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INVITATION TO COMMENT

SPR13-04

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| Title | Action Requested |
| Appellate Court Procedure: Defaults in Procuring Record and Completion of the Record in Civil Appeals | Review and submit comments by June 19, 2013 |
| Proposed Rules, Forms, Standards, or Statutes | Proposed Effective Date |
| Adopt Cal. Rules of Court, rule 8.149; amend rules 8.122, 8.140, 8.832, 8.840, and 8.842 | January 1, 2014 |
| Proposed by | Contact |
| Appellate Advisory Committee Hon. Raymond J. Ikola, Chair | Heather Anderson, 415-865-7691 heather.anderson@jud.ca.gov |

Executive Summary and Origin

To reduce defaults in the procurement of the record on appeal and reduce costs for superior courts associated with unnecessary preparation of clerk's transcripts, this proposal would make several changes in the rules relating to preparation of clerk's transcripts and relating to defaults in procuring the record in civil appeals. This proposal is based on a suggestion from a Court of Appeal justice and staff attorney.

Background

Preparation of clerk's transcripts and defaults in procurement of the record

Rules 8.121–8.163 and 8.830–8.843 of the California Rules of Court address records in civil appeals in the Court of Appeal and the superior court appellate division, respectively. Parties in these appeals are responsible for taking various steps to procure the record in these appeals, including timely filing a notice designating the record under rule 8.121 or 8.831, timely paying the superior court for the cost of any designated clerk's transcript under rule 8.122 or 8.832 or obtaining a fee waiver for this cost, and timely paying for the cost of any designated reporter's transcript or submitting a permissible substitute for this payment under rule 8.130 or 8.834. Rules 8.122 and 8.832 both provide that the clerk must complete preparation of the clerk's transcript within 30 days after the appellant makes the required deposit for the clerk's transcript or the court waives the fee for this transcript.

Some appellants may designate a reporter's transcript without realizing the cost for such a transcript or that a fee waiver does not waive this cost. Often, this misunderstanding results in 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.

appellant failing to pay for the reporter's transcript. Rules 8.140 and 8.842 generally provide for what happens if a party fails to take a required action to procure the record on appeal. Under these rules, the clerk of the superior court must issue a default notice to the appellant and, if the appellant does not timely pay for the reporter's transcript, the reviewing court may dismiss the appeal. In the meantime, while the appellant and the court are trying to sort out the issues relating to the designated reporter's transcript, if the appellant designated a clerk's transcript, the superior court clerk will most likely have begun preparing that transcript. If the appellant was granted a fee waiver and the appeal is dismissed or abandoned, the cost of preparing the unused clerk's transcript will be borne by the superior court.

Completion of the record

Rules 8.150 and 8.840 provide that when the record for a civil appeal is complete, it must be sent to the Court of Appeal or superior court appellate division, respectively. These rules do not indicate when such a record should be considered complete and thus when the record should be transmitted to the reviewing court. If only portions of a record are transmitted to the reviewing court, confusion about whether the case is ready to proceed may result. For example, if only the clerk's transcript is sent to the reviewing court when an appellant has failed to pay for a reporter's transcript, it may be unclear whether the reviewing court should proceed without a record of the oral proceedings or dismiss the appeal. By contrast, rules 8.872 and 8.922 relating to appeals in misdemeanor and infraction cases define when the record is considered complete and thus ready for transmission to the reviewing court.

The Proposal

Deadline for preparation of clerk's transcripts

To reduce costs associated with unnecessary preparation of clerk's transcripts in cases that are ultimately abandoned or dismissed, this proposal would amend the rules relating to when the superior court clerk must complete a clerk's transcript in civil appeals. Under this proposal, if an appellant has designated a reporter's transcript, the clerk would have until the later of 30 days after the appellant deposited the funds for the clerk's transcript or obtained an order for a fee waiver or 30 days after the appellant deposited the funds for the reporter's transcript or one of the authorized substitutes for this deposit. This amendment would permit, but not require, the clerk to hold off on beginning the preparation of the clerk's transcript until it is more certain that the appeal will proceed.

This proposal would also make several other clarifying changes to rules 8.122 and 8.832 on clerk's transcripts in civil appeals, including amending these rules to specifically provide that:

- If an appellant fails to make the required deposit or to submit a fee waiver application or order granting a fee waiver, the clerk will issue a default notice; and
- The clerk must prepare copies of the transcript not only for parties other than the appellant who have made a deposit for the transcript, but also for those who have been granted a fee waiver.

Completion of the record

This proposal would add new rule 8.149 and add new provisions to rule 8.840 to define when the record relating to civil appeals is complete and thus ready for transmission to the reviewing court. These provisions should eliminate any potential confusion about whether the reviewing court has received the complete record and the case is ready to proceed.

