

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Hon. Kathryn Doi Todd, Chair
Heather Anderson, Senior Attorney, 415-865-7691,
heather.anderson@jud.ca.gov

DATE: September 18, 2007

SUBJECT: Appellate Procedure: 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) (Action Required)

Issue Statement

Notices of Default

Rules 8.100, 8.140, and 8.220 contain similar provisions requiring the clerk to send a party who does not comply with the rules' requirements a notice concerning the potential sanctions if the default is not corrected. Currently, all of these provisions require the notice to state that the court "will" impose the applicable sanctions if the party does not comply with the notice. These same rules also provide, however, that if the party does not comply with the notice, the court "may" impose the applicable sanctions. These provisions may be confusing to some rule users because the "will" language in the notice seems to indicate that imposition of sanctions is inevitable if the party does not comply while the "may" language seems to indicate that the actual imposition of sanctions is discretionary.

Notices of Appeal

Rule 8.108 addresses various circumstances in which the normal time to file a notice of appeal in a civil case under rule 8.104(a) is "extended." The advisory committee comment to rule 8.108 explains that this rule is intended only to *increase* the time to appeal, not to shorten it. The language of the rule itself, however, could be misinterpreted to provide less time to file a notice of appeal than is provided under 8.104(a) under certain circumstances. Similarly, rules 8.308 and 8.400, relating to cross-appeals in felony and juvenile cases respectively, could be misinterpreted to provide less time to file a cross-appeal than parties in those cases would ordinarily have to file an original appeal.

Rule 8.108(a) provides that if any party serves and files a valid notice of intention to move for a new trial and the motion is denied, the time to appeal from the judgment is extended. This rule does not address, however, the time for filing a notice of appeal when the court issues an order granting a new trial conditional on plaintiff's acceptance of an additur or remittitur of damages within a specified period. Parties in such cases may therefore be confused about the time for filing a notice of appeal.

Recommendation

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

1. Amend rules 8.100, 8.140, and 8.220 to make the notice of default and sanctions provisions more consistent, including requiring the notice to state that the court may, rather than will, impose the specified sanctions if the party does not correct the default;
2. Further amend rule 8.100 to create separate subdivisions addressing the procedures that apply if an appellant fails to pay the appellate filing fee and the procedures that apply if an appellant fails to pay the superior court deposit;
3. Amend rule 8.108 to:
 - a. Clarify that this rule operates only to increase the time to appeal otherwise prescribed in rule 8.104(a); it does not shorten the time to appeal; and
 - b. Clarify when a notice of appeal must be filed if the court issues an order granting a new trial conditional on plaintiff's acceptance of an additur or remittitur; and
4. Amend rules 8.308 and 8.400 to clarify when a cross-appeal must be filed in felony and juvenile cases.

The text of the proposed amendments to the rules is attached at pages 7–15.

Rationale for Recommendation

Notices of Default

Rules 8.100(c), (d), and (f) relating to failure to pay appellate fees and failure to submit a civil case information sheet; 8.140(a) relating to failure to procure the record; and 8.220(a) relating to failure to timely file a brief in a civil appeal all contain similar provisions requiring the clerk to send the defaulting party a notice concerning the potential sanctions if the default is not corrected. Currently, all of these provisions require that the notice state that the court “will” impose the sanctions identified in the applicable rule if the default is not corrected within a specified time period. The word “will” in these notice provisions suggests that imposition of these sanctions is inevitable if the default is

not corrected within the time specified in the notice. In practice, however, the court can, and often does, extend the time a party has to correct the default. This is explicitly recognized in rule 8.220(d), which authorizes parties to seek extensions of time to file a brief after having received a default notice. All of these rules also recognize the court's discretion with regard to the actual imposition of sanction by providing that if the party does not comply with the notice, the court "may" impose the identified sanctions.

Some rule users may find it confusing that the notice provision uses different language concerning the imposition of sanctions than the actual sanctions provision. To eliminate this potential confusion, the committee recommends making the language of the required notice and sanction provisions more closely parallel each other, including amending the notice provisions in all of these rules to provide that "the court may" impose the applicable sanctions if these defaults are not corrected within the specified time period. With these changes, both the notice and sanction provisions would consistently convey that the court has the power to impose the applicable sanctions if the defaulting party does not take the action specified in the notice.

The committee also recommends additional clarifying amendments to rule 8.100. Appellants in civil cases are required to pay both an appellate filing fee and a separate, additional deposit to the superior court at the time they file their notice of appeal. Currently, the procedures that apply if an appellant fails to pay the appellate filing fee and the procedures that apply if an appellant fails to pay the superior court deposit are combined into a single subdivision of rule 8.100. This combination makes this subdivision long and hard to understand. To make these provisions easier to understand, the committee recommends that the procedures that apply if an appellant fails to pay the appellate filing fee and the procedures that apply if an appellant fails to pay the superior court deposit be placed in separate subdivisions of rule 8.100.

Notices of Appeal

Rule 8.108 addresses various circumstances in which the normal time to file a notice of appeal in a civil case specified in rule 8.104(a) is "extended." The advisory committee comment to rule 8.108 states:

The use of the word "extended" limits the scope of the rule: i.e., the rule operates only to *increase* any time to appeal otherwise prescribed; it cannot shorten the time. Thus if the time provided by rule 8.108 would be less than the normal time to appeal stated in rule 8.104(a)—e.g., when a new trial motion is denied before notice of entry of judgment is given—the rule 8.104(a) time governs.

If a rule user does not see this explanation in the advisory committee comment, however, the language of the rule itself could be misinterpreted under certain circumstances as providing less time to file a notice of appeal than the 60-day period ordinarily provided under 8.104(a). For example, 8.108(e) provides that the time for filing a cross-appeal is

“extended” until 20 days after the superior court clerk mails notification of the first appeal. However, if the first notice of appeal is filed early, for example, only 30 days after the notice of entry is mailed, “extending” the time to file the notice of appeal to 20 days after the clerk mails notice of the first appeal would result in the notice of appeal being due *before* the normal 60-day appeal period specified in rule 8.104(a) expires.

