JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
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San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Hon. Kathryn Doi Todd, Chair
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DATE: September 18, 2007

SUBJECT: Appellate Procedure: Certificate of Interested Entities and Persons (amend Cal. Rules of Court, rules 8.208 and 8.490, and approve form APP-008, *Certificate of Interested Entities or Persons*) (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 that identifies entities or persons having an interest in a party or the case. Rule 8.490 contains a similar requirement applicable to writ proceedings. Since the adoption of these rules effective January 1, 2006, questions have arisen about whether the requirement to file such a certificate applies in appeals and writ proceedings in family, juvenile, guardianship, and conservatorship cases and in writ proceedings in criminal cases. Questions have also arisen about when the Certificate of Interested Entities or Persons is required to be filed. In addition, practitioners have raised concerns about situations in which complying with the certificate requirement would reveal the identity of a party that has not previously been disclosed. Finally, each Court of Appeal district has adopted its own certificate form to implement this requirement, which makes complying with this requirement more complicated for those who practice in more than one district.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2008:

1. Amend rules 8.208 and 8.490 to:

a. Clarify that the requirement to file a Certificate of Interested Entities or Persons applies in civil cases other than family, juvenile, guardianship, and conservatorship cases; and

b. Clarify that a party may seek to file a certificate under seal if the identity of a party has not been publicly disclosed;

2. Further amend rule 8.208 to clarify that the Certificate of Interested Entities or Persons must be served and filed with the first application, motion, or opposition to such an application or motion filed before the principal brief or, if no such pre-briefing motion, application, or opposition is filed, with the principal brief; and

3. Approve *Certificate of Interested Entities and Persons* (form APP-008) for optional use and amend the advisory committee comments to rules 8.208 and 8.490 to add a reference to this new form.

The text of the proposed amendments to the rules is attached at pages 5–7 and the text of the proposed form is at page 8.

Rationale for Recommendation

Rule 8.208, which is part of the chapter of the rules relating to civil appeals, requires parties to file a Certificate of Interested Entities or Persons. Rule 8.490 contains a similar requirement applicable in writ proceedings. These requirements were adopted, effective January 1, 2006, to help justices of the Courts of Appeal determine whether to disqualify themselves from a proceeding. The certificate is intended to provide the justices with additional information about the financial or other relationships that may not be apparent on the face of the record, such as when there is a corporate party that is owned by another entity or person.

Based on questions and suggestions received from courts and practitioners, the committee is recommending several clarifying changes to these rules. First, it recommends amending both rules 8.208 and 8.490 to specify that the requirement to file a certificate applies only in civil cases other than family, juvenile, guardianship, and conservatorship cases. The committee recommends that a certificate not be required in family, juvenile, guardianship, and conservatorship cases because, unlike in general civil cases, the identities of all interested entities and persons are typically clear from the face of the record in these cases; the parties in these cases are not corporate entities nor are such entities the subject of the dispute.

Second, the committee recommends amending rule 8.208 to clarify that in appeals, if a party files a motion, application, or an opposition to such a motion or an application before the party files its principal brief, a certificate must be filed with the first such motion, application, or opposition. If no such pre-briefing motion, application, or opposition is filed, the rule would provide that the certificate must be filed with the

party's principal brief. Rule 8.208 currently provides that the certificate must be filed at the time a party files its first document in the Court of Appeal and that each party must also include a copy of the certificate in its principal brief. This language has been interpreted by some as requiring that a certificate be filed with the civil case information sheet. The committee's original intent was to ensure that the justices receive these certificates before they must act on any matter within a case. Thus the certificates are not necessary at the time the civil case information sheet is filed but rather only when a party files an application or a motion that requires consideration by the court. The proposed amendment would clarify that original intent.

Third, the committee recommends amending both rules 8.208 and 8.490 to clarify that if the identity of a party has not been publicly disclosed in the case, a party may request that the certificate be filed under seal. As pointed out to the committee, in some proceedings the identity of a party may be confidential. Serving and filing a certificate that would be accessible to the public in such circumstances could undermine confidentiality. Allowing a party to seek authorization to file the certificate under seal in these situations would address this concern.

Finally, the committee recommends that the Judicial Council adopt an optional *Certificate of Interested Entities or Persons* form. This would create a single form that litigants could use in any district, thereby simplifying the process. The form recommended by the committee was developed based on a combination of the forms adopted by each of the Court of Appeal districts. The committee also recommends adding a reference to this form in the advisory committee comments accompanying both rule 8.208 and rule 8.490 so that rule users are aware that the form is available for use in complying with these rules.

