

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT

W20-01

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| <b>Title</b>   | <b>Action Requested</b>                                   |
| Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals         | Review and submit comments by February 11, 2020           |
| <b>Proposed Rules, Forms, Standards, or Statutes</b>                       | <b>Proposed Effective Date</b>                            |
| Amend Cal. Rules of Court, rule 8.851; revise forms CR-131-INFO and CR-133 | September 1, 2020   |
| <b>Proposed by</b>   | <b>Contact</b>  |
| Appellate Advisory Committee<br>Hon. Louis R. Mauro, Chair                 | Christy Simons, 415-865-7694<br>christy.simons@jud.ca.gov |

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### Executive Summary and Origin

To implement the California Supreme Court’s decision in *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, the Appellate Advisory Committee proposes amending the rule regarding appointment of counsel in misdemeanor appeals to expand the circumstances under which the appellate division must appoint counsel for an indigent defendant. The proposal would also revise two forms to be consistent with the rule amendments.

### Background

Currently, rule 8.851 of the California Rules of Court provides for the appointment of counsel on appeal only for convicted defendants. On application, the appellate division must appoint appellate counsel for a defendant convicted of a misdemeanor who was represented by appointed counsel in the trial court or establishes indigency and who either “is subject to incarceration or a fine of more than \$500,” or “is likely to suffer significant adverse collateral consequences as a result of the conviction.” (Cal. Rules of Court, rule 8.851(a)(1).) The appellate division “may appoint counsel for any other indigent defendant convicted of a misdemeanor.” (*Id.*, rule 8.851(a)(2).) The rule does not authorize the appointment of counsel for defendants who have not been convicted.

In *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998 (*Gardner*), the Supreme Court addressed the question of whether a defendant facing misdemeanor charges, who filed a successful motion to suppress evidence with the help of court-appointed counsel, was entitled to appointed counsel’s assistance in responding to a pretrial prosecution appeal of the

*This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. It is circulated for comment purposes only.*

suppression order. The court explained that, under the California Constitution, a criminal defendant's right to counsel is not limited to trial; rather, it "extends to other, 'critical' stages of the criminal process." (*Gardner*, 6 Cal.5th at p. 1004 (citations omitted).) Further, "critical stages can be understood as those events or proceedings in which the accused is brought in confrontation with the state, where potential substantial prejudice to the accused's rights inheres in the confrontation, and where counsel's assistance can help to avoid that prejudice." (*Id.*, at pp. 1004-1005.) In light of the consequences to the defendant if she lost the appeal and the difficulty of defending a suppression order without the assistance of counsel, the court held that the pretrial prosecution appeal of an order granting the defendant's motion to suppress evidence was a "critical stage" of the proceedings at which the defendant had a right to appointed counsel as a matter of state constitutional law. (*Id.*, at p. 1005.)

## **The Proposal**

### **Rule 8.851**

This proposal would amend rule 8.851(a) to require the appellate division to appoint counsel in circumstances that qualify as "critical stages" of the proceedings, as prescribed in *Gardner*. A pretrial prosecution appeal of a suppression order is a critical stage for which counsel must be appointed, but, as noted above, the *Gardner* court's holding was not limited to this one situation. Accordingly, the proposed rule language is intended to be broad enough to encompass other possible critical stages in the proceedings for a defendant who has been accused, but not convicted, of a misdemeanor. For clarity and to avoid repetitiveness, the committee proposes reorganizing paragraph (1) of subdivision (a) to include the indigency requirement, keep the provisions regarding convicted defendants in subdivision (a)(1)(A), and draft new language for subdivision (a)(1)(B) regarding accused defendants who are entitled to appointed counsel.

The proposal includes minor conforming changes to other parts of subdivisions (a) and (b) and the existing advisory committee comment. It also includes a new advisory committee comment for subdivision (a)(1)(B) describing the *Gardner* decision.

### ***Information on Appeal Procedures for Misdemeanors (form CR-131-INFO)***

The committee proposes revisions to this information sheet that conform to the proposed rule amendments. Item 5 ("How do I get a lawyer to represent me?"), which describes the circumstances in which the appellate division is required to appoint counsel, would be revised to include proceedings before a final judgment in which the defendant faces potential substantial prejudice (i.e., a *Gardner* situation). A reference to rule 8.851 would also be added to item 5.

In addition, the proposal would revise item 4 ("Do I need a lawyer to appeal?") to clarify that a defendant does not have a right of self-representation and to add language advising a defendant whose request for self-representation was denied of the need to either hire an attorney or request that an attorney be appointed.

