

Judicial Council of California • Administrative Office of the Courts

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INVITATION TO COMMENT
SPR11-08

Title	Action Requested
Appellate Procedure: Briefs	Review and submit comments by Monday, June 20, 2011
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rules 8.212, 8.360, and 8.882	January 1, 2012
Proposed by	Contact
Appellate Advisory Committee	Heather Anderson, 415-865-7691
Hon. Kathryn Doi Todd, Chair	heather.anderson@jud.ca.gov

Summary

The current California Rules of Court regarding the time for filing briefs in civil cases do not alert rule users to the fact that there may be statutory limitations on extensions of briefing time. In addition, when there is a cross-appeal, some parties may be confused about when to file their briefs. In felony appeals in which the appellant is “the People,” it is unclear who must be served with the People’s brief. This proposal would make clarifying changes to the rules of court to address these issues.

Discussion

Statutory limits on extension of briefing time

Rule 8.212 establishes the general time for filing briefs in civil appeals in the Court of Appeal. Subdivision (a) of this rule generally provides that the appellant’s opening brief must be filed within 40 days after the record is filed, respondent’s brief must be filed within 30 days after the appellant’s opening brief is filed, and the appellant’s reply brief must be filed with 20 days after the respondent’s brief is filed. Subdivision (b) provides for extensions of these briefing time periods, including extensions on the stipulation of the parties. Rule 8.882 similarly establishes the basic briefing time and provides for extensions of this time in civil appeals in the superior court appellate division.

Some statutes, however, limit extensions of briefing time. For example, under Public Resources Code section 21167.6(h), extensions are limited to one 30-day extension for the opening brief and one 30-day extension for “preparation of responding brief.” To alert rule users to the

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

existence of these potential limitations, this proposal would amend rules 8.212 and 8.882 to provide that stipulated extensions are available “unless otherwise provided by statute.” In addition, the advisory committee comment accompanying rule 8.212 would be amended and a new comment would be added to rule 8.882 to indicate that the ability to extend briefing time may be limited by statute, such as Public Resources Code section 21167.6.

Briefing periods when there is a cross-appeal

Sometimes, more than one appeal is filed in the same case (the second or subsequent appeal is often referred to as a cross-appeal). In these cases, a party may be both an appellant in one appeal and a respondent in another. Separate rules address the sequence and timing of briefing when there is a cross-appeal: rule 8.216 in the Court of Appeal and rule 8.884 in the superior court appellate division. These rules provide for combining the different briefs that a party would ordinarily file as an appellant and as a respondent and require the parties to submit a proposed briefing sequence to the court. The court then orders a briefing sequence and sets briefing periods consistent with normal briefing periods. A typical briefing order in such a case would require the first appellant/respondent to file its opening brief within the normal period for filing an opening brief, require the second appellant/respondent to file a combined opening and respondent’s brief within the normal period for filing a respondent’s brief, and require the first appellant/respondent to file a combined reply and respondent’s brief within the normal period for filing a reply brief.

Despite rules 8.216 and 8.884, some members of the Appellate Advisory Committee have encountered parties who are confused about the applicable briefing period when there is a cross-appeal. To help prevent this confusion, this proposal would make two clarifying changes to the advisory committee comment accompanying rule 8.212. First, it would add language to the comment noting that rule 8.216 addresses the sequence and timing of briefing when there is a cross-appeal. Second, it would add language noting that, in such cases, the cross-appellant’s combined respondent’s brief and opening brief typically must be filed within the period for filing a respondent’s brief. Similar language would be included in the new advisory committee comment to rule 8.882.

Service of briefs in felony appeals when the appellant is “the People”

Rule 8.360 addresses service and filing of briefs in appeals in felony cases. Subdivision (d)(3) of this rule addresses service of briefs prepared by the People. Currently, this provision states that “[f]or each appealing defendant,” the People must serve briefs on the defendant’s appellate counsel and the district appellate project. In some cases, however, the appellant is the People, not the defendant, so there is no “appealing defendant.” The current rule does not specifically address on whom the People’s briefs should be served in such cases. This proposal would fill that gap by amending this rule to instead provide for service of the People’s briefs on appellate counsel for each defendant who is a party to the appeal and on the district appellate project.

In addition, the rule would be amended to clarify that if the district attorney is representing the People, the district attorney must also serve one copy of its brief on the Attorney General.

Rules 8.212, 8.360, and 8.882 of the California Rules of Court would be amended, effective January 1, 2012, to read:

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 2. Civil Appeals

Article 3. Briefs in the Court of Appeal

Rule 8.212. Service and filing of briefs

(a) Time to file

- (1) An appellant must serve and file its opening brief within:
 - (A) 40 days after the record—or the reporter’s transcript, after a rule 8.124 election—is filed in the reviewing court; or
 - (B) 70 days after the filing of a rule 8.124 election, if the appeal proceeds without a reporter’s transcript.
 - (2) A respondent must serve and file its brief within 30 days after the appellant files its opening brief.
 - (3) An appellant must serve and file its reply brief, if any, within 20 days after the respondent files its brief.