Alternative Actions Considered

As noted in the next section, the committee received quite a few suggestions for substantive changes to rules 8.208 and 8.490 that were beyond the scope of the amendments circulated proposal. The committee considered whether to delay making a recommendation to the council concerning the amendments that were circulated for public comment so that it could consider all of the suggestions, develop and circulate a new proposal, and present the council with a comprehensive recommendation at a later date. Ultimately, however, the committee concluded that it was preferable for the circulated rule amendments and form to be adopted as soon as possible in order to address existing questions and concerns about the certificate procedures. The committee will consider the additional suggestions during the next committee year.

Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2007 comment cycle. Ten individuals or organizations submitted comments on this proposal. Four commentators agreed with the proposal and six agreed with the proposal if modified. The full text of the comments received and the committee's responses is attached at pages

9–27.

Several commentators pointed out that the provisions establishing the notice and sanction procedures if a party fails to file a certificate were inconsistent with the committee's proposed language concerning notices and the imposition of sanctions for other types of defaults. In another invitation to comment circulated at the same time as this proposal, the committee had recommended that the notice of default sent to the party indicate that the court "may," rather than "will," impose the applicable sanctions. In response to these comments, the committee has revised its proposal to make it consistent with the language it is recommending be adopted in other default provisions.[*]

Several commentators suggested additional substantive changes to the rules that were not part of the proposal circulated for public comment. These include suggestions for eliminating the requirement that certificates be served, identifying additional relationships that do not create an "interest" within the meaning of the rule and therefore need not be disclosed in a certificate, and expanding the circumstances in which a party can request that a certificate be filed under seal. Because these would be substantive changes, the committee believes that they should not be considered for potential adoption without first being circulated for public comment. The committee will consider all of these suggestions during the 2008 committee year.

Implementation Requirements and Costs

Clarifying rules 8.208 and 8.490 should reduce questions, problems, and, thus, costs associated with implementation of these provisions. In addition, adopting a statewide form should make compliance with the certificate requirements easier for individuals who practice in more than one appellate district.

Attachments

[*] Please see the separate report to the Judicial Council entitled *Notices of Appeal and Notices of Various Defaults (amend Cal. Rules of Court, rules 8.100, 8.108, 8.140, 8.220, 8.308, and 8.400*).

Rules 8.208 and 8.490 of the California Rules of Court are amended and optional *Certificate of Interested Entities or Persons* (form APP-008) is approved, effective January 1, 2008, to read:

Rule 8.208. Certificate of Interested Entities or Persons

(a) *** * ***

(b) Application

This rule applies in appeals in civil cases other than family, juvenile, guardianship, and conservatorship cases.

~~(b)~~(c) *** * ***

~~(c)~~(d) Serving and filing a certificate

(1) Except as otherwise provided in this rule, if a party files a motion, an application, or an opposition to such motion or application in the Court of Appeal before filing its principal brief, the party must serve and file its certificate at the time it files the first such motion, application, or opposition and must include a copy of this certificate in the party's principal brief. If no motion, application, or opposition to such motion or application is filed before the parties file their principal briefs, each party must ~~serve and file a certificate at the time it files its first document in the Court of Appeal. Each party must also~~ include ~~a copy of the~~ its certificate in its principal brief. The certificate must appear after the cover and before the tables. If the identity of any party has not been publicly disclosed in the proceedings, the party may serve and file an application for permission to file its certificate under seal separately from its principal brief, motion, application, or opposition.

(2) If a party fails to file a certificate as required under (1), the clerk must notify the party by mail that the party must file the certificate within 15 days after the clerk's notice is mailed and that ~~failure~~ if the party fails to comply, ~~will~~ the court may ~~result in~~ impose one of the following sanctions:

(A) If the party is the appellant, the court ~~will~~ may strike the document or dismiss the appeal; or

(B) If the party is the respondent, the court ~~will~~ may strike the document or decide the appeal on the record, the opening brief, and any oral argument by the appellant.

(3) If the party fails to ~~comply with~~ file the certificate as specified in the notice under (2), the court may impose the sanctions specified in the notice.

~~(d)~~(e) Contents of certificate

(1) If an entity is a party, that party's certificate must list any other entity or person that the party knows has an ownership interest of 10 percent or more in the party.

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

(A) A mutual or common investment fund's ownership of securities or bonds issued by an entity does not constitute a financial interest in that entity.

(B) An interest in the outcome of the proceeding does not arise solely because the entity or person is in the same industry, field of business, or regulatory category as a party and the case might establish a precedent that would affect that industry, field of business, or regulatory category.

(3) If the party knows of no entity or person that must be listed under (1) or (2), the party must so state in the certificate.

