



Judicial Council of California
ADMINISTRATIVE OFFICE OF THE COURTS

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 29, 2010

Title	Agenda Item Type
Appellate Procedure: Judicial Notice	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Adopt Cal. Rules of Court, rule 8.809	January 1, 2011
Recommended by	Date of Report
Appellate Advisory Committee Hon. Kathryn Doi Todd, Chair	September 10, 2010
	Contact
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Executive Summary

The Appellate Advisory Committee recommends adopting a new rule addressing how parties may request that the superior court appellate division take judicial notice of a matter. Adopting this rule will fill a gap in the appellate division rules.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2011, adopt rule 8.809 of the California Rules of Court to address how parties may request that the superior court appellate division take judicial notice of a matter.

The text of the proposed rule is attached at page 4.

Previous Council Action

In April 2000, the Judicial Council adopted a rule establishing the procedures for requesting that the Supreme Court or Court of Appeal take judicial notice of a matter. This rule, which took

effect July 1, 2000, was subsequently amended and renumbered as rule 8.252(a). In February 2008, the Judicial Council adopted new rules for the superior court appellate division. Although these new rules were generally modeled on the rules for the Court of Appeal, they did not include a provision addressing requests for judicial notice.

Rationale for Recommendation

Rule 8.252(a) of the California Rules of Court establishes the procedures for a party to request that the Court of Appeal take judicial notice of a matter. Under rule 8.520(g), this same procedure for requesting judicial notice applies in proceedings before the Supreme Court. Currently, however, there is no rule establishing a procedure for requesting judicial notice in the superior court appellate division. This makes it difficult for litigants, particularly self-represented litigants, to figure out how to request judicial notice in appellate division proceedings and results in these litigants making errors. Both courts and parties must expend resources to correct these mistakes.

This proposal would establish the same procedure for requesting judicial notice in the superior court appellate division as is currently followed in the Supreme Court and Court of Appeal, including requiring that the request be filed as a separate motion with a proposed order and that the matter to be judicially noticed be served and filed with the motion if it is not already in the record.

Comments, Alternatives Considered, and Policy Implications

The proposal to adopt rule 8.809 was circulated for public comment between April 19 and June 18, 2010, as part of the regular spring comment cycle. Thirteen individuals and organizations submitted comments on this proposal. Eight commentators agreed with the proposal, three agreed with the proposal if modified, and two did not indicate their position on the proposal. The full text of the comments received and the committee's responses are set out in the attached comment chart at pages 5–9 and the significant substantive comments are discussed below.

Two commentators suggested changes to the language of proposed rule 8.809. Because the proposed language is taken, unchanged, from the rule that currently establishes the procedures for requesting judicial notice in the Court of Appeal and Supreme Court, and the committee is not aware of any problems with this rule language, the committee declined to modify the proposal as suggested by these commentators. The committee believes it is important for the rules applicable in the superior court appellate division to use the same language as rules addressing the same topic in the Court of Appeal unless there is a structural or other substantive reason for the rules to differ. This was one of the basic premises followed in developing the new appellate division rules adopted by the council effective January 1, 2009. At a later time, the committee will, however, consider whether both the Court of Appeal rule and rule 8.809 (if adopted) should be amended as suggested by these commentators.

One commentator suggested that the rules be modified to address matters that the courts must take judicial notice of and the appealability of an order denying a motion for judicial notice. Because these matters are addressed by statute, not the Rules of Court, the committee believes that such changes must be sought by way of a statutory amendment rather than through a change to the Rules of Court. At a later time, the committee will consider whether to propose such a statutory amendment.

Implementation Requirements, Costs, and Operational Impacts

Adopting a rule explaining how to request judicial notice in appellate division proceedings should reduce the number of errors made in making such requests, thereby reducing costs for both courts and litigants associated with correcting those errors.

Relevant Strategic Plan Goals and Operational Plan Objectives

Because this proposal recommends amendment of rules of court to improve practices and procedures, it supports the policies of promoting innovative and effective practices for processing cases and ensuring that statewide rules promote the fair, timely, effective, and efficient processing of cases underlying Goal III, Modernization of Management and Administration (Goal III. B., Policies 1 and 2).