To clarify that rule 8.108 operates only to extend the time to file a notice of appeal, not to shorten it, the committee recommends that the explanation now found in the advisory committee comment be moved into the text of the rule.

Like rule 8.108, rules 8.308 and 8.400, relating to cross-appeals in felony and juvenile cases respectively, currently provide that if one party timely files a notice of appeal, the time for the other party to file a notice appeal in the same case is “extended.” These provisions could similarly be misinterpreted to provide less time to file a cross-appeal than parties in those cases would ordinarily have to file an original appeal. To address this, the committee recommends that these rules be amended to clarify that the time to file a cross-appeal is the later of the normal time to file a notice of appeal on the “extended” time currently specified in these rules.

The committee also recommends amending rule 8.108 to clarify when a notice of appeal must be filed if the court issues an order granting a new trial conditional on plaintiff’s acceptance of an additur or remittitur. Subdivision (a) of rule 8.108 provides that if any party serves and files a valid notice of intention to move for a new trial and the motion is denied, the time to appeal from the judgment is extended for all parties until the earliest of: (1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order; (2) 30 days after denial of the motion by operation of law; or (3) 180 days after entry of judgment. It is not uncommon, however, for a court to issue an order granting a new trial conditional on the plaintiff’s acceptance of an additur or remittitur of damages within a specified period. If the plaintiff accepts within the time specified, the new trial is denied. If such a conditional order is considered an order denying the motion for a new trial, the time to file the notice of appeal would begin running as soon as the order is issued and could run out while the plaintiff is still deciding whether to accept the additur or remittitur. To address this, the committee recommends adding a new provision to rule 8.108 specifically setting the time for filing a notice of appeal when a party accepts such an additur or remittitur.

Alternative Actions Considered

The committee considered several alternative approaches to the rules relating to notices of defaults. First, the committee considered leaving these rules unchanged, with the required notices stating that the applicable sanctions “will” be imposed and the sanctions provisions stating that “the court may” impose these sanctions. The committee understands that some stakeholders, particularly the clerks of the appellate courts, believe that it is very important to convey to parties in the default notice the strong likelihood that sanctions will be imposed in order to motivate the parties to timely correct the

default. For this reason, these stakeholders believe it is important that the notice state that the sanctions “will” be imposed. These stakeholders believe that it is not inconsistent for the notice to express this strong likelihood while the provision on actual imposition of sanctions states that “the court may” impose the sanctions since the “may” in this context expresses the court’s power to impose sanctions rather than expressing that imposition of the sanctions is optional. Finally, these stakeholders do not believe that rule users have found these rules confusing and, therefore, do not see any reason to modify the rules.

The committee believes that leaving these rules unchanged is a viable alternative but not the best alternative. The history of proposals to amend these provisions during the last decade indicates that commentators have repeatedly expressed concern about the inconsistency between the language of the notice and the language of the sanctions provision. While the committee agrees that it is important for parties to understand that they need to cure the default in order to avoid applicable sanctions, the committee does not think that using different language in the notice and actual sanctions provisions serves this purpose. In fact, the committee believes that the contrasting language of the notice and sanction provisions detracts from the force, and thus the purported benefit, of using “will” in the notice. Committee members believe a notice communicating that the court has the power to impose sanctions will be equally effective at motivating parties to take the action necessary to correct the default.

The committee also considered leaving the “will” impose language in the notice provision but changing the sanction provision to similarly provide that the court “will” impose the applicable sanctions if the party does not comply with the notice. This approach would maintain the language that the stakeholders noted above believe best conveys the strong likelihood that sanctions will be imposed and also make the language of the notice and sanctions provisions parallel. The committee concluded, however, that a sanctions provision stating that the court “will” impose the applicable sanctions would not sufficiently reflect the court’s power to extend the time that parties have to correct these defaults. While the committee agreed that imposition of the applicable sanctions is inevitable if the default is never corrected, they did not believe that imposition of such sanctions is inevitable if the default is not corrected within the time period specified in the notice. In fact, the committee believed that courts prefer to consider appeals on their merits and thus often allow parties additional time to correct defaults.

Ultimately, the committee concluded that structuring both the notice and sanctions provisions to indicate that the court “may” impose the applicable sanctions if the party does not take the action specified in the notice was the best alternative. This approach conveys a consistent message that the court has the power to impose these sanctions if the default is not corrected within the time specified in the notice but does not suggest that the imposition of these sanctions at that time is inevitable or mandatory.

Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2007 comment cycle.

Eleven individuals or organizations submitted comments on this proposal. Four commentators agreed with the proposal and seven agreed with the proposal if amended. The full text of the comments received and the committee's responses is attached beginning on page 16.

As circulated for public comment, this proposal would have amended rule 8.108(e) to state that the time to file a cross-appeal in a civil case is the later of the extended time under 8.108(e) or the normal time to appeal under rule 8.104(a). One commentator suggested that, given the advisory committee comment's explanation that rule 8.108 operates only to increase the time to appeal, this amendment was unnecessary. This commentator also suggested that amending just one of rule 8.108's subdivisions might create an implication that the other subdivisions could be read as shortening the normal time to file a notice of appeal. In response to these comments, the committee has modified its proposal to incorporate into the text of rule 8.108 the language from the advisory committee comment clarifying that this rule operates only to extend the time to appeal, not to shorten it. The committee has also deleted from its proposal the amendments to 8.108(e) that were originally circulated for comment.

Several commentators, including the California Appellate Court Clerks' Association, opposed amending the rules regarding default notices to provide that courts "may" rather than "will" impose sanctions if the party does not comply with the notice. For the reasons discussed above, the committee still recommends that these rules be amended. Rather than simply substituting "may" for "will" in these notice provisions, however, the committee recommends further amendments intended to make the notice and sanctions provisions more closely parallel each other and to consistently convey the court's power to impose sanctions if a party does not take the action specified in the court's notice, including providing in the required notice that "the court may impose" the applicable sanctions if the party does not correct the default.