~~(e)~~(f) Supplemental information

A party that learns of changed or additional information that must be disclosed under ~~(d)~~(e) must promptly serve and file a supplemental certificate in the reviewing court.

Advisory Committee Comment

The Judicial Council has adopted an optional form, *Certificate of Interested Entities or Persons* (form APP-008), that can be used to file the certificate required by this rule.

Subdivision ~~(d)~~(e). This subdivision requires a party to list on its certificate entities or persons that the party *knows* have specified interests. This subdivision does not impose a duty on a party to gather information not already known by that party.

Rule 8.490. Petitions for writ of mandate, certiorari, or prohibition

(a)–(h) * * *

(i) Certificate of Interested Entities or Persons

(1) This subdivision applies in writ proceedings in civil cases other than family, juvenile, guardianship, and conservatorship cases.

~~(1)~~(2) Each party must comply with the requirements of rule 8.208 concerning serving and filing a Certificate of Interested Entities or Persons.

~~(2)~~(3) The petitioner's certificate must be included in the petition. The certificates of the respondent and real party in interest must be included in their preliminary opposition or, if no such opposition is filed, in their return, if any. The certificate must appear after the cover and before the tables. If the identity of any party has not been publicly disclosed in the proceedings, the party may file an application for permission to file its certificate under seal separately from the petition, preliminary opposition, or return.

~~(3)~~(4) If a party fails to file a certificate as required under ~~(1)~~(2) and ~~(2)~~(3), the clerk must notify the party by mail that the party must file the certificate within 10 days after the clerk's notice is mailed and that ~~failure~~ if the party fails to comply, ~~will~~ the court may ~~result in~~ impose one of the following sanctions:

(A) If the party is the petitioner, the court ~~will~~ may strike the petition; or

(B) If the party is the respondent or the real party in interest, the court ~~will~~ may strike the document.

~~(4)~~(5) If the party fails to ~~comply with~~ file the certificate as specified in the notice under ~~(3)~~(4), the court may impose the sanctions specified in the notice.

(j)–(m) * * *

Advisory Committee Comment

* * *

Subdivision (i): The Judicial Council has adopted an optional form, *Certificate of Interested Entities or Persons* (form APP-008), that can be used to file the certificate required by this provision.

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number:
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	Superior Court Case Number: ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: RESPONDENT/REAL PARTY IN INTEREST:	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☐ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.490(i) before completing this form. You may use this form for the initial certificate in a civil appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ in a civil case. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): _____

2. a. ☐ There are no interested entities or persons that must be listed in this Certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Party (*Check one*):	Nonparty	Nature of interest *(Explain):*
(1)		☐	☐	
(2)		☐	☐	
(3)		☐	☐	
(4)		☐	☐	
(5)		☐	☐	

☐ Continued on Attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

SPR07-03

Appellate Procedure: Certificate of Interested Entities and Persons (amend Cal. Rules of Court, rules 8.208 and 8.490, and approve form APP-008, *Certificate of Interested Entities or Persons*)

List of All Commentators, Overall Positions on the Proposal, and General Comments

	Commentator	**Position**	**Comment on behalf of group?**	**Comment**	**Committee response**
1.	Appellate Court Committee of the San Diego County Bar Association Lisa W. Cooney, Chair	AM	Y	See comments on specific provisions below.	
2.	California Appellate Court Clerks' Association Deena C. Fawcett, President	AM	Y	See comments on specific provisions below.	
3.	Court of Appeal, Second Appellate District Hon. Roger W. Boren Administrative Presiding Justice	AM	Y	See comments on specific provisions below.	
4.	Kevin Lane Assistant Clerk Administrator Court of Appeal, Fourth Appellate District, Division One	AM	N	See comments on specific provisions below.	
5.	Pam Moraida Program Manager Superior Court of Solano County	A	N	No narrative comments submitted.	No response required.
6.	Orange County Bar Association Joseph Chairez, President	AM	Y	See comments on specific provisions below.	
7.	State Bar of California Committee on Appellate Courts Saul Bercovitch, Staff Attorney	AM	Y	See comments on specific provisions below.	

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
8.	Sharol Strickland Executive Officer Superior Court of Butte County	A	N	No narrative comments submitted.	No response required.
9.	Superior Court of Los Angeles County (no name provided)	A	Y	No narrative comments submitted.	No response required.
10.	Superior Court of San Diego County Michael M. Roddy, Executive Officer	A	Y	No narrative comments submitted.	No response required.

