

# Judicial Council of California

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## INVITATION TO COMMENT SP16-13

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Title	Action Requested
Appellate Procedure: Expedited Review of Certain Orders Denying Motions to Compel Arbitration	Review and submit comments by January 11, 2017
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Adopt California Rules of Court, rules 8.710 – 8.717	July 1, 2017
Proposed by	Contact
Appellate Advisory Committee	Heather Anderson, 415-865-7691
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### Executive Summary and Origin

Recent legislation requires the Court of Appeal to issue its decision in cases involving the review of certain orders denying motions to compel arbitration no later than 100 days after the notice of appeal is filed. The legislation also requires the Judicial Council to adopt rules to implement this requirement and to establish a shortened notice of appeal period in these cases. These proposed rules are intended to fulfill this legislative obligation.

### Background

On September 25, 2016, the Governor signed into law Senate Bill 1065. This legislation enacted new Code of Civil Procedure section 1294.4 which provides for expedited appellate review of superior court orders dismissing or denying a petition to compel arbitration involving a claim under the Elder and Dependent Adult Civil Protection Act in which a party has been granted a preference under Code of Civil Procedure section 36. Under this new statute, the Court of Appeal is required to issue its decision no later than 100 days after the notice of appeal is filed and may only grant extensions of time if good cause is shown and the extension will promote the interests of justice. The legislation requires that, on or before July 1, 2017, the Judicial Council adopt rules to implement these statutory requirement and to establish a shortened notice of appeal period for the cases.

*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 These proposals are circulated for comment purposes only.*

## **The Proposal**

The attached proposed rules 8.710 – 8.717 are intended to fulfill the Judicial Council’s statutory obligation to adopt rules to implement new Code of Civil Procedure section 1294.4. These rules are generally modeled on existing rules 8.700 – 8.702 which implement statutory requirements for expedited review in certain cases under the California Environmental Quality Act (CEQA).

The main differences between these proposed rules and the CEQA rules are:

- Because the 100-day period for issuance of a decision in cases under Code of Civil Procedure section 1294.4 is shorter than the period provided under the relevant CEQA provisions, the attached proposed rules would establish different time periods for some of the steps in the appellate process than are established by rules 8.700 – 8.702. For example, proposed rule 8.715 would require that the appellant’s opening brief be filed within 10 days of the filing of the notice of appeal, rather than the 25 days provided under the CEQA rules (rule 8.702(f)). Under this proposal, the appellant would be expected to utilize some of the proposed 20-day notice of appeal period to prepare its opening brief.
- The committee did not include a provision similar to rule 8.703(d)(2)(B) regarding applications for reimbursement of transcript costs from the Transcript Reimbursement Fund because of concerns relating to delay in the preparation of the record and because the appellant in these cases is unlikely to qualify for such reimbursement. As an alternative approach for those who are unable to purchase a copy of the reporter’s transcript, the committee included a provision modelled on rule 8.153, regarding lending of the record (see proposed rule 8.713(b)(4)). The committee would particularly appreciate comments on this approach.

## **Alternatives Considered**

Because adoption of rules to implement Code of Civil Procedure section 1294.4 is mandated by statute, the committee did not consider the option of not proposing implementing rules. The committee did consider different alternatives for the length of time provided for various steps in the appellate process. For example, the committee considered setting a 5-day notice of appeal period, similar to that in the CEQA rules, and then giving a longer time for filing the appellant’s opening brief. The committee ultimately decided that the approach of having a somewhat longer notice of appeal period and shorter opening brief deadline was preferable because it would provide greater flexibility in scheduling the remaining briefing while still allowing time for the court’s deliberations during the statutorily–mandated 100-day period for the appeal. The committee would particularly appreciate comments on this approach.

The committee also considered what would be the best approach to provide rule users with adequate notice regarding the situations in which the standard notice of appeal period does not apply. The proposed amendments to rule 8.104 would add a cross-reference to proposed new rule 8.712 and the proposed amendments to the accompanying advisory committee comment would provide information about the types of proceedings that rule 8.712 covers, as well as information about the other rule provisions currently cross-referenced in rule 8.104. The committee considered the alternative of adding more descriptive information to the text of the rule, but

decided against this approach because it would make the rule text longer and potentially more difficult to understand.

The committee also considered whether or not it is necessary to include a provision addressing the potential effect of a cross-appeal on the time to file a notice of appeal. The committee would appreciate comments on this issue.

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

Implementing Code of Civil Procedure section 1294.4 will generate costs and operational impact for the Courts of Appeal in which the proceedings governed by this statute are filed. The committee does not anticipate that these proposed rules will add to the burden created by this new statutory procedure.