Implementation Requirements and Costs

The committee does not believe that there will be appreciable costs associated with implementing these amendments. Clarifying the time to file a notice of appeal and the sanction rules should reduce questions and problems associated with these rules.

Attachments

Rules 8.100, 8.108, 8.140, 8.220, 8.308, and 8.400 of the California Rules of Court are amended effective January 1, 2008, to read:

1 **Rule 8.100. Filing the appeal**

2
3 **(a)–(b) * * ***

4
5 **(c) Failure to pay filing fee or deposit**

6
7 (1) The reviewing court clerk must promptly notify the appellant in writing if:

8
9 (A) The reviewing court receives a notice of appeal without the filing fee
10 required by (b)(1), a certificate of cash payment under ~~(d)~~(e)(5), or an
11 application for, or order granting, a fee waiver under rules 3.50–3.63;

12
13 (B) A check for the filing fee is dishonored; or

14
15 (C) An application for a waiver under rules 3.50–3.63 is denied.

16
17 (2) A clerk’s notice under (1) must state that the court may dismiss the appeal ~~will~~
18 ~~be dismissed~~ unless, within 15 days after the notice is sent, the appellant either:

19
20 (A) Pays the fee; or

21
22 (B) Files an application for a waiver under rules 3.50–3.63 if the appellant has
23 not previously filed such an application.

24
25 ~~(3) If the appellant fails to comply with (b)(2), the superior court clerk must~~
26 ~~promptly notify the appellant in writing that the appeal will be dismissed~~
27 ~~unless, within 15 days after the notice is sent, the appellant either:~~

28
29 ~~(A) Makes the deposit; or~~

30
31 ~~(B) Files an application in the superior court for a waiver under rules 3.50–~~
32 ~~3.63 if the appellant has not previously filed such an application.~~

33
34 ~~(4) If the appellant fails to comply with a notice given under (3), the superior court~~
35 ~~clerk must notify the reviewing court of the default.~~

36
37 ~~(5)~~(3) If the appellant fails to comply with take the action specified in a notice given
38 under (2), or the superior court clerk notifies the reviewing court under (4) of a
39 default, the reviewing court may dismiss the appeal, but may vacate the
40 dismissal for good cause.

1 **(d) Failure to pay deposit**
2

3 (1) If the appellant fails to pay the deposit to the superior court required under
4 (b)(2), the superior court clerk must promptly notify the appellant in writing
5 that the reviewing court may dismiss the appeal unless, within 15 days after the
6 notice is sent, the appellant either:

7
8 (A) Makes the deposit; or

9
10 (B) Files an application in the superior court for a waiver under rules 3.50–
11 3.63 if the appellant has not previously filed such an application.

12
13 (2) If the appellant fails to take the action specified in a notice given under (1), the
14 superior court clerk must notify the reviewing court of the default.

15
16 (3) If the superior court clerk notifies the reviewing court of a default under (2),
17 the reviewing court may dismiss the appeal, but may vacate the dismissal for
18 good cause.

19
20 ~~(d)~~(e) * * *

21
22 ~~(e)~~(f) * * *

23
24 **(f)(g) Civil case information statement**
25

26 (1) On receiving notice of the filing of a notice of appeal under ~~(d)~~(e)(1), the
27 reviewing court clerk must promptly mail the appellant a copy of the *Civil*
28 *Case Information Statement* (form APP-004) and a notice that the statement
29 must be filed within 10 days.

30
31 (2) * * *

32
33 (3) If the appellant fails to timely file a case information statement under (2), the
34 reviewing court clerk must notify the appellant by mail that the appellant must
35 file the statement within 15 days after the clerk’s notice is mailed and that
36 ~~failure if the appellant fails to comply, will result in the court may either the~~
37 ~~imposition of impose~~ impose monetary sanctions or ~~dismissal of dismiss~~ dismiss the appeal. If
38 the appellant fails to ~~comply with~~ file the statement as specified in the notice,
39 the court may impose the sanctions specified in the notice.

1 **Advisory Committee Comment**

2
3 **Subdivision (a).** * * *

4
5 **Subdivision (b).** * * *

6
7 **Subdivision ~~(d)~~(e).** Under subdivision ~~(d)~~(e)(2), a notification of the filing of a notice of appeal must
8 show the date that the clerk mailed the document. This provision is intended to establish the date when
9 the 20-day extension of the time to file a cross-appeal under rule 8.108(e) begins to run.

10
11 Subdivision ~~(d)~~(e)(1) requires the clerk to mail a notification of the filing of the notice of appeal to the
12 appellant’s attorney or to the appellant if unrepresented. Knowledge of the date of that notification allows
13 the appellant’s attorney or the appellant to track the running of the 20-day extension of time to file a
14 cross-appeal under rule 8.108(e).

15
16
17 **Rule 8.108. Extending the time to appeal**

18
19 **(a) Extension of time**

20
21 This rule operates only to extend the time to appeal otherwise prescribed in rule
22 8.104(a); it does not shorten the time to appeal. If the normal time to appeal stated in
23 rule 8.104(a) is longer than the time provided in this rule, the time to appeal stated
24 in rule 8.104(a) governs.

25
26 **(a)(b) Motion for new trial**

27
28 If any party serves and files a valid notice of intention to move for a new trial, the
29 time to appeal from the judgment is extended for all parties as follows:

30
31 (1) If the motion is denied, the time to appeal from the judgment is extended for all
32 parties until the earliest of:

33
34 ~~(1)~~(A) 30 days after the superior court clerk mails, or a party serves, an order
35 denying the motion or a notice of entry of that order;

36
37 ~~(2)~~(B) 30 days after denial of the motion by operation of law; or

38
39 ~~(3)~~(C) 180 days after entry of judgment.

40
41 (2) If any party serves an acceptance of a conditionally ordered additur or
42 remittitur of damages pursuant to a trial court finding of excessive or
43 inadequate damages, until 30 days after the date the party serves the
44 acceptance.