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

Rules 8.208(b) and 8.490(i)(1) – Cases in Which Certificate Is Required

Rule/Issue	Commentator	Comment	Committee response
Rules 8.208(b) and 8.490(i)(1) Cases in which Certificate Is Required	California Appellate Court Clerks' Association Deena C. Fawcett, President	Rule 8.208. We agree with the addition of subdivision (b) clarifying the applicability of this rule Rule 8.490. Please see the comments to SPR07-01, rule 8.490, above. They apply here as well. This should be a separate rule consistent with the pattern set out in rule 8.208 for civil appeals. Rule 8.490 has become too long!	No response required. The committee agrees that this rule is very long and will consider whether to propose breaking it into smaller rules during the next rules cycle.
Rules 8.208(b) and 8.490(i)(1) Cases in which Certificate Is Required	State Bar of California Committee on Appellate Courts Saul Bercovitch, Staff Attorney	In its discussion of SPR07-03, the Appellate Advisory Committee recommends that rules 8.208 and 8.490 be amended to specify that the requirement of filing a Certificate of Interested Entities and Parties applies only in civil cases other than family, juvenile, guardianship, and conservatorship cases, and that the requirement does not apply in criminal cases, "because, unlike in civil cases involving corporate entities, in these cases the identity of all the interested entities and persons is typically clear from the face of the papers and the record." The Committee questions why these proposed exemptions are absolute, and can imagine circumstances in which the identity of interested entities or persons would not be clear, and may form the basis of a recusal decision. In addition, civil cases that only involve individuals would – for purposes of these rules – appear to be the same as family, juvenile, guardianship, and conservatorship cases. Ultimately, there may be nothing to disclose in the certificates in those types of cases, but the Committee believes a case-by-case approach is preferable to a rule that would create the categorical exemptions. In connection with its discussion of this issue, the Committee compared this proposal against the parallel provision governing cases in the California Supreme Court. The Supreme Court	With regard to criminal cases in which a corporate entity is a party, the comment raises an important issue that is not addressed in the current rule or in this proposal. Because applying these requirements to criminal cases in which a corporate entity is a party would be an important substantive change to the rules, however, the committee believes public comment should be sought before any such change is considered for adoption. The committee will consider this suggestion during the next rules cycle. With regard to family, juvenile, guardianship, and conservatorship cases, the committee specifically considered whether the certificate requirement should apply in these cases and concluded that it should not. Unlike general civil cases, there are no corporate parties in these cases; the

Rule/Issue	Commentator	Comment	Committee response
		requirement regarding the "certification of interested entities or persons" is found in the Supreme Court's Internal Operating Practices and Procedures (IOPPs). (See IOPP IV, L.) That requirement applies "in a civil case or a criminal case in which a corporate entity is a party." It is not clear why the proposed requirements for the Court of Appeal should diverge from the Supreme Court requirements, given that the same information would be relevant to a Justice when making a decision regarding recusal. If the rules applicable to the Court of Appeal were amended to specify that criminal cases in which a corporate entity is a party are included (as in the IOPPs), the current rules would need to be adjusted because rule 8.208 is located in Chapter 2 governing civil appeals, and rule 8.490 is located in Chapter 7 governing miscellaneous writs. To the extent the rules are amended to state explicitly that criminal cases are exempt from the certificate requirement, the Committee recommends that habeas corpus matters be added to the list of exemptions to avoid potential confusion about whether those matters should be characterized as "civil" for purposes of the rules.	parties are all government entities or individuals whose identity is clear from the face of the papers and record. The commentator is correct that the rules currently require certificates in general civil cases in which there is no corporate party. In such general civil cases, however, the subject matter of dispute itself may be or affect a corporate entity, even if the corporation is not a party. This is not true in family, juvenile, guardianship, and conservatorship cases, where the subject of the dispute is the party relationships.

Rule 8.208(d) – When to File Certificate

Rule/Issue	Commentator	Comment	Committee response
Rule 8.208(d) When to File Certificate	California Appellate Court Clerks' Association Deena C. Fawcett, President	Rule 8.208. We disagree with proposed subdivision (d)(1). We still believe that the certificate should be limited to being required in the brief only. The terms "application," "motion," and "request" tend to be used interchangeably for filing purposes. To prevent conflicts with the filing party the court will have to rely on the title the party has chosen to use to enforce this rule, even if it means that some documents that should have a certificate don't and other's, such as requests for extension of time, do, e.g., "Application for Extension of Time" vs. "Request for Extension of Time." If this certificate is still going to be required outside of or in addition to the one in a brief, it would be much more manageable to keep the language of the present rule that requires it "at the time it files its first document." A "first document" is much more specific. Rule 8.208. Another option would be to specify the type of motion, i.e., "Motion to Dismiss." Is it necessary to know about interested parties in motions to augment or requests for extension of time, for example?	The committee believes that it is important for the justices to receive information relevant to whether they should disqualify themselves before they act on any motion or application filed in a case.
Rule 8.208(d) When to File Certificate	Court of Appeal, Second Appellate District Hon. Roger W. Boren Administrative Presiding Justice	The committee proposes that rule 8.208(d), Serving and filing a certificate, be amended to clarify that a certificate must be filed with a motion, application or opposition if one is filed before the party's principal brief. However, the language of the proposed modification is cumbersome. I suggest that it be revised to provide as follows: (1) Except as otherwise provided in this rule, each party must ~~serve and file a certificate at the time it files its first document in the Court of Appeal. Each party must also~~ include a ~~copy of the~~ certificate in its principal brief. The certificate must appear	The committee agrees with these suggestions and has incorporated them, with minor alterations, into the amendments that it is recommending for adoption.