Attachments

1. Cal. Rules of Court, rule 8.809
2. Chart of comments, at pages 5–9

Rule 8.809 of the California Rules of Court is adopted, effective January 1, 2011, to read:

Title 8. Appellate Rules

Division 2. Rules Relating to the Superior Court Appellate Division

Chapter 1. General Rules Applicable to Appellate Division Proceedings

Rule 8.809. Judicial notice

(a) Motion required

(1) To obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order.

(2) The motion must state:

(A) Why the matter to be noticed is relevant to the appeal;

(B) Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court; and

(C) Whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal.

(b) Copy of matter to be judicially noticed

If the matter to be noticed is not in the record, the party must serve and file a copy with the motion or explain why it is not practicable to do so.

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

	Commentator	Position	Comment	Proposed Committee Response
1.	Appellate Court Committee San Diego County Bar Association by Kevin K. Green Chair	A	<p>Our committee thanks the Judicial Council for its continued attention to the rules governing the Superior Court Appellate Division. The major revamp three years ago covered a lot of ground but some issues remain.</p> <p>Existing rules govern requests for judicial notice in the Court of Appeal and the Supreme Court. SPR1 0-07 would extend those provisions to the Appellate Division. In our experience, this guidance is needed because requests for judicial notice are common in the Appellate Division. These requests often do not include the material sought to be judicially noticed and do not address the factors the Appellate Division is required to consider (Evid.Code, § 459) in ruling on such requests. As a result, requests for judicial notice delay the process in the Appellate Division, or are simply denied for failure to establish that judicial notice is appropriate. New rule 8.809 should foster uniformity and efficiency.</p>	No response required.
2.	California Appellate Court Clerks Association by Joseph Lane	NI		No response required.
3.	California Judges Association by Jordan O. Posamentier Legislative Counsel San Francisco	NI	This proposal, which provides new protocol for judicial notice, is written clearly and addresses an area not treated in the present rules. However, we question the need for this rule. Have there been a significant number of cases that present problems due to a lack a	As reflected in the comments of Appellate Court Committee of the San Diego County Bar Association above, the committee believes that there have been a significant number of appellate division cases in which the lack of a rule addressing how to request judicial notice has

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			formalized procedure for judicial notice? Adding this rule may, without need, have the untoward effect of adding another hurdle for pro se appellants to clear.	caused problems and therefore that adoption of this proposal is warranted.
4.	Committee on Appellate Courts State Bar of California by T. Peter Pierce, Chair San Francisco	A	No additional comment.	No response required.
5.	Gerald H. Genard Danville	AM	<p>This rule should be amended, for appellate divisions, to require mandatory judicial notice on appeal of generally known facts upon request, unless the opposing party can demonstrate prejudice. It should further be amended to allow mandatory review in the court of appeal for any denial of judicial notice of such facts.</p> <p>Reason: In 2009, the appellate division of the Contra Costa Superior Court refused to take judicial notice that there were no signs at the entrance to a private road, as required by the California Vehicle Code and local enabling ordinance, warning that the California Vehicle Code was in force on that road. The appellate division had been furnished with photos and views from Google Earth proving the absence of the signs. Nevertheless, the motion for judicial notice was denied and the appellate division, without opinion or any reference to the record, affirmed a judgment of guilty for a speeding violation on a road where it was beyond dispute that the Vehicle Code didn't</p>	The committee considered but decided not to modify the proposal to incorporate these suggestions. With respect to the suggestion concerning matters a court should be required to take judicial notice of, this is specified by statute, not the Rules of Court (see Evidence Code sections 450 – 460). The committee therefore believes that an amendment of these statutes would be needed to add matters that a court must take judicial notice of. With respect to the suggestion concerning review of an order denying a motion requesting a court take judicial notice of a matter, a party already has the ability to challenge such an order by way of a petition for a writ. If the commentator is suggesting that an order denying a request for judicial notice be immediately appealable, the orders that can be immediately appealed are also specified by statute, not the Rules of Court (see Code of Civil Procedure sections 904.1 and 904.2 and Penal Code sections 1466). The committee therefore believes that an amendment of these statutes would be needed to add orders that can be immediately appealed. At a later time, the