Alternatives Considered

The committee considered amending the rules regarding defaults in the procurement of the record to provide that when the appellant defaults in the procurement of a reporter's transcript or other designated record of the oral proceedings, as an alternative to dismissing the appeal, the reviewing court could proceed with the appeal on the clerk's transcript or other record of the documents from the trial court proceedings alone. To implement this approach, the committee also considered requiring, in at least some cases, that the clerk complete the clerk's transcript and transmit it to the reviewing court even if the appellant defaults in the procurement of a reporter's transcript or other designated record of the oral proceedings. Ultimately, however, the committee concluded that the appellant is in the best position to determine whether the issues on appeal can be determined without a record of the oral proceedings and therefore that it would be preferable to give the appellant in such circumstances the opportunity to decide whether to proceed without such a record.¹

Generally, the appellant is not required to identify the issues on appeal until the time of briefing (except if the record of the oral proceedings designated by the appellant includes less than all of the proceedings). If the issues on appeal have not been identified by the appellant, the reviewing court would generally not be able to determine whether the appeal could be decided based only on a record of the documents in the case. The committee's view was that if the reviewing court would not be able to address the appeal on its merits without a record of the oral proceedings, to require that the clerk's transcript be completed and transmitted to the reviewing court would be a waste of resources.

The committee also considered not recommending any changes to the rules on clerk's and reporter's transcript or defaults in procurement of the record but concluded that amending these rules would reduce costs for the superior courts and therefore that it would be preferable to propose these amendments.

Implementation Requirements, Costs, and Operational Impacts

This proposal should impose no significant implementation burdens on the superior courts or Court of Appeal and should provide significant cost savings for the superior courts.

¹ A proposal to provide appellants with various options, including proceeding without a record of the oral proceedings, when they learn of the cost of a designated reporter's transcript or that they are responsible for this cost is also being circulated as part of a separate invitation to comment.

Request for Specific Comments

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

- Does the proposal reasonably achieve the stated purpose?
Would this proposal have an impact on public's access to the courts? If a positive impact, please describe. If a negative impact, what changes might lessen the impact?

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

- Would the proposal provide costs savings? If so, please quantify. If not, what changes might be made that would provide savings, or greater savings?
- 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.
- Are the proposed new provisions regarding when preparation of a designated clerk's transcript must be completed and when the record as a whole is considered complete clear and easy for trial court clerks to implement?
- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- If this proposal would be cumbersome or difficult to implement in a court of your size, what changes would allow the proposal to be implemented more easily or simply in a court of your size?

Rule 8.149 of the California Rules of Court would be adopted and rules 8.122, 8.140, 8.832, 8.840, and 8.842 would be amended, effective January 1, 2014, to read:

Title 8. Appellate Rules

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

Chapter 2. Civil Appeals

Article 2. Record on Appeal

Rule 8.122. Clerk's transcript

(a)–(b) * * *

(c) Deposit for cost of transcript

(1)–(2) * * *

(3) Unless otherwise provided by law, within 10 days after the clerk sends a notice under (1), the appellant and any party wanting to purchase a copy of the clerk's transcript must either deposit the estimated cost specified in the notice under (1) with the clerk, unless otherwise provided by law or the party submits an application for, or an order granting, a waiver of the cost.

(4) If the appellant does not submit a required deposit or an application for, or an order granting, a waiver of the cost within the required period, the clerk must promptly issue a notice of default under rule 8.140.

(d) Preparation of transcript

(1) ~~Within 30 days after the appellant deposits the estimated cost of the transcript or the court files an order waiving that cost~~ the time specified in (2), the clerk must:

(A) ~~Prepare an original and one copy of the transcript, and certify the original transcript;~~

(B) Prepare one copy of the transcript for the appellant; and

~~**(B)**~~**(C)** Prepare additional copies for which the parties have made deposits or received an order waiving the cost.

(2) The clerk must complete preparation of the transcripts required under (1):

(A) If the appellant elects under rule 8.121 to proceed without a reporter's transcript, within 30 days after either:

1
2 (i) The appellant deposits either the estimated cost of the clerk’s transcript or
3 a pre-existing order granting a waiver of that cost; or
4

5 (ii) The court grants an application submitted under (c)(3) to waive that cost;
6 or
7

8 (B) If the appellant elects under rule 8.121 to proceed with a reporter’s transcript,
9 within the later of either the time specified in (A) or 30 days after the appellant
10 deposits the estimated cost of the reporter’s transcript or one of the substitutes
11 under rule 8.130(b).
12

13 ~~(2)~~(3) If the appeal is abandoned or dismissed before the clerk has completed preparation of
14 the transcript, the clerk must refund any portion of the deposit under (c) exceeding
15 the preparation cost actually incurred.
16