Rule/Issue	Commentator	Comment	Committee response
		after the cover and before the tables. ~~If a party files a motion or application in the Court of Appeal or an opposition to such a motion or application before filing its principal brief, however, the party must serve and file a certificate at the time it files the motion, application or opposition and include a copy of the certificate in the principal brief.~~ If a party files a motion, application, or opposition to a motion or application in the Court of Appeal before filing its principal brief, the party must also serve and file a certificate at the time the motion, application or opposition is filed. If the identity of any party has not been publicly disclosed in the proceedings, the party may serve and file an application for permission to file its certificate under seal separately from its principal brief. Notes: The wording of the original rule in 8.208(c) requiring a party to serve and file a certificate at the time it files its "first document" has prompted many parties to file the certificate with the case information statement. The modification clarifies that the certificate must be filed with a motion, application or opposition if one is filed before the principal brief. This seems to be a better procedure in terms of both the workings of the clerk's office and the purpose of the rule. The committee's discussion sounds as if a certificate need not be filed with the principal brief if one has been filed with an earlier motion or application. This would not promote the purposes of the rule; however, the wording of its proposed modification makes it clear that a certificate must be filed with the brief as well as an earlier motion or application. In our suggested modification we have omitted the word "copy" [of the certificate in the principal brief] that appears in	

Rule/Issue	Commentator	Comment	Committee response
		the proposed modification, since under existing rule 8.208(e) a party has to promptly file a supplemental certificate if it learns of changed or additional information that must be disclosed, and if this occurs between the filing of the motion and the filing of the brief, the new (not copy) certificate filed with the brief would cover this requirement without the need for a "supplemental" certificate.	
Rule 8.208(d) When to File Certificate	State Bar of California Committee on Appellate Courts Saul Bercovitch, Staff Attorney	The Committee supports the proposed amendment to clarify that if a motion, application or opposition is filed before a principal brief, then a certificate must be filed with the document. The Committee also supports the proposed amendment that would allow a party to file an application for permission to file its certificate under seal, if the identity of any party has not been publicly disclosed in the proceedings. The Committee suggests alternative language for what would become rule 8.208(d)(1), however, to address three issues. First, under the proposed amendments, a certificate would generally be included in a principal brief but, pursuant to the exception, a copy of the previously filed certificate would be included. This would be similar to the process under the current rule, which provides for a certificate when a party files its "first document" but a "copy of the certificate" in the principal brief. The Committee believes the rule should be amended to require that a certificate be included in the principal brief in all circumstances. The proposed language (like the current language) assumes that the information included in a certificate filed with a motion, application or opposition will, in all cases, be the same as the information that would be included at a later date, along with the principal brief. Although that may generally be the case, requiring a new certificate in all circumstances seems appropriate and, as current rule 8.208(e)	The committee agrees with these suggestions and has incorporated them, with minor alterations, into the amendments that it is recommending for adoption.

Rule/Issue	Commentator	Comment	Committee response
		recognizes, a party may learn of changed or additional information that should be disclosed in a certificate. Second, the Committee believes that in the case of a motion, application or opposition, the party should be required to "attach" the certificate to the document, similar to the requirement applicable to a principal brief. Third, the proposed language dealing with an application to file a certificate under seal addresses a principal brief, but does not include a motion, application or opposition. With all of the Committee's suggested changes, rule 8.208(d) would read as follows: "Each party must include a certificate in its principal brief. The certificate must appear after the cover and before the tables. If a party files a motion or application in the Court of Appeal or an opposition to such a motion or application before filing its principal brief, the party must also attach a certificate to the motion, application or opposition. If the identity of any party has not been publicly disclosed in the proceedings, the party may serve and file an application for permission to file its certificate under seal separately from its principal brief, motion, application or opposition."	