1
2 ~~(b)(c)~~ * * *

3
4 ~~(e)(d)~~ * * *

5
6 ~~(d)(e)~~ * * *

7
8 ~~(e)(f)~~ * * *

9
10 ~~(f)(g)~~ * * *

11
12 **Advisory Committee Comment**

13
14 Rule 8.108 provides various circumstances in which the time to appeal is “extended.” The use of the word
15 “extended” limits the scope of the rule: i.e., the rule operates only to *increase* any time to appeal
16 otherwise prescribed; it cannot shorten the time. Thus if the time provided by rule 8.108 would be less
17 than the normal time to appeal stated in rule 8.104(a) — e.g., when a new trial motion is denied before
18 notice of entry of judgment is given — the rule 8.104(a) time governs.

19
20 Subdivisions ~~(a)–(d)~~ ~~(b)–(e)~~ operate only when a party serves and files a “valid” motion or notice of
21 intent to move for the relief in question. As used in these provisions, the word “valid” means only that the
22 motion or notice complies with all procedural requirements; it does not mean that the motion or notice
23 must also be substantively meritorious. For example, under the rule a timely new trial motion on the
24 ground of excessive damages (Code Civ. Proc., § 657) extends the time to appeal from the judgment even
25 if the trial court ultimately determines the damages were not excessive. Similarly, a timely motion to
26 reconsider (*id.*, § 1008) extends the time to appeal from an appealable order for which reconsideration
27 was sought even if the trial court ultimately determines the motion was not “based upon new or different
28 facts, circumstances, or law,” as subdivision (a) of section 1008 requires.

29
30 **Subdivision ~~(a)~~(b).** Subdivision ~~(a)~~(b)(1) provides that the denial of a motion for new trial triggers a 30-
31 day extension of the time to appeal from the judgment beginning on the date that the superior court clerk
32 mails, or a party serves, either the order of denial or a notice of entry of that order. This provision is
33 intended to eliminate a trap for litigants and to make the rule consistent with the primary rule on the time
34 to appeal from the judgment (rule 8.104(a)).

35
36 **Subdivision ~~(b)~~(c).** The Code of Civil Procedure provides two distinct statutory motions to vacate a
37 judgment: (1) a motion to vacate a judgment and enter “another and different judgment” because of
38 judicial error (*id.*, § 663), which requires a notice of intention to move to vacate (*id.*, § 663a); and (2) a
39 motion to vacate a judgment because of mistake, inadvertence, surprise, or neglect, which requires a
40 motion to vacate but not a notice of intention to so move (*id.*, § 473, subd. (b)). The courts also recognize
41 certain nonstatutory motions to vacate a judgment, e.g., when the judgment is void on the face of the
42 record or was obtained by extrinsic fraud. (See 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on
43 Judgment in Trial Court, §§ 222–236, pp. 726–750.) Subdivision (b) is intended to apply to all such
44 motions.

45
46 In subdivision ~~(b)~~(c) the phrase “within the time prescribed by rule 8.104 to appeal from the judgment” is
47 intended to incorporate in full the provisions of rule 8.104(a).

1
2 Under subdivision ~~(b)~~(c)(1), the 30-day extension of the time to appeal from the judgment begins when
3 the superior court clerk mails, or a party serves, the order denying the motion or notice of entry of that
4 order. This provision is discussed further under subdivision ~~(a)~~(b) of this comment.
5

6 **Subdivision ~~(e)~~(d).** Subdivision ~~(e)~~(d)(1) provides an extension of time after an order denying a motion
7 for judgment notwithstanding the verdict regardless of whether the moving party also moved
8 unsuccessfully for a new trial.
9

10 Subdivision ~~(e)~~(d) further specifies the times to appeal when, as often occurs, a motion for judgment
11 notwithstanding the verdict is joined with a motion for new trial and both motions are denied. Under
12 subdivision ~~(a)~~(b), the appellant has 30 days after notice of the denial of the new trial motion to appeal
13 from the judgment. Subdivision ~~(e)~~(d) allows the appellant the longer time provided by rule 8.104 to
14 appeal from the order denying the motion for judgment notwithstanding the verdict, subject to that time
15 being further extended in the circumstances covered by subdivision ~~(e)~~(f)(2).
16

17 Under subdivision ~~(e)~~(d)(1)(A), the 30-day extension of the time to appeal from the judgment begins
18 when the superior court clerk mails, or a party serves, the order denying the motion or notice of entry of
19 that order. This provision is discussed further under subdivision ~~(a)~~(b) of this comment.
20

21 **Subdivision ~~(d)~~(e).** The scope of subdivision ~~(d)~~(e) is specific. It applies to any “appealable order,”
22 whether made before or after judgment (see Code Civ. Proc., § 904.1, subd. (a)(2)–(12)), but it extends
23 only the time to appeal “from that order.” The subdivision thus takes no position on whether a judgment
24 is subject to a motion to reconsider (see, e.g., *Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233,
25 1236–1238 [postjudgment motion to reconsider order granting summary judgment did not extend time to
26 appeal from judgment because trial court had no power to rule on such motion after entry of judgment]),
27 or whether an order denying a motion to reconsider is itself appealable (compare *Santee v. Santa Clara*
28 *County Office of Education* (1990) 220 Cal.App.3d 702, 710–711 [order appealable if motion based on
29 new facts] with *Rojes v. Riverside General Hospital* (1988) 203 Cal.App.3d 1151, 1160–1161 [order not
30 appealable under any circumstances]). Both these issues are legislative matters.
31

32 Subdivision ~~(d)~~(e) applies only when a “party” makes a valid motion to “reconsider” an appealable order
33 under subdivision (a) of Code of Civil Procedure section 1008; it therefore does not apply when a court
34 reconsiders an order on its own motion (*id.*, subd. ~~(e)~~(d)) or when a party makes “a subsequent
35 application for the same order” (*id.*, subd. ~~(b)~~(c)). The statute provides no time limits within which either
36 of the latter events must occur.
37