### ***Request for Court-Appointed Lawyer in Misdemeanor Appeal (form CR-133)***

The committee proposes a number of changes to this form for requesting a court-appointed lawyer, to be consistent with *Gardner*. Currently, the form is addressed exclusively to an appellant who has filed a notice of appeal, and the instructions refer only to a convicted defendant as eligible for appointed counsel. References to “appellant” and “your notice of appeal” in various places on the form would be replaced with “defendant” and “the notice of appeal.” The instructions would be revised to include defendants in *Gardner* situations by adding the same new language proposed for item 5 on form CR-131-INFO.

### **Alternatives Considered**

The committee considered proposing narrower language in rule 8.851 to implement *Gardner*, but concluded that the Supreme Court’s analysis of the right to counsel was broad enough potentially to include proceedings other than a pretrial prosecution appeal of an order granting a motion to suppress evidence that take place before the trial court issues a final judgment.

The committee considered adding language to implement *Gardner* by retaining current rule 8.851(a)(1) regarding convicted defendants for whom the appellate division must appoint counsel and adding a new subdivision (a)(2) regarding defendants accused of a misdemeanor. However, for clarity and to avoid repetitiveness, the committee is proposing to reorganize subdivision (a)(1) as described above.

The committee considered proposing that subdivision (a)(2), which authorizes the appellate division to appoint counsel for any other indigent defendant “convicted of a misdemeanor,” be amended to include any other indigent defendant “accused of a misdemeanor.” However, the committee concluded that this might be an unwarranted expansion of the rule with unintended consequences. The committee is seeking comments on this alternative.

The committee also considered a new subdivision (d) of rule 8.851 regarding appointment of counsel for a defendant whose request for self-representation was denied. The committee decided not to propose a new subdivision because self-representation on appeal is not sufficiently related to the content of rule 8.851 and would be better addressed, if at all in the rules of court, in a separate rule. The proposed revisions to item 4 on form CR-131-INFO, described above, are intended to clarify that a misdemeanor defendant does not have a right of self-representation on appeal.

### **Fiscal and Operational Impacts**

Implementation requirements of this proposal would include education and training for judges and court staff. It might also result in more attorneys appointed to represent misdemeanor defendants on appeal, and a commensurate increase in the cost of providing appointed counsel. However, this proposal is required to respond to a change in the law: providing appointed counsel in circumstances encompassed by *Gardner* is mandatory, not optional, under the state Constitution.

### **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 appropriately address the stated purpose?
- Should subdivision (a)(2) of the rule be amended to authorize the appellate division, in its discretion, to appoint counsel for any other indigent defendant *accused* of a misdemeanor?
- Should the committee consider developing a separate rule regarding appointment of counsel in writ proceedings in the appellate division?

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

- Would the proposal provide cost savings? If so, please quantify.
- 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 three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

### **Attachments and Links**

1. Cal. Rules of Court, rule 8.551, at pages 5–6
2. Forms CR-131-INFO and CR-133, at pages 7–17
3. Link A: *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998

Rule 8.851 of the California Rules of Court would be amended, effective September 1, 2020, to read:

1 **Rule 8.851. Appointment of appellate counsel**

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3 **(a) Standards for appointment**

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5 (1) On application, the appellate division must appoint appellate counsel for a  
6 defendant ~~convicted of a misdemeanor~~ who was represented by appointed  
7 counsel in the trial court or establishes indigency and who:

8  
9 (A) Was convicted of a misdemeanor and is subject to incarceration or a  
10 fine of more than \$500 (including penalty and other assessments), or  
11 who is likely to suffer significant adverse collateral consequences as a  
12 result of the conviction; ~~and~~ or

13  
14 (B) ~~Was represented by appointed counsel in the trial court or establishes~~  
15 ~~indigency.~~ Is charged with a misdemeanor and the proceeding qualifies  
16 as a critical stage of the criminal process.

17  
18 (2) On application, the appellate division may appoint counsel for any other  
19 indigent defendant convicted of a misdemeanor.

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21 (3) For applications under (1)(A), a defendant is subject to incarceration or a fine  
22 if the incarceration or fine is in a sentence, is a condition of probation, or may  
23 be ordered if the defendant violates probation.

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25 **(b) Application; duties of trial counsel and clerk**

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27 (1) If defense trial counsel has reason to believe that the client is indigent and  
28 will file an appeal or is a party in a proceeding described in (a)(1)(B), counsel  
29 must prepare and file in the trial court an application to the appellate division  
30 for appointment of counsel.