Rules 8.208(d) & 8.490(i)(4) – Failure to File Certificate

Rule/Issue	Commentator	Comment	Committee response
Rules 8.208(d) and 8.490(i)(4) Failure to File Certificate	California Appellate Court Clerks' Association Deena C. Fawcett, President	We also request that the word "will" in proposed section (d)(2) not be substituted with the word "may" for reasons similar to those set out in our comments for SPR07-07. Rules 8.100, 8.140, and 8.220.	As discussed in more detail in the report concerning the committee's proposal relating to notice of various defaults, the committee believes that parallel language should be used in the notice provision and in the provision concerning the actual imposition of sanctions. The committee has revised its proposal to make the language in these provisions parallel each other even more closely. Under this revised proposal, both provisions would state that "the court may impose" the listed sanctions, thus consistently conveying the court's power to impose these sanctions.
Rules 8.208(d) and 8.490(i)(4) Failure to File Certificate	Court of Appeal, Second Appellate District Hon. Roger W. Boren Administrative Presiding Justice	A proposed modification of rule 8.208(d)(2) would provide that if a party fails to file a certificate as provided under subdivision (1), its failure to comply may result, rather than will result (as the rule now reads), in one of the specified sanctions. However, there is no proposal to change the language from "will result" to "may result" in the analogous provision governing certificates in petitions for writs of mandate, certiorari or prohibition, rule 8.490(i)(4). If you support the proposal to change the language in rule 8.208(d)(2) to "may," you will/may want to suggest that the same change be made in rule 8.490(i)(4) as well.	The committee agrees with this suggestion and has modified its proposal to eliminate the word "will" from this provision.
Rules	Orange County Bar Association	The proposed change in Rule 8.208(d)(2) changes "will" to	The committee agrees with this

Rule/Issue	Commentator	Comment	Committee response
8.208(d) and 8.490(i)(4) Failure to File Certificate	Joseph Chairez, President	"may" so that the court "may" issue a particular sanction. In rule 8.490(i)(4), however, the word "will" remains. It should be changed to "may" as well, so that these two rules are consistent.	suggestion and has modified its proposal to eliminate the word "will" from this provision.
Rules 8.208(d) and 8.490(i)(4) Failure to File Certificate	State Bar of California Committee on Appellate Courts Saul Bercovitch, Staff Attorney	The Committee supports the proposed amendment that would change "will" to "may" in what would become rule 8.208(d) but suggests that subdivisions (2)(A) and (2)(B) also be amended to read as follows: "(A) If the party is the appellant, the court ~~will strike~~ striking the document or ~~dismiss~~ dismissing the appeal; or (B) If the party is the respondent, the court ~~will strike~~ striking the document or ~~decide~~ deciding the appeal on the record, the opening brief, and any oral argument by the appellant." The reason for the Committee's suggested language change is to achieve parallel language structure with proposed rule 8.100(g)(3), which currently exists as rule 8.100(f)(3), and to avoid confusion about the discretionary nature of the sanctions. The Committee perceived some residual confusion in this regard notwithstanding the changes suggested by the proposal because although the word "will" would be changed to "may" in the first part of rule 8.208(d), the word "will" would remain in each of the subdivisions (A) and (B).	The committee agrees with the concern expressed in this comment and has revised its proposal to eliminate the word "will" from subdivisions (2)(A) and (B).

Rule 8.208(d) & 8.490(i)(3)– Filing Certificate Under Seal

Rule/Issue	Commentator	Comment	Committee response
Rule 8.208(d) and 8.490(i)(3) Filing Certificate Under Seal	Appellate Court Committee of the San Diego County Bar Association Lisa W. Cooney, Chair	We also have substantive comments on the amendments proposed for rule 8.208. New subdivision (d) of the rule provides: "If the identity of any party has not been publicly disclosed in the proceedings, the party may serve and file an application for permission to file its certificate under seal separately from its principal brief." We commend this addition. It accounts for important privacy and confidentiality interests that may come into play when attempting to comply with rule 8.208. The introductory remarks to SPR07-03 note that "[i]n some proceedings, the identity of a party may be confidential." This confidentiality can be protected consistent with, as the introductory remarks put it, "help[ing] justices of the Courts of Appeal determine whether to disqualify themselves from a proceeding." We propose an expansion of the new language to take into account another circumstance. In some civil cases, a party is required to disclose, as an "interested" entity or person, the identity of an entity or person that is normally obtained only through discovery. Hence, an adversary in litigation, through this disclosure, may be able to obtain information to which it would not be entitled under the discovery rules, such as, for example, who has an ownership interest in a party. This does not seem right because the certificate aims to assist the appellate justices, not opposing parties. To cover this situation, we propose to amend rule 8.208(d) to read: "If the identity of any *entity or person subject to disclosure under this rule* has not been publicly disclosed in the proceedings, the party may serve and file an application for permission to file its certificate under seal separately from its	Because these would be important substantive changes to the proposal, the committee believes public comment should be sought before they are considered for adoption. The committee will consider these suggestions during the next rules cycle.

