

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
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Report

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
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DATE: September 3, 2008

SUBJECT: Appellate Procedure: Certificates of Interested Entities and Persons (adopt Cal. Rules of Court, rule 8.361; amend rules 8.208 and 8.490;¹ and revise form APP-008) (Action Required)

Issue Statement

Rule 8.208 of the California Rules of Court requires parties in civil appeals to file a certificate of interested entities or persons identifying entities or persons who have an ownership interest in a party or certain interests in the outcome of the proceedings. Rule 8.490, relating to writ proceedings, contains a similar requirement. *Certificate of Interested Entities or Persons* (form APP-008) is an optional form that litigants can use to prepare and file the required certificate.

Currently, it is not clear from the rule or form if parties are required to provide information about themselves or other parties on their certificates. It is also not clear whether a party's insurer is considered to have a financial interest that must be disclosed in a certificate solely on the basis of its status as insurer for that party. This may make it difficult for litigants to appropriately complete the certificate.

Rule 8.208(d)(2) currently provides that parties can apply to file their certificates under seal if the identity of any party has not been publicly disclosed in the proceedings. There may be other circumstances in which the identity of an entity or person subject to disclosure in a certificate was not publically disclosed or was not disclosed to the other parties. Rule 8.208 does not currently address the filing of certificates in these situations.

Currently, the rules only require certificates to be filed in civil cases. However, when an entity is a party in a criminal proceeding, just as when an entity is a party in a civil case,

¹ Other proposed amendments to rule 8.490 are also being recommended by the committee at this time. Please see the report concerning proceedings for writs of mandate, certiorari, and prohibition, also on this meeting's agenda.

there may ownership or other interests connected with that party that are not apparent from the papers or record in the case.

Recommendation

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

1. Amend rule 8.208 to:
 - a. Clarify that only entities or individuals other than the parties themselves need to be identified on the certificate;
 - b. Clarify that an insurer does not have a financial interest requiring disclosure based simply on its status as insurer for a party; and
 - c. Allow a party to request permission to file the certificate under seal if the identity of any person or entity subject to disclosure on the certificate has not been disclosed in the proceeding; and
2. Adopt new rule 8.361 and amend rule 8.490;² to require that a certificate be filed in criminal cases in which an entity is a defendant; and
3. Revise *Certificate of Interested Entities or Persons* (form APP-008) to reflect the changes in the rules by deleting boxes that could be checked to indicate whether an interested entity or person was a party or nonparty and deleting language in the Notice section that referred to the use of the certificate form only in civil cases.

The text of the proposed rule amendments and the revised form are attached at pages 5–8.

Rationale for Recommendation

Last year, the committee circulated for public comment, and the Judicial Council adopted, several proposed changes to the rules relating to certificates of interested entities or persons and approved the new, optional *Certificate of Interested Entities or Persons* (form APP-008). The public comments received when that earlier proposal was circulated included several new suggestions for modifying or clarifying these provisions. This proposal addresses several of those suggestions.

Modifying rule 8.208 and *Certificate of Interested Entities or Persons* (form APP-008) to clarify that parties need only identify interested entities and persons *other than the parties themselves* will help litigants determine how to appropriately comply with the certificate requirement. The purpose of the certificate requirement is to help Court of Appeal

² As previously noted, other proposed amendments to rule 8.490 are also being recommended by the committee at this time. If those amendments are adopted by the council, the part of rule 8.490 that would be amended—subdivision (i)—will be renumbered as rule 8.488.

justices identify entities or persons whose interests in the case are not clear from the documents already filed in the case. The identity of the parties is clear from the face of these documents so no purpose is served by identifying the parties on the certificate.

Similarly, specifying that an insurer does not have a financial interest in the proceeding that must be disclosed in a certificate solely on the basis of its status as insurer for a party will also help litigants appropriately comply with the certificate requirement. Canon 3E(5)(d) of the Code of Judicial Ethics, which addresses disqualification of appellate justices, provides that a proprietary interest of a policyholder in a mutual insurance company or similar interest is not a financial interest within the meaning of this canon unless the outcome of the proceeding could substantially affect the value of the interest. Insurers are required to maintain reserves sufficient to ensure that payment of the policy limits on any particular claim will not substantially affect the value of the insurance company. Thus, even if a justice had an ownership interest in a party's insurer, the justice would not have a financial interest in the case necessitating disqualification based solely on that insurer's provision of coverage to a party because the outcome of the proceeding would not substantially affect the value of the justice's interest in the insurer.

Adding new rule 8.361 to the rules relating to felony appeals and amending rule 8.490 relating to writ proceedings to provide that any entity that is a defendant must file a certificate will provide Court of Appeal justices with helpful information about any interests in these cases that are not apparent from the papers or record. This information will help justices appropriately determine whether to disqualify themselves in these cases. Form APP-008 would also be revised to reflect this change by deleting references to civil appeals in the Notice at the top of the form.