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			apply. Weeks after the affirmance, new signs were installed.	committee will consider whether to propose such a statutory amendments.
6.	Orange County Bar Association by Lei Lei Wang Ekvall Newport Beach	A	No additional comment.	No response required.
7.	Public Counsel Los Angeles	A	Public Counsel supports the proposal to establish a procedure for requesting judicial notice in the appellate division of the superior court. Although the majority of self-represented litigants who visit the Appellate Self-Help Clinic have cases in the Court of Appeal, a smaller but still significant number have cases in the Appellate Division of the Los Angeles Superior Court, and the relative lack of forms and procedures available to these litigants is often striking. Fortunately, the Judicial Council has been addressing this problem over the last few years, and this proposal is another example of the welcome attention being paid to the appellate division.	No response required.
8.	Superior Court of Los Angeles County LASC Appellate Division	A	No additional comment.	No response required.
9.	Superior Court of Sacramento County by Robert Turner ASO II Finance Division	AM	Currently, there is no specific rule establishing procedures for obtaining judicial notice in the appellate division. This proposed change would add a new rule specifying a procedure for obtaining judicial notice. I am not opposed to part (a)(1) of the proposed	The committee considered but decided not to delete proposed subdivision (a)(1). The language of this subdivision was taken directly from existing rule 8.252, which specifies the procedures for requesting judicial notice in the Court of Appeal and, by cross-reference in rule 8.520, the Supreme Court. The committee is not

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			rule as it seems to correctly reference Evidence Code section 459. However, part (a)(2) of the proposed rule does not adequately mirror the requirements of the Evidence Code and seems to suggest that subsection (A)-(C) is all that the reviewing court needs to determine whether to take judicial notice. However, reviewing courts likely need more information than whether the matter is relevant, whether the trial court took judicial notice and whether the matter is related to postjudgment proceedings. For instance, the motion requesting judicial notice should also state whether review is sought under section 451, 452 or 453. As such, I would recommend deleting part (a)(2) of the proposed rule.	aware that the motions filed under this rule have proved inadequate in terms of providing those courts with sufficient information to rule. Absent such problems, the committee believes that the new appellate division rule should mirror the language in the existing Court of Appeal rule. However, the committee will consider during an upcoming committee year whether it would be beneficial to amend both rule 8.252 and rule 8.809 (if adopted) to specifically require that a motion for judicial notice address the statutory basis under which judicial notice is sought.
10.	Superior Court of San Bernardino County by Debra Meyers Deputy Court Executive Officer/General Counsel	A	No additional comment.	No response required.
11.	Superior Court of San Diego County by Michael M. Roddy Court Executive Officer	A	Our court would like to expressly thank the Appellate Advisory Committee for their hard work and well-considered proposal.	No response required.
12.	Superior Court of Ventura County by Julie Camacho Program Manager	AM	Modify Rule 8.809(b) to provide that the party must serve and “attach” a copy to the motion presented for filing instead of the phrase “serve and file a copy with the motion...”. This clarification would eliminate any	The committee considered but decided not to modify the proposal to incorporate this suggestion. The language of proposed rule 8.809 was taken directly from existing rule 8.252, which specifies the procedures for requesting judicial notice in the Court of Appeal and, by

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			confusion regarding how the document should be presented to the court.	cross-reference in rule 8.520, the Supreme Court. The committee is not aware that there have been problems in these courts with parties being confused about how to present the matter to be judicially noticed to the court. Absent such problems, the committee believes that the new appellate division rule should mirror the language in the existing Court of Appeal rule. However, the committee will consider during an upcoming committee year whether it would be beneficial to amend both rule 8.252 and rule 8.809 (if adopted) to specifically require that the matter to be judicially noticed be attached to the motion.
13.	Nancy Neal Yeend Los Altos	A	Very much support this change, which helps with access.	No response required.