



## Judicial Council of California · Administrative Office of the Courts

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 26, 2012

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Title	Agenda Item Type
Appellate Procedure: Copies of Briefs in Civil Appeals in the Court of Appeal Served on the Supreme Court	Action Required
	Effective Date
	January 1, 2013
Rules, Forms, Standards, or Statutes Affected	Date of Report
Amend Cal. Rules of Court, rules 8.44 and 8.212	October 5, 2012
Recommended by	Contact
Appellate Advisory Committee	Heather Anderson, 415-865-7691
Hon. Kathryn Doi Todd, Chair	<a href="mailto:heather.anderson@jud.ca.gov">heather.anderson@jud.ca.gov</a>
Court Technology Advisory Committee	Patrick O'Donnell, 415-865-7665
Hon. Ming W. Chin, Chair	<a href="mailto:patrick.o'donnell@jud.ca.gov">patrick.o'donnell@jud.ca.gov</a>

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### Executive Summary

The Appellate Advisory Committee and the Court Technology Advisory Committee recommend amending the rules relating to the copies of briefs from civil appeals in the Court of Appeal that must be served on the Supreme Court to provide that (1) unless it would cause the party filing the brief undue hardship, a single electronic copy of the brief must be served on the Supreme Court, rather than four paper copies; and (2) petitions for rehearing and answers to these petitions are not considered “briefs” for this purpose.

### Recommendation

The Appellate Advisory Committee and Court Technology Advisory Committee recommend that the Judicial Council, effective January 1, 2013:

1. Amend rules 8.44 and 8.212 of the California Rules of Court to:
  - a. Require that parties serve the Supreme Court with a single electronic copy of briefs filed in civil appeals in the Court of Appeal unless doing so would cause undue hardship for the party filing the brief, in which case four paper copies could be served on the Supreme Court; and
  - b. Provide that, for purposes of sending copies of briefs to the Supreme Court, a petition for rehearing or answer thereto is not considered a brief; and
2. Amend the advisory committee comment accompanying rule 8.212 to reflect these amendments and to update the reference to the web page where information about serving the electronic copies of briefs on the Supreme Court is located.

The text of the proposed rules is attached at pages 6–7.

### **Previous Council Action**

The predecessor to rule 8.44, regarding the number of copies of documents that must be filed in proceedings in the Supreme Court and Court of Appeal, was adopted by the Judicial Council as part of the original Rules for the Supreme Court and District Courts of Appeal, effective September 1, 1928. At that time, the rule required that in a civil case in the Court of Appeal, an original and 20 copies of any printed paper be filed and that 17 of those copies be delivered to the Supreme Court (there were separate requirements for typewritten documents). In January 1962, the Judicial Council amended this rule to require that an original and three copies of such a document be filed along with proof of delivery or mailing of 17 copies to the Supreme Court. In January 1972, the Judicial Council amended this rule to separately identify the number of copies of different types of documents required to be filed. As amended, this rule required filing of an original and three copies and proof of delivery to the Supreme Court of 7 copies of a brief or petition in a civil case in the Court of Appeal. The Judicial Council subsequently amended this rule several times, ultimately reducing to four the number of copies of such briefs required to be delivered to the Supreme Court.

The predecessor to rule 8.212, regarding the time to file briefs in civil appeals in the Court of Appeal, was adopted by the Judicial Council as part of the original Rules for the Supreme Court and District Courts of Appeal, effective September 1, 1928. As originally adopted, this rule did not address the number of copies of briefs required to be filed. Effective January 1, 2002, the Judicial Council amended this rule to restate the provision from the predecessor to rule 8.44 regarding the number of copies of briefs that must be filed. Effective January 1, 2008, the Judicial Council amended this provision to give parties in civil appeals the option of serving one electronic copy rather than four paper copies of their briefs on the Supreme Court. On February 28, 2012, the Judicial Council approved other amendments to rule 8.212 that will take effect on

January 1, 2013, including changing the references in the rule and accompanying advisory committee comment from the Supreme Court’s electronic “notification” address to the Supreme Court’s electronic “service” address.<sup>1</sup>

### **Rationale for Recommendation**

Rule 8.44 of the California Rules of Court specifies the number of copies of documents that must be filed in the Court of Appeal and Supreme Court. Subdivision (b)(1) of this rule currently requires that in civil appeals in the Court of Appeal, in addition to the copies of briefs that must be filed in the Court of Appeal, parties must file proof of delivery of four copies of briefs to the Supreme Court. Rule 8.212(c)(2) also addresses the number of copies of briefs that must be served and filed in civil appeals in the Court of Appeal. This rule currently requires that, in civil appeals in the Court of Appeal, either one electronic copy or four paper copies of briefs must be sent to the California Supreme Court.