Rule/Issue	Commentator	Comment	Committee response
		principal brief. *If the application is granted, the clerk of the reviewing court must allow the certificate to be filed under seal, without service, pursuant to this rule. The certificate must be filed within ten days of the order granting the application. Once filed under seal, the certificate need not be filed again with the party's principal brief or any other document filed in the Court of Appeal.* " The latter sentences clarify what is to occur, and when, if the request is allowed. B. Revised Rule 8.490 SPR07-03 also proposes analogous changes to disclosure of interested entities or persons in writ proceedings. To be consistent with the modification we suggest above, revised rule 8.490(i)(3) would need to be amended to provide: "If the identity of any *entity or person subject to disclosure under this rule* has not been publicly disclosed in the proceedings, the party may *serve and* file an application for permission to file its certificate under seal separately from the petition, preliminary opposition, or return. *If the application is granted, the clerk of the reviewing court must allow the certificate to be filed under seal, without service, pursuant to this rule. The certificate must be filed within ten days of the order granting the application. Once filed under seal, the certificate need not be filed again with the party's petition, preliminary opposition, return to the petition, or any other document filed in the Court of Appeal.*" Interestingly, rule 8.208(d), discussed above, requires a party to "serve" in civil appeals any application for permission to file the certificate under seal. However, this mandate is not found in rule 8.490(i)(3) as currently proposed. Although writs and appeals differ in many respects, we are unaware of any distinction between them that would suggest serving the application in an appeal, but not in a writ proceeding. The	

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		omission of the service requirement in rule 8.490(i)(3) appears to be inadvertent. For this reason, we have inserted the words “serve and” before “file” above. The italicized sentences at the end clarify that a party making the application should not include with the application the certificate proposed to be sealed. Instead, the certificate should be filed within ten days of the order granting the application.	

Rules 8.208 & 8.490(i) – New suggestions

	Commentator	Comment	Committee response
Rules 8.208 and 8.490(i) New Suggestions	State Bar of California Committee on Appellate Courts Saul Bercovitch, Staff Attorney	The Committee's discussion of SPR07-03 gave rise to some related issues that it believes warrant further study and consideration, perhaps separate and apart from this particular proposal. Most significantly, the Committee questions why the certificate needs to be formally filed or served at all (as opposed to being informally lodged with or received by the Court of Appeal only), given that the purpose of a certificate is to provide information to the Justices for recusal purposes. Public filing and service often result in the unnecessary disclosure of the identities of entities or persons to the public or opposing parties. One Committee member relayed an instance of a case in which a privately held corporation won a discovery battle in the trial court allowing it to keep the identities of its individual shareholders undisclosed, only to be subject on appeal, by reason of the certificate requirement, to service of the information on opposing counsel and public disclosure of the information by the filing of the certificate. The same issue has come up in other cases involving privately held corporations where the corporate ownership structure was simply not an issue in the case, so was never disclosed at the trial level. The certificate requirement is problematic, to the extent it requires a party to reveal otherwise confidential information to the other side and, through the filing, to the public in general. Moreover, the practical utility of sending that information to the other side is questionable, because the other side is unable to evaluate the significance of that information without knowing the connection that any individual Justice may have with the interested entities or parties.	Because it would be an important substantive change to eliminate the service requirement, the committee believes public comment should be sought before any such change is considered for adoption. As suggested by the State Bar committee, this suggestion will be considered during another rules cycle.

	Commentator	Comment	Committee response
		The Supreme Court provision differs in some respects, but still does not prevent disclosure beyond the Court itself. Under the IOPPs, a party is required to "file" (but not serve) the certificate. The form letter the clerk of the court sends to the parties to inform them of the requirement refers to IOPP IV, L, as providing that "each party must file" the certificate. The letter provides a form to use for the purpose, and concludes by saying that the completed form and eight copies "should be returned to us within 15 days." There is no mention of a service requirement, and the Committee has been informed that the clerk's office does not require a proof of service when it receives the form. Although the information is not sent directly to the other parties under this procedure, the certificate would probably be considered a public record if someone wanted to view it in the court's file. The Committee believes that this and other issues (such as why the Supreme Court requirement is not found in the rules of court) should be studied as part of an overall re-examination of the Court of Appeal and Supreme Court procedures governing these certificates.	