17 **Advisory Committee Comment**

18
19 **Subdivision (a).** * * *

20
21 **Subdivision (b).** * * *

22
23 **Subdivision (c).** * * *

24
25 **Subdivision (d).** The different timelines for preparing a clerk’s transcript under subdivision (d)(2)(A)(i)
26 and (ii) recognize that an appellant may apply for and receive a waiver of fees at different points during
27 the appellate process. Some appellants may have applied for and obtained an order waiving fees before
28 receiving the estimate of the cost of the clerk’s transcript and thus may be able to provide that order to the
29 court in lieu of making a deposit for the clerk’s transcript. Other appellants may not apply for a waiver
30 until after they receive the estimate of the cost for the clerk’s transcript, in which case the time for
31 preparing the transcript runs from the granting of that waiver.
32
33

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

35
36 **(a) Notice of default**
37

38 Except as otherwise provided by these rules, if a party fails to timely do an act required to
39 procure the record, the superior court clerk must promptly notify the party by mail that it
40 must do the act specified in the notice within 15 days after the notice is mailed, and that if
41 it fails to comply, the reviewing court may impose one of the following sanctions:
42

43 (1)–(2) * * *
44
45

1 **(b) Sanctions**

2
3 If a party fails to take the action specified in a notice given under (a), the superior court
4 clerk must promptly notify the reviewing court of the default, and the reviewing court may
5 impose one of the following sanctions:
6

7 (1) If the defaulting party is the appellant, the reviewing court may dismiss the appeal.
8 If the appeal is dismissed, the reviewing court must promptly notify the superior
9 court. The reviewing court ~~but~~ may vacate the dismissal for good cause.~~;~~
10

11 (2) * * *

12
13 (c) * * *

14
15
16 **Rule 8.149. When the record is complete**

17
18 **(a) Record of written documents**

19
20 If the appellant elected to proceed without a record of the oral proceedings in the trial
21 court and the parties are not proceeding by appendix under rule 8.124, the record is
22 complete:
23

24 (1) If a clerk's transcript will be used, when the clerk's transcript is certified under rule
25 8.122(d);

26
27 (2) If the original trial court file will be used instead of the clerk's transcript, when that
28 original file is ready for transmission as provided under rule 8.128(b);

29
30 (3) If an agreed statement will be used instead of the clerk's transcript, when the
31 appellant files the agreed statement under rule 8.134(b); or

32
33 (4) If a settled statement will be used instead of the clerk's transcript, when the
34 statement has been certified by the trial court under rule 8.137(c).
35

36 **(b) Record of the oral proceedings**

37
38 (1) If the parties are not proceeding by appendix under rule 8.124 and the appellant
39 elected to proceed with a record of the oral proceedings in the trial court, the record
40 is complete when the clerk's transcript or other record of the documents from the
41 trial court is complete as provided in (a) and:
42

43 (A) If the appellant elected to use a reporter's transcript, when the certified
44 reporter's transcript is delivered to the court under rule 8.130;
45

1 (B) If an agreed statement will be used instead of the reporters transcript, when the
2 appellant files the agreed statement under rule 8.134(b); or

3
4 (C) If a settled statement will be used instead of the reporter’s transcript, when the
5 statement has been certified by the trial court under rule 8.137(c).

6
7 (2) If the parties are proceeding by appendix under rule 8.124 and the appellant elected
8 to proceed with a record of the oral proceedings in the trial court, the record is
9 complete when the record of the oral proceedings is complete, as provided in (1)(A),
10 (B), or (C).

11
12
13 **Division 2. Rules Relating to the Superior Court Appellate Division**

14
15 **Chapter 2. Appeals and Records in Limited Civil Cases**

16
17 **Article 2. Record in Civil Appeals**

18
19 **Rule 8.832. Clerk’s transcript**

20
21 **(a)–(b) * * ***

22
23 **(c) Deposit for cost of clerk’s transcript**

24
25 (1)–(2) * * *

26
27 (3) Unless otherwise provided by law, within 10 days after the clerk sends a notice under
28 (1), the appellant and any party wanting to purchase a copy of the clerk’s transcript
29 must either deposit the estimated cost specified in the notice under (1) with the clerk,
30 unless otherwise provided by law or the party submits an application for a waiver of
31 the cost under rule 8.818 or an order granting a waiver of this cost.

32
33 (4) If the appellant does not submit a required deposit or an application for, or an order
34 granting, a waiver of the cost within the required period, the clerk must promptly
35 issue a notice of default under rule 8.842.