The Supreme Court has traditionally provided the copies of Court of Appeal briefs provided under these rules to repository libraries for their collections. Because of limitations on storage space and other issues, the repository libraries have been moving away from retaining paper copies of these briefs. To facilitate transmission and storage of these copies, as noted above, in 2008, the Judicial Council amended rule 8.212 to give parties the option of sending the Supreme Court a single electronic copy of such a brief, rather than four paper copies. Despite this change, in the majority of cases, the Supreme Court still receives four paper copies of these briefs, rather than an electronic copy. Sorting, boxing, and sending out these paper copies of briefs consumes Supreme Court staff time. It also takes resources for the recipients of these briefs to convert them to an electronic format for storage.

The proposed amendment to rule 8.212 is intended to save Supreme Court staff time and resources by requiring that parties serve the Supreme Court with a single electronic copy of briefs in civil appeals unless doing so would cause undue hardship for the party filing the brief, in which case four paper copies could be served on the Supreme Court. Rule 8.44 would also be amended to reflect this change. These proposed amendments are based on a suggestion from the Appellate E-Filing Working Group of the Appellate, Court Technology, and Administrative Presiding Justices Advisory Committees.

Under the definitions in rule 8.10, the word “briefs” includes petitions for rehearing and answers thereto. Thus, under rules 8.44(b)(1) and 8.212(c)(2), parties in civil appeals in the Court of Appeal must send the Supreme Court copies not only of the opening, respondent’s, and appellant’s reply briefs, and any amicus briefs, but also of any petition for rehearing and related answer. Particularly given that the vast majority of petitions for rehearing are denied, the view of the committees is that it is not likely to be helpful for repository libraries to have these documents available and, therefore, that the cost to parties and the Supreme Court of providing,

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<sup>1</sup> The report to the Judicial Council regarding the amendments to rule 8.212 that will take effect on January 1, 2013, can be accessed at [www.courts.ca.gov/documents/jc-20120228-itemA1.pdf](http://www.courts.ca.gov/documents/jc-20120228-itemA1.pdf).

sorting, and distributing copies of these documents is unwarranted. The advisory committees therefore recommend amending rules 8.44 and 8.212 to provide that, for purposes of sending copies of briefs to the Supreme Court, a petition for rehearing or answer thereto is not considered a brief.

## **Comments, Alternatives Considered, and Policy Implications**

### **Comments**

This proposal was circulated for public comment between April 17 and June 20, 2012, as part of the regular spring 2012 comment cycle. Five individuals or organizations submitted comments on this proposal. Four commentators agreed with the proposal and one agreed with the proposal if modified. The full text of the comments received and the committee responses are set out in the attached comment chart at pages 8–10. The main substantive comments and the committee’s responses are discussed below.

***Examples of “undue hardship”.*** As noted above, this proposal would require that parties serve the Supreme Court with a single electronic copy of briefs filed in civil appeals in the Court of Appeal unless doing so would cause undue hardship for the party filing the brief, in which case four paper copies could be served on the Supreme Court. One of the commentators noted that the proposed rule does not define the term “undue hardship.” To avoid confusing parties, the commentator suggested adding an explanation or examples of what would constitute “undue hardship” to the advisory committee comment. The committees agreed with this suggestion and modified the proposal to add examples of undue hardship to the advisory committee comment.

***Enforcement mechanism.*** This same commentator also noted that, as circulated for public comment, the rule did not contain a mechanism for enforcing the requirement that a party file a single electronic copy of its brief with the Supreme Court, rather than four paper copies. The committees’ view was that enforcement is unlikely to be an issue because most parties will comply with this requirement. The committees therefore decided not to modify the proposal to include a specific enforcement mechanism. If enforcement does become an issue, the committees can reconsider this issue in the future.

***Copy of brief for trial judge.*** In the invitation to comment, the committees specifically asked for comment on whether the requirement in rule 8.212(c)(1) for service of a copy of each brief on the superior court clerk for delivery to the trial judge also be deleted. Two commentators provided input on this issue and both recommended against deleting this requirement. Based on this input, the committees decided not to recommend deletion of this requirement.

### **Alternatives considered**

In addition to the alternatives considered based on the public comments, the committees considered maintaining the current requirement that parties in civil cases in the Court of Appeal send copies of petitions for rehearing and answers to these petitions to the Supreme Court. The

committee concluded, however, that the costs of maintaining this requirement outweigh the benefits.