### **Request for Specific Comments**

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on

- Whether the proposed amendment to the advisory committee comment to rule 8.104 is sufficient to provide rule users with adequate notice about the nature of the exceptions to the normal time for filing a notice of appeal or whether further information should be incorporated into the text of the rule.
- Which is preferable – the proposed approach of having a longer notice of appeal period and shorter period for filing the appellant’s opening brief (which will allow longer periods for the respondent’s and reply briefs) or the alternative approach of having a 5-day notice of appeal period and longer period for filing the appellant’s opening brief (but which will require shorter periods for the respondent’s and reply briefs in order to comply with the 100-day period for adjudicating appeals).
- Whether it is necessary for the rules to include a provision such as proposed in 8.712(c)(4) addressing the effect of cross-appeals on the time to file a notice of appeal.
- Whether the proposed rules should include a provision similar to rule 8.703(d)(2)(B) regarding applications for reimbursement of transcript costs from the Transcript Reimbursement Fund.

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

**Attachments and Links**

1. Proposed California Rules of Court, rules 8.104 and 8.710 – 8.717.
2. Senate bill 1065, as adopted by the Legislature and approved by the Governor:  
[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160SB1065](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1065)

California Rules of Court, rules 8.104 would be amended and rules 8.710 – 8.717 would be adopted, effective July 1, 2017 to read:

1 **Title 8. Appellate Rules**

2  
3 **Division 1. Rules Relating to the Supreme Court and Courts of Appeal**

4  
5 **Chapter 2. Civil Appeals**

6  
7 **Article 1. Taking the Appeal**

8  
9 **Rule 8.104. Time to appeal**

10  
11 **(a) Normal time**

12  
13 (1) Unless a statute, or rules 8.108, ~~or rule 8.702,~~ or 8.712 provides otherwise, a notice  
14 of appeal must be filed on or before the earliest of:

15  
16 (A) – (C) \* \* \*

17  
18 **(b) – (e) \* \* \***

19  
20 **Advisory Committee Comment**

21  
22 **Subdivision (a).** This subdivision establishes the standard time for filing a notice of appeal and identifies  
23 rules that establish very limited exceptions to this standard time period for cases involving certain post  
24 judgment motions and cross-appeals (rule 8.108), certain expedited appeals under the California  
25 Environmental Quality Act (rule 8.702), and review of an order dismissing or denying a petition to  
26 compel arbitration under Code of Civil Procedure section 1294.4 (Rule 8.712).

27  
28 Under subdivision (a)(1)(A), a notice of entry of judgment (or a copy of the judgment) must show the  
29 date on which the clerk served the document. The proof of service establishes the date that the 60-day  
30 period under subdivision (a)(1)(A) begins to run.

31  
32 Subdivision (a)(1)(B) requires that a notice of entry of judgment (or a copy of the judgment) served by or  
33 on a party be accompanied by proof of service. The proof of service establishes the date that the 60-day  
34 period under subdivision (a)(1)(B) begins to run. Although the general rule on service (rule 8.25(a))  
35 requires proof of service for all documents served by parties, the requirement is reiterated here because of  
36 the serious consequence of a failure to file a timely notice of appeal (see subd. (e)).

37  
38 **Subdivision (b).** \* \* \*

1                    **Chapter 12. Review of An Order Dismissing Or Denying A Petition To Compel**  
2                    **Arbitration Under Code of Civil Procedure Section 1294.4**

3  
4  
5                    **Rule 8.710. Application**

6  
7                    **(a) Application of the rules in this chapter**

8  
9                    The rules in this chapter govern appeals to review a superior court order dismissing or  
10                    denying a petition to compel arbitration under Code of Civil Procedure section 1294.4.

11  
12                    **(b) Application of general rules for civil appeals**

13  
14                    Except as otherwise provided by the rules in this chapter, rules 8.100–8.278, relating to  
15                    civil appeals, apply to appeals under this chapter.

16  
17  
18                    **Rule 8.711. Filing and service**

19  
20                    **(a) Service**

21  
22                    Except when the court orders otherwise under (b) or as otherwise provided by law, all  
23                    documents that the rules in this chapter require be served on the parties must be served by  
24                    personal delivery, electronic service, express mail, or other means consistent with Code of  
25                    Civil Procedure sections 1010, 1011, 1012, and 1013 and reasonably calculated to ensure  
26                    delivery of the document to the parties not later than the close of the business day after the  
27                    document is filed or lodged with the court.

