

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: September 3, 2008

SUBJECT: Appellate Procedure: Petitions for Review (amend Cal. Rules of Court,
rules 8.504 and 8.520) (Action Required)

Issue Statement

Attachments to Petitions for Review

Rule 8.504 of the California Rules of Court currently requires that if a petition for review is seeking review of an opinion of the Court of Appeal, a copy of that opinion must be attached to the petition. In practice, if the petition is seeking review of an order of the Court of Appeal, a copy of that order is also attached to the petition.

Rule 8.504 also limits the materials that can be attached to a petition for review and requires that these attachments generally not exceed 10 pages. In many cases, however, the opinion or order that is the subject of the petition, and that therefore must be attached to the petition, exceeds 10 pages.

Reply Briefs on the Merits

Rule 8.520 addresses the briefs that are filed after the Supreme Court has ordered review in a case. Currently, rule 8.520(c) provides that the petitioner's brief on the merits and the opposing party's answer brief on the merits may be up to 14,000 words or 50 pages in length, but that the petitioner's reply brief on the merits may be only 4,200 words or 15 pages. It is very difficult for petitioners to reply to 50 pages of argument by the opposing party in only 15 pages.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2009:

1. Amend rule 8.504 to:
 - a. Clarify that if a petition is seeking review of a Court of Appeal order, a copy of that order must be attached to the petition; and
 - b. Clarify that copies of orders or opinions that must be attached to the petition do not count toward the 10-page limit on attachments to petitions for review; and
2. Amend rule 8.520 to increase the maximum length of a reply brief on the merits to 8,400 words or 30 pages.

The text of the proposed amendments to the rules is attached at pages 5 and 6.

Rationale for Recommendation

Attachments to Petitions for Review

Requiring that a copy of the relevant Court of Appeal order be attached to a petition for review when the petition is seeking review of the order will conform rule 8.504 to current practice. Clarifying that copies of orders or opinions that must be attached to the petition do not count toward the 10-page limit on attachments to petitions for review will eliminate an inconsistency between the 10-page limit on attachments and the requirement that these documents be attached to the petition.

Reply Briefs on the Merits

Increasing the permissible length of reply briefs on the merits will give petitioners additional space to more fully articulate their response to the opposing party's arguments. Given the relatively small number of cases in which the Supreme Court grants review and the potential importance of these cases, the committee believes it is appropriate to give the petitioner this additional space. Additional discussion of the issues by the petitioner at this phase is likely to be helpful to the court. Increasing the page limit on these briefs is also likely to reduce the need for petitioners to make and the court to consider requests to file overlength reply briefs.

Alternative Actions Considered

The committee considered recommending that the limit on the length of reply briefs be the same as the limit on petitioner's opening and respondent's answering briefs on the merits—14,000 words or 50 pages. Ultimately, after receiving input from Supreme Court staff and committee members, the committee decided to recommend raising this limit to only 8,400 words or 30 pages. The committee believes that 8,400 words or 30 pages is generally a sufficient length for an adequate reply brief at this stage in the proceedings. At the Supreme Court, the issues will have been narrowed from those presented in the Court of Appeal to only those on which the Supreme Court granted review. In addition, the Court of Appeal briefs that address the issues on review also are available to the Supreme Court.

Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2008 comment cycle. Nine individuals or organizations submitted comments on this proposal. Eight commentators agreed with the proposal and one agreed with the proposal if amended. The full text of the comments received and the committee's responses is attached beginning on page 7.

Attachments to Petitions for Review

All of the commentators agreed with the recommendation to amend rule 8.504 to address attachments to petitions for review. One commentator suggested, however, that in addition to the specific order being reviewed, other orders that might aid in the Supreme Court's consideration of the petition also should be exempted from the 10-page limit on attachments to the petition. The committee considered but ultimately decided not to pursue this suggestion. As a policy matter, the committee believes that attachments to petitions for review should be permitted sparingly in order to keep petitions a reasonable length. The committee also believes it is important to avoid unnecessarily duplicating materials that are otherwise available to the court. The record of the case, which contains all of the relevant orders, is sent to the Supreme Court and parties can call the court's attention to particular orders through references to this record. The petitioner is given the option under rule 8.504(e)(1)(B) of attaching to the petition a copy of any order the petitioner believes is unusually significant, but the committee believes it is appropriate that these optional attachments be subject to the 10-page limit.