SPR07-03

Appellate Procedure: Certificate of Interested Entities and Persons (amend Cal. Rules of Court, rules 8.208 and 8.490, and approve form APP-008, *Certificate of Interested Entities or Persons*)

	Commentator	Comment	Committee response
Rule 8.208 and 8.490(i) New Suggestions	Appellate Court Committee of the San Diego County Bar Association Lisa W. Cooney, Chair	In addition, there has been some uncertainty in the bar on whether an insurer of a party, based on that relationship alone, has a "financial or other interest" that dictates disclosure of the insurer under rule 8.208. This issue could be addressed in new subdivision (e)(2), which specifies certain relationships and circumstances that do not create an "interest" under the rule. Alternatively, the issue could be addressed by way of an Advisory Committee Comment. On a related note, a Comment might be helpful to clarify whether rule 8.208 requires parties to list themselves as interested persons or entities.	Because these would be important substantive changes to the proposal, the committee believes public comment should be sought before they are considered for adoption. The committee will consider these suggestions during the next rules cycle.

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

Form APP-008

	Commentator	Comment	Committee response
Form APP-008	Appellate Court Committee of the San Diego County Bar Association Lisa W. Cooney, Chair	We have two suggested changes to proposed form APP-008 (Certificate of Interested Entities or Persons). First, near the top, there are places to identify "APPELLANT" and "RESPONDENT." Because APP-008 will also be used in writ proceedings (see, e.g., rule 8.490(i)), we suggest expanding the party labels to "APPELLANT/PETITIONER" and "RESPONDENT/REAL PARTY IN INTEREST."	The committee agrees and has incorporated these revisions into the form it is recommending for adoption.
		Second, near the bottom, there is a line for "(SIGNATURE OF PARTY)." This should also be expanded to include what seems more common – the signature of counsel. Accordingly, this would read "(SIGNATURE OF PARTY OR ITS COUNSEL)" instead.	The committee agrees and has incorporated these revisions into the form it is recommending for adoption.
		To encourage use of new APP-008, rather than the current patchwork of forms emanating from individual Courts of Appeal, we suggest a modification to rule 8.208 to refer expressly to APP-008: Rule 8.208 Certificate of Interested Entities or Persons (a) * * * (b) Definitions For purposes of this rule: (1) "Certificate" means a Certificate of Interested Entities or Persons signed by appellate counsel or an unrepresented party. Form APP-008 (Certificate of Interested Entities or Persons) may be used.	The suggested language appears to contemplate that form APP-008, like APP-004, would be a mandatory form. The committee is proposing that form APP-008 be an optional form rather than a mandatory form; therefore it would not be appropriate to parallel the language concerning form APP-004. The committee is recommending, however, that the advisory committee comments to both rules 8.208 and 8.490 be amended to include cross-references to form APP-008.

 Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

	Commentator	Comment	Committee response
		* * * This addition would resemble what is already done, as noted above, with APP-004 (Civil Case Information Statement) in rule 8.100(f)(1). This addition would also track the revision we propose above for new rule 8.121, amending it to refer specifically to APP-003 (Notice Designating Record on Appeal). On a related note, we pose an idea for the Appellate Advisory Committee's consideration. Rule 8.100(f) places an express, affirmative duty on the clerk of the reviewing court, after receiving notice of the appeal, to mail a copy of form APP-004 to the appellant. Perhaps there should be a similar duty in rule 8.208 regarding new form APP-008. In practice, some Courts of Appeal already do this as part of a "welcome packet" that includes APP-004 and, at present, the local certificate of interested entities or persons. It does not seem a great additional burden on the clerk to include, in the same mailing, a copy of new APP-008.	
Form APP-008	California Appellate Court Clerks' Association Deena C. Fawcett, President	We concur in the statewide adoption of a standard form for compliance with rules 8.208 and 8.490(i).	No response required.
Form APP-008	Kevin Lane Assistant Clerk Administrator Court of Appeal, Fourth Appellate District, Division One	I agree with the rule modifications and use of a single optional form. The format of appellate forms needs to be the same. Refer to APP-003 to [APP-]006. The case number is in different places. If there is a standard we should have this form follow it.	The commentator is correct that the location of the case number in the appellate forms does vary. The forms filed in the superior court have the case number in the lower-right corner of the caption. The majority of the forms filed in the Court of Appeal have the case

	Commentator	Comment	Committee response
			number in the upper-right corner of the caption, as does proposed form APP-008. The committee will consider for the next rules cycle whether other appellate forms that do not follow this pattern should be revised.
Form APP-008	State Bar of California Committee on Appellate Courts Saul Bercovitch, Staff Attorney	The Committee supports the proposed optional Judicial Council Form (APP-008).	No response required.