Court of Appeal, Second Appellate District 300 South Spring Street Los Angeles, CA 90013	A	N	No specific comment.	No response needed
3.	Ms. Mary Carnahan Criminal Division Program Manager Solano County Superior Court 530 Union Avenue, Suite 200 Fairfield, CA 94533	A	N	No specific comment.	No response needed

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4.	Ms. Sue DuFour Stanislaus County Superior Court P.O. Box 3488 Modesto, CA 95353	A	N	No specific comment.	No response needed
5.	Ms. Deena Fawcett President California Appellate Court Clerks Association Court of Appeal, Third Appellate Dist. 900 N Street, Room 400 Sacramento, CA 95814-4869	A	Y	No specific comment.	No response needed
6.	Mr. Dennis A. Fischer Certified Appellate Specialist 1448 15 th Street, #206 Santa Monica, CA 90404	A N	N N	Rule 8.304 (formerly rule 30): The clarification of “felony case” per recent case laws is appropriate and helpful. Rule 8.308 (formerly rule 30.1): The addition of “cross appeal” is unnecessary and unwise. There is no correlation between defendant’s appeals from conviction (Pen. Code § 1237), and the kinds of orders subject to People’s appeals at that stage (Pen. Code § 1238), and the language “same judgment or order” is confusing. What is the problem that justifies the increased number of appeals and substantive uncertainty this misguided proposal is certain to provoke?	No response needed While many of the types of orders that the People may appeal do not appear to overlap with the judgments and orders that can be appealed by a defendant, it appears possible that there might be at least some circumstances—such as if the defendant appealed his or her sentence under 1237(a) and the People appealed the same sentence on the basis that it was unlawful under 1238(a)(10) - in which both the People and the defendant might appeal some aspect of the same

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					judgment or order. Given this possibility, it appears appropriate that the rule address the timing of an appeal by the other party when either the defendant or the appeal have already filed an appeal of a given judgment or order.
7.	Ms. Janet Garcia Manager, Planning & Research Unit Los Angeles County Superior Court 111 North Hill Street Los Angeles, CA 90012	A	Y	No specific comment.	No response needed
8.	Ms. Cheryl Kanatzar Deputy Executive Officer Ventura County Superior Court 800 South Victoria Avenue Ventura, CA 93009	A	Y	No specific comment.	No response needed
9.	Mr. Nelson Lu Deputy Public Defender San Joaquin Co. Public Defender's Office 102 South San Joaquin Street Stockton, CA 95202	A	N	No specific comment.	No response needed

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10.	Ms. Julie M. McCoy, President Orange County Bar Association P.O. Box 17777 Irvine, CA 92623-7777	A	Y	No specific comment.	No response needed
11.	Abbas Mohajerian Mediator 2500 E. Willow Street, #202 Signal Hill, CA 90755	A	N	No specific comment.	No response needed
12.	Mr. Mike Roddy Executive Officer San Diego County Superior Court 220 West Broadway San Diego, CA 92101	A	Y	No specific comment.	No response needed
13.	Ms. Carmela F. Simoncini Chair, Appellate Court Committee of the San Diego County Bar Association Appellate Defenders, Inc. 555 West Beech Street, Suite 300 San Diego, CA 92101	A	Y	We agree with the proposed changes to rules 8.304 and 8.308 (formerly rules 30 and 30.1). This committee previously suggested revising rule 8.308 (formerly rule 30.1) to provide time limits to file cross-appeals in criminal cases. We appreciate the committee's responsiveness to this suggestion. We also suggest a slight modification to rule 8.304(a)(3) (formerly rule 30(a)(3)) to clarify that a notice of appeal may be filed by any attorney acting on the defendant's behalf. As written, it is subject to the interpretation that only the attorney of record from the trial level	No response needed This is beyond the scope of the proposal that was circulated for public comment. The committee will consider this for the next rules cycle.

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				<p>proceedings has the authority to sign the notice of appeal. However, decisional law holds that a notice of appeal is operative and the rules of court are satisfied when any person, attorney or not, who is empowered to act on appellant's behalf (citations omitted)</p> <p>We suggest the following revision:</p> <p>(3) If the defendant appeals, the defendant <u>or any attorney acting on the defendant's behalf</u> must sign the notice of appeal. If the People appeal, the attorney for the People must sign the notice.</p>	