Reply Briefs on the Merits

All of the commentators also agreed with the recommendation to increase the permissible length of reply briefs on the merits in the Supreme Court. However, two commentators noted that the rules applicable to the Courts of Appeal permit reply briefs to be the same length as the appellant's and respondent's opening briefs—14,000 words or 50 pages. One of these commentators, the State Bar Committee on Appellate Courts, noted that its members were split on whether reply briefs on the merits in the Supreme Court should be 30 or 50 pages but specifically recommended that if a lower limit is maintained for reply briefs in the Supreme Court, that same limit should be applied to reply briefs in the Court of Appeal. The Supreme Court similarly suggested that the committee consider whether the same length limits should be applied to reply briefs in the Court of Appeal and Supreme Court.

The committee considered the suggestion that reply briefs in the Court of Appeal be shortened to 30 pages, but ultimately decided not to pursue this suggestion. Reply briefs in the Court of Appeal historically have been longer than those in the Supreme Court. The committee believes that this difference reflects the different posture of cases in the two courts. There is likely to be a broader range of issues and arguments raised by both parties in the Court of Appeal than in the Supreme Court. As noted above, at the Supreme Court, the issues will have been narrowed to those the Supreme Court has agreed to review. In members' experience, it is therefore helpful to have additional reply briefing in

the Court of Appeal. In addition, the Court of Appeal briefs that address the issues on review also are available to the Supreme Court. Finally, while there is an intuitive appeal to having reply briefs in the Supreme Court and Court of Appeal be the same length, the committee believes that the potential benefits of creating this uniformity are small. The committee is not aware that the difference in the length of reply briefs in the two courts, which have existed in the rules since the 1980s, has been the source of confusion to litigants in the past and therefore believes that any risk of confusion caused by maintaining this difference is likely to be small.

Implementation Requirements and Costs

The committee does not believe that there will be appreciable costs associated with implementing these amendments. Clarifying the rules on attachments should reduce questions and problems associated with these rules. Increasing the permissible length of reply briefs on the merits should decrease the need for parties to prepare and the court to consider applications to file overlength briefs.

Attachments

Rules 8.504 and 8.520 of California Rules of Court are amended, effective January 1, 2009, to read:

1 **Rule 8.504. Form and contents of petition, answer, and reply**

2
3 (a) * * *

4
5 (b) **Contents of a petition**

6
7 (1)–(3) * * *

8
9 (4) If the petition seeks review of a Court of Appeal opinion, a copy of the opinion
10 showing its filing date and a copy of any order modifying the opinion or
11 directing its publication must be bound at the back of the original petition and
12 each copy filed in the Supreme Court.

13
14 (5) If the petition seeks review of a Court of Appeal order, a copy of the order
15 showing the date it was entered must be bound at the back of the original
16 petition and each copy filed in the Supreme Court.

17
18 ~~(5)~~(6) * * *

19
20 ~~(6)~~(7) * * *

21
22 (c)–(d) * * *

23
24 (e) **Attachments and incorporation by reference**

25
26 (1) No attachments are permitted except:

27
28 (A) An opinion or order ~~from which the party seeks relief~~ required to be
29 attached under (b)(4) or (5);

30
31 (B) Exhibits or orders of a trial court or Court of Appeal that the party
32 considers unusually significant;

33
34 (C) Copies of relevant local, state, or federal regulations or rules, out-of-state
35 statutes, or other similar citable materials that are not readily accessible;
36 and

37
38 (D) An opinion required to be attached under rule 8.1115(c).

39
40 (2) The attachments under (1)~~(A)~~(B)–(C) must not exceed a combined total of 10
41 pages.
42

- 1 (3) No incorporation by reference is permitted except a reference to a petition, an
2 answer, or a reply filed by another party in the same case or filed in a case that
3 raises the same or similar issues and in which a petition for review is pending
4 or has been granted.
5

6
7 **Rule 8.520. Briefs by parties and amici curiae; judicial notice**
8

9 **(a)–(b) * * ***

10
11 **(c) Length**
12

- 13 (1) If produced on a computer, an opening or answering brief on the merits must
14 not exceed 14,000 words, including footnotes, and a reply brief on the merits
15 must not exceed ~~4,200~~ 8,400 words, including footnotes. Each brief must
16 include a certificate by appellate counsel or an unrepresented party stating the
17 number of words in the brief. The person certifying may rely on the word
18 count of the computer program used to prepare the brief.
19
- 20 (2) If typewritten, an opening or answering brief on the merits must not exceed 50
21 pages and a reply brief on the merits must not exceed ~~45~~ 30 pages.
22
- 23 (3) The tables, a certificate under (1), any attachment under (h), and any quotation
24 of issues required by (b)(2) are excluded from the limits stated in (1) and (2).
25
- 26 (4) On application and for good cause, the Chief Justice may permit a longer brief.
27