38 Under subdivision ~~(d)~~(e)(1), the 30-day extension of the time to appeal from the order begins when the
39 superior court clerk mails, or a party serves, the order denying the motion or notice of entry of that order.
40 The purpose of this provision is discussed further under subdivision ~~(a)~~(b) of this comment.
41

42 Among its alternative periods of extension of the time to appeal, subdivision ~~(d)~~(e) provides in paragraph
43 (2) for a 90-day period beginning on the filing of the motion to reconsider or, if there is more than one
44 such motion, the filing of the first such motion. The provision is consistent with subdivision ~~(b)~~(c)(2),
45 governing motions to vacate judgment; as in the case of those motions, there is no time limit for a ruling
46 on a motion to reconsider.
47

1 **Subdivision (e)(f).** Consistent with case law, subdivision (e)(f)(1) extends the time to appeal after another
2 party appeals only if the later appeal is taken “from the same order or judgment as the first appeal.”
3 (*Commercial & Farmers Nat. Bank v. Edwards* (1979) 91 Cal.App.3d 699, 704.)
4

5 The former rule (former rule 3(c), second sentence) provided an extension of time for filing a protective
6 cross-appeal from the judgment when the trial court granted a motion for new trial or a motion to vacate
7 the judgment, but did not provide the same extension when the trial court granted a motion for judgment
8 notwithstanding the verdict. One case declined to infer that the omission was unintentional, but suggested
9 that the Judicial Council might consider amending the rule to fill the gap. (*Lippert v. AVCO Community*
10 *Developers, Inc.* (1976) 60 Cal.App.3d 775, 778 & fn. 3.) Rule 8.108(e)(2) fills the gap thus identified.
11

12 **Subdivision (f)(g).** Under subdivision (f)(g), an order or notice mailed by the clerk under this rule must
13 show the date on which the clerk mailed the document, analogously to the clerk’s “certificate of mailing”
14 currently in use in many superior courts. This provision is intended to establish the date when an
15 extension of the time to appeal begins to run after the clerk mails such an order or notice.
16

17 Subdivision (f)(g) also requires that an order or notice served by a party under this rule be accompanied by
18 proof of service. The proof of service establishes the date when an extension of the time to appeal begins
19 to run after the party serves such an order or notice.
20
21

22 **Rule 8.140. Failure to procure the record**

23 24 **(a) Notice of default**

25
26 If a party fails to timely do an act required to procure the record, the superior court
27 clerk must promptly notify the party by mail that it must do the act specified in the
28 notice within 15 days after the notice is mailed, and that ~~failure if it fails to comply,~~
29 ~~will result in~~ the reviewing court may impose one of the following sanctions:
30

- 31 (1) If the defaulting party is the appellant, the court may dismiss the appeal ~~will be~~
32 ~~dismissed~~; or
33
34 (2) If the defaulting party is the respondent, the court may proceed with the appeal
35 ~~will proceed~~ on the record designated by the appellant.
36

37 **(b) Sanctions**

38
39 If a party fails to ~~comply with~~ take the action specified in a notice given under (a),
40 the superior court clerk must promptly notify the reviewing court of the default, and
41 the reviewing court may impose one of the following sanctions:
42

- 43 (1) If the defaulting party is the appellant, the reviewing court may dismiss the
44 appeal, but may vacate the dismissal for good cause; or
45

1 (2) If the defaulting party is the respondent, the reviewing court may order the
2 appeal to proceed on the record designated by the appellant, but the respondent
3 may obtain relief from default under rule 8.60(d).
4

5 **(c) Motion for sanctions**
6

7 If the superior court clerk fails to give a notice required by (a), a party may serve
8 and file a motion for sanctions under (b) in the reviewing court, but the motion must
9 be denied if the defaulting party cures the default within 15 days after the motion is
10 served.
11

12
13 **Rule 8.220. Failure to file a brief**
14

15 **(a) Notice to file**
16

17 If a party fails to timely file an appellant's opening brief or a respondent's brief, the
18 reviewing court clerk must promptly notify the party by mail that the brief must be
19 filed within 15 days after the notice is mailed and that if the party fails failure to
20 comply will result in, the court may impose one of the following sanctions:
21

- 22 (1) If the brief is an appellant's opening brief, the court ~~will~~ may dismiss the
23 appeal;
24
25 (2) If the brief is a respondent's brief, the court ~~will~~ may decide the appeal on the
26 record, the opening brief, and any oral argument by the appellant.
27

28 **(b) * * ***
29

30 **(c) Sanction**
31

32 If a party fails to ~~comply with~~ to file the brief as specified in a notice under (a), the
33 court may impose the sanction specified in the notice.
34

35 **(d) Extension of time**
36

37 Within the period specified in the notice under (a), a party may apply to the
38 presiding justice for an extension of that period for good cause. If the extension is
39 granted and the brief is not filed within the extended period, the court may impose
40 the sanction under (c) without further notice.
41
42

1 **Rule 8.308. Time to appeal**

2
3 (a) * * *

4
5 **(b) Cross-appeal**

6
7 If the defendant or the People timely appeals from a judgment or appealable order,
8 the time for any other party to appeal from the same judgment or order is ~~extended~~
9 ~~until~~ either the time specified in (a) or 30 days after the superior court clerk mails
10 notification of the first appeal, whichever is later.

11
12 (c)–(e) * * *

13
14
15 **Rule 8.400. Appeals in juvenile cases generally**

16
17 (a)–(c) * * *

18
19 **(d) Time to appeal**

- 20
21 (1) Except as provided in (2) and (3), a notice of appeal must be filed within 60
22 days after the rendition of the judgment or the making of the order being
23 appealed. Except as provided in rule 8.66, no court may extend the time to file
24 a notice of appeal.
- 25
26 (2) In matters heard by a referee not acting as a temporary judge, a notice of
27 appeal must be filed within 60 days after the referee’s order becomes final
28 under rule 5.540(c).
- 29
30 (3) When an application for rehearing of an order of a referee not acting as a
31 temporary judge is denied under rule 5.542, a notice of appeal from the
32 referee’s order must be filed within 60 days after that order is served under rule
33 5.538(b)(3) or 30 days after entry of the order denying rehearing, whichever is
34 later.