Finally, allowing a party to request permission to file the certificate under seal if the identity of any person or entity subject to disclosure on the certificate has not been revealed in the proceeding addresses concerns that serving and filing a certificate might result in disclosure of confidential information, including information that a party was not allowed to access through the discovery process in the trial court proceedings.

Alternative Actions Considered

The committee considered, but ultimately decided not to recommend, amending the rules to eliminate the general requirement that certificates be served on other parties. The committee believes that service of these certificates is helpful in ensuring that the justices receive the most complete information possible. Review of each other's certificates can assist parties in identifying entities or individuals who should be listed on these certificates.

Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2008 comment cycle. Eleven individuals or organizations submitted comments on this proposal. Eight commentators agreed with the proposal, two agreed with the proposal if amended, and one disagreed with the proposal. The major substantive comments are discussed below.

The verbatim text of all the comments received and the committee's responses is attached beginning on page 9.

The commentator who disagreed with the proposal believed that it is unnecessary to require certificates in criminal cases. The committee notes that it is only proposing that a certificate be filed in a very limited segment of criminal cases – those in which an entity is a party. These criminal cases can raise some of the same concerns as do civil cases about interests that are not apparent from the papers or record. The committee therefore concluded that, for disqualification purposes, the filing of a certificate of interested entities or persons would also be of assistance to Court of Appeal Justices in these criminal cases. The committee has tried to craft this requirement narrowly by only requiring a certificate from the party who is an entity in these cases.

One of the commentators who approved the proposal if amended suggested that rule 8.208 should be further amended to state that an insurer *is* an interested party if seeking recovery in a subrogation action or otherwise seeking to recover from another litigant funds that the insurer has already paid on behalf of an insured. The committee considered, but ultimately decided not to pursue this suggestion. The committee believes it is preferable to list circumstances that do not create an interest requiring disclosure, rather than trying to identify all of the circumstances that do create an interest requiring disclosure.

Another commentator suggested that the committee should clarify whether rule 8.160, governing sealed records in the Court of Appeal applies when a party requests to file a certificate under seal. Adding provisions concerning the application of rule 8.160 would be a substantive change to rule 8.208 that the public did not have an opportunity to comment on as part of the proposal that was circulated this spring. The committee will consider this suggestion for possible circulation during the next committee year.

Implementation Requirements and Costs

This proposal will create a new requirement for entities who are parties in criminal actions to file a certificate of interested entities or parties, however, the committee believes that complying with this requirement will not impose a substantial burden on these parties. The committee believes that identifying interests that do not need to be disclosed on certificates will reduce burdens on all litigants who must complete these certificates.

Attachments

Cal. Rules of Court, rule 8.361 is adopted, rules 8.208 and 8.490 are amended, and *Certificate of Interested Entities or Persons* (form APP-008) is revised, effective January 1, 2009, to read:

1 **Rule 8.208. Certificate of Interested Entities or Persons**

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3 **(a)–(c) * * ***

4
5 **(d) Serving and filing a certificate**

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7 (1) Except as otherwise provided in this rule, if a party files a motion, an
8 application, or an opposition to such motion or application in the Court of
9 Appeal before filing its principal brief, the party must serve and file its
10 certificate at the time it files the first such motion, application, or opposition
11 and must include a copy of this certificate in the party’s principal brief. If no
12 motion, application, or opposition to such motion or application is filed before
13 the parties file their principal briefs, each party must include its certificate in
14 its principal brief. The certificate must appear after the cover and before the
15 tables.

16
17 (2) If the identity of any party or any entity or person subject to disclosure under
18 this rule has not been publicly disclosed in the proceedings and a party wants
19 to keep that identity confidential, the party may serve and file an application
20 for permission to file its certificate under seal separately from its principal
21 brief, motion, application, or opposition. If the application is granted, the party
22 must file the certificate under seal and without service within 10 days of the
23 court’s order granting the application.

24
25 ~~(2)~~(3) * * *

26
27 ~~(3)~~(4) * * *

28
29 **(e) Contents of certificate**

30
31 (1) * * *

32
33 (2) If a party knows of any ~~other~~ person or entity, other than the parties
34 themselves, that has a financial or other interest in the outcome of the
35 proceeding that the party reasonably believes the justices should consider in
36 determining whether to disqualify themselves under canon 3E of the Code of
37 Judicial Ethics, the party’s certificate must list that entity or person and
38 identify the nature of the interest of the person or entity. For purposes of this
39 subdivision:

40
41 (A)–(B) * * *

1 **Advisory Committee Comment**

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3 ***

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5 **Subdivision (i).** Under rule 8.208(c), for purposes of certificates of interested entities or persons, an
6 “entity” means a corporation, a partnership, a firm, or any other association, but does not include a
7 governmental entity or its agencies, or a natural person. The Judicial Council has adopted an optional
8 form, *Certificate of Interested Entities or Persons* (form APP-008), that can be used to file the certificate
9 required by this provision.

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