(b) Extensions of time

- (1) Except as otherwise provided by statute, the parties may extend each period under (a) by up to 60 days by filing one or more stipulations in the reviewing court before the brief is due. Stipulations must be signed by and served on all parties. The original signature of at least one party must appear on the stipulation filed in the reviewing court; the signatures of the other parties may be in the form of copies of the signed signature page of the stipulation.

(2)-(4) * * *

(c) * * *

Advisory Committee Comment

Subdivision (a). Note that the sequence and timing of briefing in appeals in which a party is both appellant and respondent (cross-appeals) are governed by rule 8.216. Typically, a cross-appellant's combined respondent's brief and opening brief must be filed within the time specified in (a)(2) for the respondent's brief.

Subdivision (b). Extensions of briefing time are limited by statute in some cases. For example, under Public Resources Code section 21167.6(h) in cases under section 21167, extensions are limited to one 30-day extension for the opening brief and one 30-day extension for “preparation of responding brief.” In criminal cases, stipulated extensions of time to file briefs are prohibited by rule. (See rule 8.360(e)(4).)

Subdivision (b)(2) clarifies that a party seeking an extension of time from the presiding justice must proceed by application under rule 8.50 rather than by motion under rule 8.54.

Subdivision (c). In subdivision (c)(2) the word “brief” means only (1) an appellant’s opening brief, (2) a respondent’s brief, (3) an appellant’s reply brief, (4) a petition for rehearing, (5) an answer thereto, or (6) an amicus curiae brief. It follows that no other documents or papers filed in the Court of Appeal, whatever their nature, should be served on the Supreme Court. Further, only briefs filed in the Court of Appeal “in a civil appeal” must be served on the Supreme Court. It follows that no briefs filed in the Court of Appeal in criminal appeals or in original proceedings should be served on the Supreme Court.

Subdivision (e). “Electronic notification address” is defined in rule 2.250. The Supreme Court’s electronic filing address can be found on the California Courts website at www.courts.ca.gov/supremecourt.

Chapter 3. Criminal Appeals

Article 3. Briefs, Hearing, and Decision

Rule 8.360. Briefs by parties and amici curiae

(a)-(c) * * *

(d) Service

- (1) Defendant's appellate counsel must serve each brief for the defendant on the People and the district attorney, and must send a copy of each to the defendant personally unless the defendant requests otherwise.

- 1 (2) The proof of service under (1) must state that a copy of the defendant's brief
2 was sent to the defendant, or counsel must file a signed statement that the
3 defendant requested in writing that no copy be sent.
4
5 (3) ~~For each appealing defendant, t~~The People must serve two copies of their
6 briefs on the defendant's appellate counsel for each defendant who is a party
7 to the appeal and one copy on the district appellate project. If the district
8 attorney is representing the People, one copy of the district attorney's brief
9 must be served on the Attorney General.
10
11 (4) A copy of each brief must be served on the superior court clerk for delivery
12 to the trial judge.
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14 (e)-(f) * * *

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17 **Division 2. Rules Relating to the Superior Court Appellate Division**
18

19 **Chapter 4. Briefs, Hearing, and Decision in Limited Civil and Misdemeanor**
20 **Appeals**
21

22 **Rule 8.882. Briefs by parties and amici curiae**
23

24 **(a) Briefs by parties**
25

- 26 (1) The appellant must serve and file an appellant's opening brief within 30 days
27 after the record is filed in the appellate division.
28
29 (2) Any respondent's brief must be served and filed within 30 days after the
30 appellant files its opening brief.
31
32 (3) Any appellant's reply brief must be served and filed within 20 days after the
33 respondent files its brief.
34
35 (4) No other brief may be filed except with the permission of the presiding judge.
36
37 (5) Instead of filing a brief, or as part of its brief, a party may join in a brief or
38 adopt by reference all or part of a brief in the same or a related appeal.
39

40 **(b) Extensions of time**
41

- 42 (1) Except as otherwise provided by statute, in a civil case, the parties may
43 extend each period under (a) by up to 30 days by filing one or more

1 stipulations in the appellate division before the brief is due. Stipulations must
2 be signed by and served on all parties. The original signature of at least one
3 party must appear on the stipulation filed in the appellate division; the
4 signatures of the other parties may be in the form of fax copies of the signed
5 signature page of the stipulation.

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7 (2)-(4) * * *

8
9 (c)-(e) * * *

10
11 **Advisory Committee Comment**
12

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14 appellant and respondent (cross-appeals) are governed by rule 8.884. Typically, a cross-
15 appellant's combined respondent's brief and opening brief must be filed within the time specified
16 in (a)(2) for the respondent's brief.

17
18 **Subdivision (b).** Extensions of briefing time are limited by statute in some cases. For example,
19 under Public Resources Code section 21167.6(h) in cases under section 21167 extensions are
20 limited to one 30-day extension for the opening brief and one 30-day extension for "preparation
21 of responding brief."

Item SPR11-08 Response Form

Title: Appellate Procedure: Briefs (amend Cal. Rules of Court, 8.212, 8.360, and 8.882)

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ Title: _____

Organization: _____

- Commenting on behalf of an organization

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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DEADLINE FOR COMMENT: 5:00 p.m., Monday, June 20, 2011