35
36 ~~(4)~~ **(e) Cross-appeal**

37
38 If an appellant timely appeals from a judgment or appealable order, the time for any
39 other party to appeal from the same judgment or order is ~~extended until~~ either the
40 time specified in (d) or 20 days after the superior court clerk mails notification of
41 the first appeal, whichever is later.

1 ~~(e)~~(f) * * *

2

3 ~~(f)~~(g) * * *

4

5 ~~(g)~~(h) * * *

Appellate Procedure: 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)

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

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
1.	California Appellate Court Clerks' Association Deena C. Fawcett, President	AM	Y	See comments on specific provisions below.	
2.	Mary Carnahan Criminal Division Program Manager Superior Court of Solano County	A	N	No narrative comments submitted.	No response required.
3.	Court of Appeal, Second Appellate District Hon. Roger W. Boren Administrative Presiding Justice	AM	Y	See comments on specific provisions below.	
4.	David Ettinger Attorney Horvitz & Levy	AM	N	See comments on specific provisions below.	
5.	Joseph Lane Clerk Court of Appeal, Second Appellate District, Division One	AM	N	See comments on specific provisions below.	
6.	Pam Moraida Program Manager Superior Court of Solano County	A	N	No narrative comments submitted.	No response required.
7.	Orange County Bar Association	AM	Y	See comments on specific provisions below.	

SPR07-07

Appellate Procedure: 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)

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
	Joseph Chairez, President				
8.	State Bar of California Committee on Appellate Courts Saul Bercovitch, Staff Attorney	AM	Y	See comments on specific provisions below.	
9.	Sharol Strickland Executive Officer Superior Court of Butte County	A	N	See comments on specific provisions below.	
10.	Superior Court of Los Angeles County (no name provided)	AM	Y	See comments on specific provisions below.	
11.	Superior Court of San Diego County Michael M. Roddy, Executive Officer	A	Y	No narrative comments submitted.	No response required.

Appellate Procedure: 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 8.108, 8.308 and 8.400 – Time to File the Notice of Appeal

Rule/Issue	Commentator	Comment	Committee response
Rules 8.108, 8.308 and 8.400	California Appellate Court Clerks' Association Deena C. Fawcett, President	Rule 8.108, 8.308, and 8.400: We agree.	No response required.
Rules 8.108, 8.308 and 8.400	Court of Appeal Second Appellate District Hon. Roger W. Boren Administrative Presiding Justice	<p>Rules 8.108, 8.308, and 8.400, relating to civil, criminal and juvenile appeals, respectively, have proposed amendments relating to the time to file a notice of appeal in a cross-appeal. I agree with these proposed changes.</p> <p>However, we noticed that rules 8.108(e)(1) (civil) and 8.400(d)(4) (juvenile) give a cross-appellant the later of either the normal time for filing a notice of appeal (see rules 8.104(a) and 8.400(d)(1)) or 20 days after the superior court clerk mails notification of the first appeal. On the other hand, rule 8.308(b) (criminal) gives a cross-appellant the later of either the normal time for filing a notice of appeal (see rule 8.308(a)) or 30 days after the superior court clerk mails notification of the first appeal. Is there a reason to treat criminal cross-appellants differently with respect to the time for filing a notice of appeal, or should rule 8.308(b) be amended to also provide for 20 days?</p>	The additional 10 days to file a cross-appeal in a felony case is provided to compensate for delays associated with the prison mail system.
Rules 8.108, 8.308 and 8.400	David Ettinger Attorney Horvitz & Levy	<p>I appreciate the opportunity to comment on amendments to the rules of court proposed by the Judicial Council through its advisory committees. The changes on the whole will be positive ones that will improve the appellate process. I do, however, have some concerns about two proposals:</p> <p>Among other things, this proposal would amend rule 8.108(c)(1) concerning the time to file a cross-appeal. The</p>	The commentator is correct that the advisory committee comment accompanying rule 8.108 indicates that this rule does not operate to shorten the time to appeal. To clarify this, the committee is recommending that this explanation of the rule's operation be moved from the advisory committee comment into the rule itself. In light of this change, the committee is further modifying its proposal to

SPR07-07

Appellate Procedure: 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)

Rule/Issue	Commentator	Comment	Committee response
		<p>rule currently provides that, following one party's timely appeal, "the time for any other party to appeal from the same judgment or order is extended until 20 days after the superior court clerk mails notification of the first appeal." The proposal would change the rule to state that the time for the second appeal would be "either the time specified under rule 8.104(a) or 20 days after the superior court clerk mails notification of the first appeal, whichever is later."</p> <p>The proposal's goal is admirable—to ensure that a party filing a cross-appeal has at least the normal time to do so under rule 8.104(a), or, <i>in</i> other words, that the 20-day extension period of rule 8.108(e)(1) not shorten the normal time to appeal. The proposal is unnecessary, however, and, more importantly, may actually create in other subdivisions of rule 8.108 the very problem it is trying to remedy in subdivision (e).</p> <p>The amendment seems unnecessary because the rule already provides that the 20-day period is an extension of the normal time to appeal. An <i>extension</i> cannot shorten the normal time. If this weren't clear from the plain meaning of the word "extended" in the rule, the advisory committee comment to rule 8.108 removes any doubt. The comment says, "Rule 8.108 provides various circumstances in which the time to appeal is 'extended.' The use of the word 'extended' limits the scope of the rule: i.e., the rule operates only to increase any time to appeal otherwise prescribed; it cannot shorten the time. Thus if the time provided by rule 8.108 would be less than the normal time to appeal stated in rule 8.104(a)—e.g., when a new trial motion is denied before notice of entry of judgment is given—the rule 8.104(a) time governs."</p>	<p>eliminate the originally proposed amendment to subdivision (e)(1), which should address the commentator's concern about the implications of amending (e)(1) on the other subdivisions of (e).</p>