36
37 **(d) Preparing the clerk’s transcript**

38
39 (1) ~~Within 30 days after the appellant deposits the estimated cost of the transcript or the~~
40 ~~court files an order waiving that cost~~ the time specified in (2), the clerk must:

41
42 (A) ~~Prepare an original and one copy of the transcript, and certify the original~~
43 transcript;

44
45 (B) Prepare one copy of the transcript for the appellant; and
46

1 ~~(B)~~(C) Prepare any additional copies for which the parties have made deposits or
2 received an order waiving the cost.

3
4 (2) The clerk must complete preparation of the transcripts required under (1):

5
6 (A) If the appellant elects under rule 8.831 to proceed without a reporter's
7 transcript, within 30 days after either:

8
9 (i) The appellant deposits either the estimated cost of the clerk's transcript or
10 an order granting a waiver of that cost; or

11
12 (ii) The court grants an application submitted under (c)(3) to waive that cost;
13 or

14
15 (B) If the appellant elects under rule 8.831 to proceed with a reporter's transcript,
16 within the later of either the time specified in (A) or 30 days after the appellant
17 deposits the estimated cost of the reporter's transcript or one of substitutes
18 under rule 8.834(b).

19
20 ~~(2)~~(3) If the appeal is abandoned or dismissed before the clerk has completed preparation of
21 the transcript, the clerk must refund any portion of the deposit under (c) exceeding
22 the preparation cost actually incurred.

23 24 **Advisory Committee Comment**

25
26 **Subdivision (a).** * * *

27
28 **Subdivision (d).** The different timelines for preparing a clerk's transcript under subdivision (d)(2)(A)
29 recognize that an appellant may apply for and receive a waiver of fees at different points during the
30 appellate process. Some appellants may have applied for and obtained an order waiving fees before
31 receiving the estimate of the cost of the clerk's transcript and thus may be able to provide that order to the
32 court in lieu of making a deposit for the clerk's transcript. Other appellants may not apply for a waiver
33 until after they receive the estimate of the cost for the clerk's transcript, in which case the time for
34 preparing the transcript runs from the granting of that waiver.

35 36 37 **Rule 8.840. Completion and filing of the record**

38
39 **(a) When the record is complete**

40
41 (1) If the appellant elected under rule 8.831 or 8.834(b) to proceed without a record of
42 the oral proceedings in the trial court, the record is complete:

43
44 (A) If a clerk's transcript will be used, when the clerk's transcript is certified under
45 rule 8.832(d);

46

1 (B) If the original trial court file will be used instead of the clerk’s transcript, when
2 that original file is ready for transmission as provided under rule 8.833(b); or

3
4 (C) If an agreed statement will be used instead of the clerk’s transcript, when the
5 appellant files the agreed statement under rule 8.836(b).

6
7 (2) If the appellant elected under rule 8.831 to proceed with a record of the oral
8 proceedings in the trial court, the record is complete when the clerk’s transcript or
9 other record of the documents from the trial court is complete as provided in (1) and:

10
11 (A) If the appellant elected to use a reporter’s transcript, when the certified
12 reporter’s transcript is delivered to the court under rule 8.834(d);

13
14 (B) If the appellant elected to use a transcript prepared from an official electronic
15 recording, when the transcript has been prepared under rule 8.835;

16
17 (C) If the parties stipulated to the use of an official electronic recording of the
18 proceedings, when the electronic recording has been prepared under rule
19 8.835; or

20
21 (D) If the appellant elected to use a statement on appeal, when the statement on
22 appeal has been certified by the trial court or a transcript or an official
23 electronic recording has been prepared under rule 8.837(d)(6).

24
25 **(b) Filing the record**

26
27 When the record is complete, the trial court clerk must promptly send the original to the
28 appellate division and send to the appellant and respondent copies of any certified
29 statement on appeal and any copies of transcripts or official electronic recordings that they
30 have purchased. The appellate division clerk must promptly file the original and mail
31 notice of the filing date to the parties.
32
33

34 **Rule 8.842. Failure to procure the record**

35
36 **(a) Notice of default**

37
38 Except as otherwise provided by these rules, if a party fails to do any act required to
39 procure the record, the trial court clerk must promptly notify that party by mail that it must
40 do the act specified in the notice within 15 days after the notice is mailed and that, if it fails
41 to comply, the reviewing court may impose the following sanctions:

42
43 (1)–(2) * * *

1 (b) **Sanctions**

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If the party fails to take the action specified in a notice given under (a), the trial court clerk must promptly notify the appellate division of the default, and the appellate division may impose one of the following sanctions:

- (1) If the defaulting party is the appellant, the reviewing court may dismiss the appeal. If the appeal is dismissed, the reviewing court must promptly notify the superior court. The reviewing court ~~but~~ may vacate the dismissal for good cause. ~~;~~ ~~or~~
- (2) * * *