### **Implementation Requirements, Costs, and Operational Impacts**

This proposal should not have appreciable implementation requirements or costs and should reduce costs for the Supreme Court associated with sorting, boxing, and sending out paper copies of Court of Appeal briefs sent to the Supreme Court.

### **Relevant Strategic Plan Goals and Operational Plan Objectives**

This proposal will further the Judicial Council's Strategic Plan Goal: III. Modernization of management and administration and Operational Plan Objective: 5. Develop and implement effective trial and appellate case management rules, procedures, techniques, and practices to promote the fair, timely, consistent, and efficient processing of all types of cases.

### **Attachments**

1. Cal. Rules of Court, rules 8.44 and 8.212 at pages 6–7
2. Comment chart at page 8–10

Rules 8.44 and 8.212 of the California Rules of Court are amended, effective January 1, 2013, to read:

**Title 8. Appellate Rules**

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

**Chapter 1. General Provisions**

**Article 2. Service, Filing, Filing Fees, Form, and Number of Documents**

**Rule 8.44. Number of copies of filed documents**

Except as these rules provide otherwise, the number of copies of every brief, petition, motion, application, or other document that must be filed in a reviewing court is as follows:

(a) \* \* \*

**(b) Documents filed in a Court of Appeal**

(1) An original and 4 copies of a brief, an amicus curiae brief, or an answer to an amicus curiae brief, and, in civil appeals, proof of delivery of 1 electronic copy or, in case of undue hardship, 4 paper copies to the Supreme Court, as provided in rule 8.212(c). For purposes of service on the Supreme Court, the term “brief” does not include a petition for rehearing or answers thereto;

(2) – (7) \* \* \*

**Chapter 2. Civil Appeals**

**Article 3. Briefs in the Court of Appeal**

**Rule 8.212. Service and filing of briefs<sup>2</sup>**

(a) – (b) \* \* \*

**(c) Service**

(1) One copy of each brief must be served on the superior court clerk for delivery to the trial judge.

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<sup>2</sup> The amendments shown here are to the version of rule 8.212 that includes the amendments approved by the Judicial Council on February 28, 2012, which take effect on January 1, 2013.

1 (2) One electronic copy ~~or four paper copies~~ of each brief must be served on the  
2 Supreme Court as ~~provided in either (A) or (B)~~.

3  
4 ~~(A) One copy of each brief may be served on the Supreme Court electronically by~~  
5 ~~sending the copy to the Supreme Court’s electronic service address. For~~  
6 ~~purposes of this requirement, the term “brief” does not include a petition for~~  
7 ~~rehearing or an answer thereto.~~

8  
9 ~~(i)(A)~~ \* \* \*

10  
11 ~~(ii)(B)~~ \* \* \*

12  
13 ~~(B)(C)~~ If it would cause undue hardship for the party filing the brief to serve an  
14 electronic copy of the brief on the Supreme Court, the party may ~~instead of~~  
15 serve four paper copies of each the brief ~~may be~~  
16 served on the Supreme Court. If the Court of Appeal has ordered the brief  
17 sealed, the party serving the brief must place all four copies of the brief in a  
18 sealed envelope and attach a cover sheet that contains the information required  
19 by rule 8.204(b)(10) and labels the contents as “CONDITIONALLY UNDER  
20 SEAL.” The Court of Appeal clerk must promptly notify the Supreme Court of  
21 any court order unsealing the brief. In the absence of such notice, the Supreme  
22 Court clerk must keep all copies of the brief under seal.

23  
24 (3) One copy of each brief must be served on a public officer or agency when required  
25 by rule 8.29.

26  
27 **Advisory Committee Comment**

28  
29 **Subdivision (a).** \* \* \*

30  
31 **Subdivision (b).** \* \* \*

32  
33 **Subdivision (c).** In subdivision (c)(2) the word “brief” means only (1) an appellant’s opening brief, (2) a  
34 respondent’s brief, (3) an appellant’s reply brief, (4) ~~a petition for rehearing, (5) an answer thereto, or~~  
35 ~~(6) an amicus curiae brief, or (5) an answer thereto.~~ It follows that no other documents or papers filed in  
36 the Court of Appeal, whatever their nature, should be served on the Supreme Court. Further, only briefs  
37 filed in the Court of Appeal “in a civil appeal” must be served on the Supreme Court. It follows that no  
38 briefs filed in the Court of Appeal in criminal appeals or in original proceedings should be served on the  
39 Supreme Court.

40  
41 “Electronic service address” is defined in rule ~~2.250~~ 8.70. The Supreme Court’s electronic filing address  
42 and additional information about sending electronic copies of briefs to the Supreme Court can be found  
43 on the California Courts Web site at [www.courts.ca.gov/appellatebriefs.htm](http://www.courts.ca.gov/appellatebriefs.htm).