SPR07-07

Appellate Procedure: 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)

Rule/Issue	Commentator	Comment	Committee response
		<p>The proposal's larger problem is that it amends only one of five similarly worded extension subdivisions in rule 8.108. By doing so, it invites an interpretation that subdivision (e) is different than the other subdivisions concerning whether the extension period can shorten the normal time to appeal. For example, if subdivision (e) will say expressly that the normal time to appeal governs if it is longer than the extension period but subdivision (a) does <i>not</i> have that same express language concerning the extension period after a new trial motion is denied, then a court might conclude that the omission from subdivision (a) means that the normal time to appeal <i>can</i> be shortened by the subdivision (a) extension period. (See generally <i>Wasatch Property Management v. Degrade</i> (2005) 35 Ca1.4th 1111,1118 [When the Legislature [or, in this case, the Judicial Council] has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded].)</p> <p>I think that rule 8.1.08's plain language and its advisory committee comment are sufficient to make the current proposal unnecessary. However, if the Judicial Council wants to make the language even more explicit that an extension period cannot shorten the normal time to appeal, it should make the same language change in all of the rule's subdivisions, not just in subdivision (e).</p>	

SPR07-07

Appellate Procedure: 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)

Rule/Issue	Commentator	Comment	Committee response
Rules 8.108, 8.308 and 8.400	Orange County Bar Association Joseph Chairez, President	The provision dealing with the time to appeal when a plaintiff accepts a remittitur or additur should be changed. The courts have adopted two approaches, (i) that embodied in the rule, or (ii) if the trial court enters a new judgment upon acceptance, then a new 60-day period commences. A better approach would be to modify the Code of Civil Procedure to explain clearly how a trial court should implement an additur or remittitur before changing rule 8.108.	The committee believes that it is important to try to clarify the time to appeal when a trial court uses the approach of a conditional additur or remittitur, as this is not currently addressed in the rules. If the trial court enters a new judgment, rule 8.104 addresses the time to appeal. The committee will consider at a later time whether to recommend an amendment to the Code of Civil Procedure.

Appellate Procedure: 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 8.100, 8.140, and 8.220 – Notice of Various Sanctions

Rule/Issue	Commentator	Comment	Committee response
<p>Rules 8.100, 8.140, and 8.220</p>	<p>California Appellate Court Clerks' Association Deena C. Fawcett, President</p>	<p>We are opposed to the proposed change to rules 8.100, 8.140 and 8.220. We do not agree that there is an inconsistency nor do we agree that there is a suggestion the “imposition of these sanctions is mandatory”. The use of the word “WILL” in the rules referred to indicates inevitability. Webster’s New Dictionary: Used to express inclination or inevitability [boys will be boys] or for our purposes [if the appellant’s failures to file the brief the appeal WILL be dismissed. The use of the word “MAY” is empowering. Webster’s New Dictionary: Used to express ability or power. In our instance the Court has the authority to dismiss for failure to file the appellant’s opening brief after notice is given by the clerk or upon motion. Thus, the Rules control what the clerk must state in the notice to ensure that there is no ambiguity as to what will ultimately happen, and empowers the court to take said action.</p> <p>The Court is given the leeway to choose how to dismiss. There have been and will be instances when an appellant is in procedural default and thus the court may dismiss for one or more of these defaults, but may also dismiss for untimeliness of the appeal, or for other causes. The rules do not control which cause the court will act upon, just that the court is empowered to do so. To indicate that the failure to file an opening brief may result in the dismissal of the appeal will imply that there is another outcome other than dismissal which is not the case. Regardless of the fact that the time to file said brief can be extended and or that relief for good cause may be given, a brief must ultimately be filed or the appeal WILL BE DISMISSED.</p>	<p>For the reasons discussed in the report to the Judicial Council, the committee believes that parallel language should be used in the notice provision and in the provision concerning the actual imposition of sanctions if a party does not take the action specified in the notice. The committee has revised its proposal to make the language in the notice and sanctions 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 if the party does not take the action specified in the clerk’s notice. The committee believes that a notice stating that the court “may impose” the applicable sanctions accurately reflects that the court has the power to impose these sanctions but also accurately reflects that the court has the power to extend the time within which a party may correct these defaults. The committee also believes that such a notice will still serve the intended purpose of motivating parties to correct defaults.</p>

Appellate Procedure: 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)

Rule/Issue	Commentator	Comment	Committee response
		Our experience does not indicate that there is any confusion caused the parties by the current language and the best solution to ending the debate in the future would be to add language in the drafter’s notes that states that the language is used to indicate the inevitability of the sanction and the empowerment of the court to take such sanctions.	
Rules 8.100, 8.140, and 8.220	Court of Appeal, Second Appellate District Hon. Roger W. Boren Administrative Presiding Justice	Rule 8.100 reletters subdivisions (d) through (f) after adding a separate provision for failure to pay deposits in new subdivision (d). Because of the relettered subdivisions, two references, one in subdivision (c) and one in subdivision (g), must be changed: (c) Failure to pay filing fee (1) * * * (A) The reviewing court receives a notice of appeal without the filing fee required by (b)(1), a certificate of cash payment under (d)(5) (e)(5), (g) Civil case information statement (1) On receiving notice of the filing of a notice of appeal under (d)(1) (e)(1),	The committee agrees and has incorporated these changes into the proposal.
Rules 8.100, 8.140, and 8.220	Joseph Lane, Clerk Court of Appeal, Second Appellate District, Division One	I am opposed to the proposed change to CRC rules 8.100, 8.140, and 8.220. It appears that the proposed changes arise from the suggestion that the current language creates an inconsistency and thus some confusion. For more than fifty years, since the adoption of the California Rules of Court, and tens of thousands of default notices, this court has not witnessed any inconsistency or confusion on behalf of the parties involved in the appeals concerned.	Please see response to comments from the California Appellate Court Clerks’ Association concerning these rules.