28 **(d)–(h) * * ***
29

SPR08-01**Appellate Procedure: Petitions for Review** (amend Cal. Rules of Court, rules 8.504 and 8.520)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	Dennis A. Fischer Appellate Attorney Santa Monica	A	<p>8.504: Agree with this observation. Sometimes the C/A order from which review is being sought follows one or more orders that, while not dispositive, may be instructive and would aid in the Supreme Court’s consideration of the petition (e.g., a “Palma”-type order). Because it would not be “required,” is its inclusion subject to the 10-page attachment limit of (e)(2)? It should not be anymore than the final order.</p> <p>8.520: Agree, especially with much-needed change in (c)(2).</p>	<p>As proposed, only an order the petitioner is asking be reviewed, and that therefore would be required to be attached to the petition under proposed new 8.504(b)(5), would be exempt from the 10-page limit on attachments. As a policy matter, the committee believes that to keep petitions to a reasonable length and avoid unnecessarily duplicating materials that are otherwise available to the court, attachments to petitions for review should be used sparingly. The record of the case, which contains all of the relevant orders, is sent to the Supreme Court, and parties can call the court’s attention to particular orders through references to this record. The petitioner is given the option under rule 8.504(e)(1)(B) of attaching to the petition a copy of an order other than one for which review is being sought if that other order is unusually significant. However, to further the goal of ensuring sparing use of attachments, such an optional attachment is subject to the 10-page limit on attachments.</p> <p>No response required.</p>
2.	Robert Olson Greines, Martin, Stein & Richland LLP Los Angeles	A	I strongly support the increased word limit for Supreme Court replies. I believe that arguments should be cogent and focused. Nonetheless, that the Court has granted review indicates that the case is of considerable weight. Issues continue to be refined before the Supreme Court. As a recent example, I	No response required.

SPR08-01

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			<p>have a case before the Court involving complex First Amendment issues, a statutory interpretation issue and an anti-SLAPP issue. We filed a 14,000 word opening brief. There were two 14,000 word responding briefs. There was no way a 4,200 word reply would suffice. (The reply ultimately we filed with permission was 9,500 words.)</p> <p>Consideration might be given to clarifying the length of briefing where there are multiple parties on one side. If there are two 14,000 word opening briefs, should a single responding party [be] limited to 14,000 words? Likewise, where there are multiple responding briefs, should a single party (or commonly represented parties) be limited to one reply brief?</p>	<p>The committee appreciates this suggestion and will consider it during the upcoming committee year.</p>
3.	Orange County Bar Association Cathrine Castaldi	A		No response required.
4.	Leonard Sacks Attorney Granada Hills	A	I agree with the Advisory Committee comments.	No response required.
5.	San Diego County Bar Association Appellate Court Committee Edward I. Silverman, Chair	A	<p>A. Revised Rule 8.504 The first proposal, governing attachments to petitions for Supreme Court review, seems uncontroversial.</p> <p>B. Revised Rule 8.520 We support the proposed change allowing a reply brief on the merits in the Supreme Court to be 8,400 words. The important issues addressed at the Supreme Court level should be fully explored. Although we would not presume to suggest the</p>	<p>No response required.</p> <p>Please see response to the comments of the State Bar of California’s Appellate Courts Committee below.</p>

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			quantum of briefing appropriate for the Supreme Court, we note a counterintuitive contrast with word limits at the intermediate appellate level. Court of Appeal reply briefs are permitted to be much longer—14,000 words. (Cal. Rules of Court, rule 8.204(c)(1).)	
6.	State Bar of California Appellate Courts Committee Saul Bercovitch San Francisco	AM	<p><u>Attachments to Petitions for Review</u></p> <p>Rule 8.504 currently requires that a copy of the opinion from which review is sought be attached to a petition for review, but does not require the attachment of an <i>order</i> from which review is sought. This proposal would add a new subdivision (b)(5) to rule 8.504 requiring attachment of orders from which review is sought as well. Rule 8.504(e)(2) limits attachments to petitions to 10 pages. The proposal would revise the language of subdivision (e) to make it clear that the opinion or order which must be attached is not included within the 10 page limit.</p> <p>As the Appellate Advisory Committee made clear, these changes would simply conform the rules to existing practice. This Committee supports their adoption.</p> <p><u>Length Limit for Reply Brief on the Merits in Supreme Court</u></p> <p>Rule 8.520 currently limits Reply Briefs on the Merits in the Supreme Court to 4,200 words or 15 pages, though the limit for Opening and Answering Briefs on the merits is 14,000 words or 50 pages, the same as for all briefs in the Court of Appeal. The proposal is to increase the limit for Reply Briefs on the Merits to 8,400 words or 30 pages.</p>	<p>No response required.</p> <p>The committee considered the option of raising the limit on reply briefs on the merits to 14,000 words or 50 pages but ultimately decided to recommend raising this limit to only 8,400 words or 30 pages. The committee believed that at this stage in a case, 8,400 words or 30 pages would</p>