44  
45 Examples of “undue hardship” under (2)(C) include but are not limited to when a party does not have  
46 access to a computer or the software necessary to prepare an electronic copy of a brief or does not have  
47 e-mail access to electronically serve a brief on the Supreme Court.

**SPR12-08**

**Appellate Procedure: Copies of Briefs in Civil Appeals in the Court of Appeal Served on the Supreme Court**

(amend Cal. Rules of Court, rules 8.44 and 8.212)

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

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Appellate Court Committee San Diego County Bar Association By: Kate Mayer Mangan, Chair	N/I	<p>Our committee supports the revisions to rules 8.44 and 8.212 with only a minor comment. We agree with the Judicial Council that an exception to the rule for electronic service should exist to permit parties to file paper copies if necessary. As currently phrased, proposed rule 8.212(c)(2)(C) states that this exception is invoked if electronic service “would cause undue hardship for the party,” yet does not define the term “undue hardship.” To avoid confusing the very parties that would seek to invoke the exception to the electronic service requirement, we suggest a clarifying comment by the Advisory Committee to explain, and perhaps give examples of, what would constitute “undue hardship.”</p> <p>Additionally, our committee assumes that the absence of an enforcement mechanism in the revisions to prevent the service of paper copies by parties that did not face “undue hardship” was likely a reflection of the Judicial Council's view that no such mechanism should exist. If the criteria for “undue hardship” are entirely subjective, however, an Advisory Committee comment should also inform parties that no brief will be rejected for incomplete service due to a perceived lack of undue hardship. Such a comment would further the purpose of the rule's exception for electronic service while still maintaining the intent of the revisions.</p>	<p>The committees agree with this comment and have revised the proposal to include an advisory committee comment that provides examples of undue hardship.</p> <p>The committees' view is that enforcement is unlikely to be an issue, that most parties will comply with this requirement. The committees therefore decided not to modify the proposal to include a specific enforcement mechanism. If enforcement does become an issue, the committees can reconsider this issue in the future.</p>

**SPR12-08****Appellate Procedure: Copies of Briefs in Civil Appeals in the Court of Appeal Served on the Supreme Court**

(amend Cal. Rules of Court, rules 8.44 and 8.212)

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	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
2.	Committee on Appellate Courts State Bar of California By: Paul R. Johnson, Chair	N/I	<p>The Committee on Appellate Courts supports this proposal.</p> <p>With respect to the specific request for comments on whether the requirement in rule 8.212(c)(1) for service of a copy of each brief on the superior court clerk for delivery to the trial judge should also be deleted, the Committee believes this requirement should be retained because it is beneficial not only to keep the trial court apprised of developments in the case (which may return on remand or remittitur) but also to assist the trial judge in more fully understanding the court of appeal's ultimate decision. However, to limit the storage burden on the superior court, the Committee recommends that the rule be modified so as to require service on the trial judge only of copies of the <u>merits</u> briefing (i.e. Appellant's Opening Brief, Respondent's Brief and Appellant's Reply Brief) and not require service of any of the other types of briefs or motions filed in the appeal (e.g. Petitions for Rehearing and Answers, Petitions for Review and Answers).</p>	<p>The committees appreciate this input.</p> <p>Based on this and another comment, the committees decided not to eliminate the requirement that a copy of briefs be sent to the trial judge. The committees will consider the suggestion to narrow this requirement to merits briefs during an upcoming committee year.</p>
3.	Orange County Bar Association Orange County Bar Association	A	No additional comment.	The committees appreciate this input.
4.	Superior Court of San Diego County By: Mike Roddy Executive Officer	A	No additional comment.	The committees appreciate this input.

**SPR12-08****Appellate Procedure: Copies of Briefs in Civil Appeals in the Court of Appeal Served on the Supreme Court**

(amend Cal. Rules of Court, rules 8.44 and 8.212)

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

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
5.	Don Willenburg, Partner Gordon & Rees LLP San Francisco	A	<p>I support 12-08, which well serves its worthy purposes.</p> <p>E-submission to the Supreme Court is easy. The Court does not really need, and should not be tasked with storing or distributing, the paper copies.</p> <p>The Rules should not, however, omit service on the superior court judge(s) whose ruling is being challenged. Trial judges are entitled to know, and it may help keep a more civil tone about the trial court in appellate briefs.</p>	<p>The committees appreciate this input.</p> <p>Based on this and another comment, the committees decided not to eliminate the requirement that a copy of briefs be sent to the trial judge.</p>