SPR07-07

Appellate Procedure: 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)

Rule/Issue	Commentator	Comment	Committee response
		<p data-bbox="655 302 1362 362">Ironically, to change the language would be misleading and would lead to confusion.</p> <p data-bbox="655 402 1362 699">The <i>Discussion</i> section of SPR07-07 states; “Currently, all these provisions require that the notice state that the court “will impose” the sanctions identified in the applicable rule, suggesting that the imposition of these sanctions is mandatory.” It is not clear why the drafter put “will impose” in quotations since this phrase is not from the rules. Nor is it clear why the drafter concludes that there is a suggestion “... that the imposition of these sanctions is mandatory”.</p> <p data-bbox="655 740 1362 935">The use of the word “WILL” in the rules referred to is used to indicate inevitability. (See: Webster’s New World Dict. (3d college ed. 1988) p. 1528) Used to express inclination or inevitability [boys will be boys] or for our purposes [if the appellant fails to file the brief the appeal WILL be dismissed].</p> <p data-bbox="655 976 1362 1170">The use of the word “MAY” is empowering. (See: Webster’s New World Dict. (3d college ed. 1988) p. 837) Used to express ability or power. In our instance, the Court has the authority to dismiss for failure to file the appellant’s opening brief after notice is given by the clerk or upon motion.</p> <p data-bbox="655 1211 1362 1341">Thus, the Rules control what the clerk must state in the notice to ensure that there is no ambiguity as to what will ultimately happen, and empowers the court to take said action.</p> <p data-bbox="655 1382 1362 1406">The Court is given the leeway to choose how to dismiss.</p>	

SPR07-07

Appellate Procedure: 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)

Rule/Issue	Commentator	Comment	Committee response
		<p>There have been and will be instances when an appellant is in procedural default and thus the court may dismiss for one or more of these defaults, but may also dismiss for untimeliness of the appeal, or for other causes. The rules do not control which cause the court will act upon, just that the court is empowered to do so.</p> <p>To indicate that the failure to file an opening brief may result in the dismissal of the appeal will imply that there is another outcome other than dismissal which is not the case. Regardless of the fact that the time to file said brief can be extended and/or that relief for good cause may be given, a brief must ultimately be filed or the appeal WILL BE DISMISSED.</p> <p>If we are not absolutely clear as to the ultimate outcome people will not see what we need them to.</p> <p>GIVE HIM AN INCH, AND HE WILL TAKE A MILE - "Some people are never pleased with what they are given - they demand more and more. The proverb is first found in English in John Heywood's 1546 book of proverbs. First attested in the United States in 'Letters of John Randolph' (1680)." From "Random House Dictionary of Popular Proverbs and Sayings" by Gregory Y. Titelman (Random House, New York, 1996).</p> <p>Our experience does not indicate that there is any confusion caused to the parties by the current language and the best solution to ending the debate in the future (even though it is only because an exceedingly small number raise the issue) would be to add language in the drafter's notes that states that the language is used to indicate the</p>	

SPR07-07

Appellate Procedure: 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)

Rule/Issue	Commentator	Comment	Committee response
		inevitability of the sanction and the empowerment of the court to take such sanctions.	
Rules 8.100, 8.140, and 8.220	State Bar of California Committee on Appellate Courts Saul Bercovitch Staff Attorney	The Committee supports SPR07-07 in general, but proposes some additional amendments to the rules. With respect to the proposed change in language to rule 8.140(a), the Committee suggests that subdivisions (a)(1) and (a)(2) also be amended to read as follows: “(1) If the defaulting party is the appellant, the appeal will be dismissed <u>dismissal of the appeal</u> ; or (2) If the defaulting party is the respondent, the appeal will proceed <u>consideration of the appeal</u> on the record designated by the appellant.” Similarly, with respect to the proposed change in language to rule 8.220(a), the Committee suggests that subdivisions (a)(1) and (a)(2) also be amended to read as follows: “(1) If the brief is an appellant’s opening brief, the court will dismiss the appeal <u>dismissal of the appeal</u> ; (2) If the brief is the respondent’s brief, the court will decide the appeal <u>disposition of the appeal</u> on the record, the opening brief, and any oral argument by the appellant. The Committee suggests these changes for the same reason it suggests the changes to what would become rule 8.208(d)(2)(A) and (B) in SPR07-03.	The committee agrees with the concern expressed in the State Bar Committee on Appellate Courts comments to SPR07-03 that the use of the word “will” in these provisions could be the source of some residual confusion about whether these provisions empower or require the court to impose sanctions. Based on this comment, the committee has revised its proposal to eliminate the word “will” from these provisions and further revised the proposed to make the language in the notice and sanctions 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 8.100, 8.140, and 8.220	Sharol Strickland Executive Officer Superior Court of Butte County	Provides clarification on sending notice of default language, which is necessary.	No response required.

SPR07-07

Appellate Procedure: 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)

Rule/Issue	Commentator	Comment	Committee response
Rules 8.100, 8.140, and 8.220	Superior Court of Los Angeles County (no name provided)	There is an objection to the proposed change to Rule 8.100(c)(2). Replacing the word “will” with the word “may” does not accurately reflect the outcome in this type of scenario. If the appellant fails to pay the filing fee to the Superior Court, the Clerk’s Office places the appellant in non-compliance and refers the matter to the reviewing court. If the party, after being noticed of their non-compliance by both the Superior Court and by the reviewing court, fails to pay the fee and does not receive a fee waiver, the reviewing court <u>will</u> dismiss the appeal. This proposed amendment <u>will</u> only cause confusion and delay the certification of the appeal record.	The committee agrees that imposition of the applicable sanctions is inevitable if the default is never cured; they do not believe, however, that imposition of such sanctions is inevitable if the default is not cured within the time period specified in the notice. In practice, the court can, and often does, extend the time a party has to correct the default. The committee believes that a notice stating that the court “may impose” the applicable sanctions accurately reflects that the court has the power to impose these sanctions but also accurately reflects that the court has the power to extend the time within which a party may correct this default.