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			<p>The Committee unanimously supports this change. The Committee agrees with the Appellate Advisory Committee that the current limit is unreasonably restrictive. As the Appellate Advisory Committee points out, “[i]t is very difficult for petitioners to reply to 50 pages or argument in only 15 pages.” To put it another way, 4,200 words is unlikely to be enough for a full response to the Answering Brief on the Merits on an issue or issues important enough to warrant a grant of review. Experience suggests that attorneys for petitioners in the Supreme Court routinely request leave to file longer briefs, and that those requests are routinely granted. The result is a needless expenditure of time and energy for the attorneys and the Court in making and ruling on such applications.</p> <p>The Committee was divided, however, as to whether the limit should be raised further. Some members support raising the limit to 14,000 words or 50 pages, so that there would be a uniform 14,000 word-50 page limit for all non-death penalty appellate briefs in California. Others support keeping the limit for Supreme Court reply briefs on the merits at the 8,400 word-30 page level proposed by the Appellate Advisory Committee.</p> <p>Those who support moving to the 14,000 word-50 page limit did so in the belief that lawyers should have leeway within broad limits in deciding how long their briefs should be, that they are unlikely to abuse that leeway, and that time and trouble would be saved for both counsel and the Court if requests</p>	<p>generally be sufficient length for an adequate reply brief.</p>

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			<p>for leave to file oversized briefs were limited to those very rare cases in which lawyers might feel the need to exceed the 14,000 word-50 page limit. They are also impressed with advantages of clarity and convenience that would arise from having a uniform rule for all appellate briefing.</p> <p>Those who support staying with the 8,400 word-30 page limit did so in the belief that it would allow sufficient space for an adequate reply brief, that lawyers should be discouraged from writing longer briefs, and that the advantages of compelling counsel to write shorter briefs would outweigh the trouble of submitting and ruling on requests to file oversized briefs when necessary.</p> <p>There was general agreement, however, that having a single across-the-board limit for all briefs with the single exception of reply briefs in the Supreme Court is anomalous. If a lower limit is maintained for reply briefs in the Supreme Court, therefore, that same limit should at least be applied to reply briefs in the Court of Appeal as well. That would mean, if not uniformity of treatment for all briefing, at least uniformity as to the treatment of all Opening and Respondent's-Answering briefs on the one hand, and all Reply briefs on the other.</p>	<p>The committee considered but ultimately decided not to pursue the idea of creating uniformity in the length of reply briefs in the Supreme Court and Court of Appeal by decreasing the limit on reply briefs in the Court of Appeal. Reply briefs in the Court of Appeal have historically been longer than those in the Supreme Court. The committee believes that this difference reflects the different posture of cases in the two courts. There is likely to be a broader range of issues and arguments raised by both parties in the Court of Appeal than in the Supreme Court. At the Supreme Court, the issues will have been narrowed to those the Supreme Court has agreed to review. In members' experience, it is therefore helpful to have additional reply briefing in the Court of</p>

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	Commentator	Position	Comment	Committee Response
				Appeal. In addition, the Court of Appeal briefs that address the issues on review are also available to the Supreme Court. Finally, the committee believes that any risk of confusion caused by the differences in the length of reply briefs in the two courts is likely to be small.
7.	Superior Court of Los Angeles County	A		No response required.
8.	Superior Court of Riverside County David Gutknecht Supervising Management Analyst	A	The proposed amendments to Rule 8.504 merely reflect the practice that currently takes place in regards to petitions for review. In addition, the proposed rule clarifies that attaching an opinion or order to a petition does not count toward the 10-page limit on attachments to a petition for review. The proposed amendments to Rule 8.520 that would increase the limit on the length of reply briefs are likely to assist the court in its consideration of the case.	No response required. No response required.
9.	Superior Court of San Diego County Michael M. Roddy Executive Officer	A		No response required.