28  
29                    **(b) Electronic filing and service**

30  
31                    (1) In accordance with rule 8.71, all parties except self-represented parties are required  
32                    to file all documents electronically except as otherwise provided by these rules, the  
33                    local rules of the reviewing court, or court order. Notwithstanding rule 8.71(b), a  
34                    court may order a self-represented party to file documents electronically.

35  
36                    (2) All documents must be served electronically on parties who have consented to  
37                    electronic service or who are otherwise required by law or court order to accept  
38                    electronic service. All parties represented by counsel are deemed to have consented  
39                    to electronic service. All self-represented parties may so consent.

40  
41                    **(c) Exemption from extension of time**

42  
43                    The extension of time provided in Code of Civil Procedure section 1010.6 for service  
44                    completed by electronic means does not apply to any service in actions governed by these  
45                    rules.

1  
2 **Rule 8.712. Notice of appeal**

3  
4 **(a) Contents of notice of appeal**

- 5  
6 (1) The notice of appeal must state that the superior court order being appealed is  
7 governed by the rules in this chapter.  
8  
9 (2) A copy of the order being appealed must be attached to the notice of appeal.

10  
11  
12 **(b) Time to appeal**

13  
14 The notice of appeal must be served and filed on or before the earlier of:

- 15  
16 (1) Twenty days after the superior court clerk serves on the party filing the notice of  
17 appeal a document entitled “Notice of Entry” of judgment or a filed-endorsed copy  
18 of the judgment, showing the date either was served; or  
19  
20 (2) Twenty days after the party filing the notice of appeal serves or is served by a party  
21 with a document entitled “Notice of Entry” of judgment or a filed-endorsed copy of  
22 the judgment, accompanied by proof of service.

23  
24 **(c) Extending the time to appeal**

25  
26 (1) *Motion for new trial*

27  
28 If any party serves and files a valid notice of intention to move for a new trial or,  
29 under rule 3.2237, a valid motion for a new trial and that motion is denied, the time  
30 to appeal from the judgment is extended for all parties until the earlier of:

31  
32 (A) Five court days after the superior court clerk or a party serves an order denying  
33 the motion or a notice of entry of that order; or

34  
35 (B) Five court days after denial of the motion by operation of law.

36  
37 (2) *Motion to vacate judgment*

38  
39 If, within the time prescribed by subdivision (b) to appeal from the judgment, any  
40 party serves and files a valid notice of intention to move—or a valid motion—to  
41 vacate the judgment and that motion is denied, the time to appeal from the judgment  
42 is extended for all parties until five court days after the superior court clerk or a party  
43 serves an order denying the motion or a notice of entry of that order.

44  
45 (3) *Motion to reconsider appealable order*

1 If any party serves and files a valid motion to reconsider an appealable order under  
2 Code of Civil Procedure section 1008, subdivision (a), the time to appeal from that  
3 order is extended for all parties until five court days after the superior court clerk or a  
4 party serves an order denying the motion or a notice of entry of that order.

5  
6 (4) Cross-appeal

7  
8 If an appellant timely appeals from a judgment or appealable order, the time for any  
9 other party to appeal from the same judgment or order is extended until five court  
10 days after the superior court clerk serves notification of the first appeal.

11  
12 **Advisory Committee Comment**

13  
14 It is very important to note that the deadline for filing a notice of appeal may be earlier than the deadline  
15 for filing a motion for a new trial, a motion for reconsideration, or a motion to vacate the judgment.

16  
17  
18 **Rule 8.713. Record on appeal**

19  
20 **(a) Record of written documents**

21  
22 The record of the written documents from the superior court proceedings must be in the  
23 form of a joint appendix or separate appellant's and respondent's appendixes under rule  
24 8.124.

25  
26 **(b) Record of the oral proceedings**

- 27  
28 (1) The appellant must serve and file with its notice of appeal a notice designating the  
29 record under rule 8.121 specifying whether the appellant elects to proceed with or  
30 without a record of the oral proceedings in the trial court. If the appellant elects to  
31 proceed with a record of the oral proceedings in the trial court, the notice must  
32 designate a reporter's transcript.
- 33  
34 (2) Within 10 days after the superior court notifies the court reporter to prepare the  
35 transcript under rule 8.130(d)(2), the reporter must prepare and certify an original of  
36 the transcript and file the original and required number of copies in superior court.
- 37  
38 (3) If the appellant does not present its notice of designation as required under (1) or if  
39 any designating party does not submit the required deposit for the reporter's  
40 transcript under rule 8.130(b)(1) or a permissible substitute under rule 8.130(b)(3)  
41 with its notice of designation or otherwise fails to timely do another act required to  
42 procure the record, the superior court clerk must serve the defaulting party with a  
43 notice indicating that the party must do the required act within two court days of  
44 service of the clerk's notice or the reviewing court may impose one of the following  
45 sanctions:
- 46  
47 (A) If the defaulting party is the appellant, the court may dismiss the appeal; or

1  
2 (B) If the defaulting party is the respondent, the court may proceed with the appeal  
3 on the record designated by the appellant.

4  
5 (4) Within 10 days after the record is filed in the reviewing court, a party that has not  
6 purchased its own copy of the record may request the appellant, in writing, to lend it  
7 the appellant's copy of the record at the time that appellant serves its final opening  
8 brief under rule 8.715(c)(2). The borrowing party must return the copy of the record  
9 when it serves its brief or the time to file its brief has expired. The cost of sending  
10 the copy of the record to and from the borrowing party shall be treated as a cost on  
11 appeal under rule 8.891(d)(1)(B).

12  
13  
14 **Rule 8.714. Superior court clerk duties**

15  
16 Within five court days following the filing of a notice of appeal under this rule, the superior court  
17 clerk must:

18  
19 (1) Serve the following on each party:

20  
21 (A) Notification of the filing of the notice of appeal; and

22  
23 (B) A copy of the register of actions, if any.

24  
25 (2) Transmit the following to the reviewing court clerk:

26  
27 (A) A copy of the notice of appeal, with the copy of the order being appealed  
28 attached; and

29  
30 (B) A copy of the appellant's notice designating the record;

31  
32  
33 **Rule 8.715. Briefing**

34  
35 (a) **Electronic filing**

36  
37 Unless otherwise ordered by the reviewing court, all briefs must be electronically filed.

38  
39 (b) **Time to serve and file briefs**

40  
41 Unless otherwise ordered by the reviewing court:

42  
43 (1) An appellant must serve and file its opening brief within 10 days after the notice of  
44 appeal is served and filed.

1           (2) A respondent must serve and file its brief within 25 days after the appellant files its  
2           opening brief.

3  
4           (3) An appellant must serve and file its reply brief, if any, within 15 days after the  
5           respondent files its brief.

6  
7   **(c) Contents and form of briefs**

8  
9           (1) The briefs must comply as nearly as possible with rule 8.204.

10  
11          (2) If a designated reporter's transcript has not been filed at least 5 days before the date  
12          by which a brief must be filed, an initial version of the brief may be served and filed  
13          in which references to a matter in the reporter's transcript are not supported by a  
14          citation to the volume and page number of the reporter's transcript where the matter  
15          appears. Within 10 days after the reporter's transcript is filed, a revised version of  
16          the brief must be served and filed in which all references to a matter in the reporter's  
17          transcript must be supported by a citation to the volume and page number of the  
18          reporter's transcript where the matter appears. No other changes to the initial version  
19          of the brief are permitted.

20  
21   **(d) Stipulated extensions of time to file briefs**

22  
23          If the parties stipulate to extend the time to file a brief under rule 8.212(b), they are deemed  
24          to have agreed that such an extension will promote the interests of justice, that the time for  
25          resolving the action may be extended beyond 100 days by the number of days by which the  
26          parties stipulated to extend the time for filing the brief, and that to that extent, they have  
27          waived any objection to noncompliance with the deadlines for completing review stated in  
28          Code of Civil Procedure section 1294.4 for the duration of the stipulated extension.

29  
30   **(e) Failure to file brief**

31  
32          If a party fails to timely file an appellant's opening brief or a respondent's brief, the  
33          reviewing court clerk must serve the party with a notice indicating that if the required brief  
34          is not filed within two court days of service of the clerk's notice, the court may impose  
35          one of the following sanctions:

36  
37          (1) If the brief is an appellant's opening brief, the court may dismiss the appeal;

38  
39          (2) If the brief is a respondent's brief, the court may decide the appeal on the record,  
40          the opening brief, and any oral argument by the appellant; or

41  
42          (3) Any other sanction that the court finds appropriate.  
43  
44  
45

1 **Rule 8.716. Oral argument**

2  
3 The reviewing court clerk must send a notice of the time and place of oral argument to all parties  
4 at least 10 days before the argument date. The presiding justice may shorten the notice period for  
5 good cause; in that event, the clerk must immediately notify the parties by telephone or other  
6 expeditious method.

7  
8  
9 **Rule 8.717. Extensions of time**

10  
11 The Court of Appeal may grant an extension of the time in appeals governed by this chapter only  
12 if good cause is shown and the extension will promote the interests of justice.