31  
32 (2) If the defendant was represented by appointed counsel in the trial court, the  
33 application must include trial counsel's declaration to that effect. If the  
34 defendant was not represented by appointed counsel in the trial court, the  
35 application must include a declaration of indigency in the form required by  
36 the Judicial Council.

37  
38 (3) Within 15 court days after an application is filed in the trial court, the clerk  
39 must send it to the appellate division. A defendant may, however, apply  
40 directly to the appellate division for appointment of counsel at any time after  
41 ~~filing~~ the notice of appeal is filed.

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(4) The appellate division must grant or deny a defendant’s application for appointment of counsel within 30 days after the application is filed.

(c) \* \* \*

**Advisory Committee Comment**

*Request for Court-Appointed Lawyer in Misdemeanor Appeal* (form CR-133) may be used to request that appellate counsel be appointed in a misdemeanor case. If the ~~appellant~~ defendant was not represented by the public defender or other appointed counsel in the trial court, the ~~appellant~~ defendant must use *Defendant’s Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form ~~MC-210~~ CR-105) to show indigency. These forms are available at any courthouse or county law library or online at [www.courts.ca.gov/forms](http://www.courts.ca.gov/forms).

**Subdivision (a)(1)(B).** In *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal. 5th 998, the California Supreme Court addressed what constitutes a critical stage of the criminal process. The court provided the analysis for determining whether a defendant has a right to counsel in confrontational proceedings other than trial, and held that the pretrial prosecution appeal of an order granting the defendant’s motion to suppress evidence was a critical stage of the process at which the defendant, who was represented by appointed counsel in the trial court, had a right to appointed counsel as a matter of state constitutional law.

### 1 What does this information sheet cover?

This information sheet tells you about appeals in misdemeanor cases. It is only meant to give you a general idea of the appeal process, so it does not cover everything you may need to know about appeals in misdemeanor cases. To learn more, you should read rules 8.800–8.816 and 8.850–8.890 of the California Rules of Court, which set out the procedures for misdemeanor appeals. You can get these rules at any courthouse or county law library or online at [www.courts.ca.gov/rules](http://www.courts.ca.gov/rules).

### 2 What is a misdemeanor?

A misdemeanor is a crime that can be punished by jail time of up to one year, but not by time in state prison. (See Penal Code sections 17 and 19.2. You can get a copy of these laws at <http://leginfo.legislature.ca.gov/faces/codes.xhtml>.) If you were also charged with or convicted of a felony, then your case is a felony case, not a misdemeanor case.

### 3 What is an appeal?

An appeal is a request to a higher court to review a decision made by a lower court. **In a misdemeanor case, the court hearing the appeal is the appellate division of the superior court and the lower court—called the “trial court” in this information sheet—is the superior court.**

It is important to understand that **an appeal is NOT a new trial**. The appellate division will not consider new evidence, such as the testimony of new witnesses or new exhibits. The appellate division’s job is to review a record of what happened in the trial court and the trial court’s decision to see if certain kinds of legal errors were made in the case:

- **Prejudicial error:** The party that appeals (called the “appellant”) may ask the appellate division to determine if an error was made about either the law or court procedures in the case that caused substantial harm to the appellant (this is called “prejudicial error”). Prejudicial error can include things like errors made by the judge about the law, errors or misconduct by the lawyers, incorrect

For information about appeal procedures in other cases, see:

- *Information on Appeal Procedures for Infractions* (form CR-141-INFO)
- *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO)

You can get these forms at any courthouse or county law library or online at [www.courts.ca.gov/forms](http://www.courts.ca.gov/forms).

instructions given to the jury, and misconduct by the jury that harmed the appellant. When it conducts its review, the appellate division presumes that the judgment, order, or other decision being appealed is correct. It is the responsibility of the appellant to show the appellate division that an error was made and that the error was harmful.

- **No substantial evidence:** The appellant may also ask the appellate division to determine if there was substantial evidence supporting the judgment, order, or other decision being appealed. When it conducts its review, the appellate division only looks to see if there was evidence that reasonably supports the decision. The appellate division generally will not reconsider the jury’s or trial court’s conclusion about which side had more or stronger evidence or whether witnesses were telling the truth or lying.

**The appellate division generally will not overturn the judgment, order, or other decision being appealed unless the record clearly shows that one of these legal errors was made.**

### 4 Do I need a lawyer to appeal?

You will probably need a lawyer. You are **not** allowed to represent yourself in an appeal in a misdemeanor case **unless** the appellate division permits you to do so. But appeals can be complicated, and you would have to follow the same rules that lawyers have to follow. If you have any questions about the appeal procedures, you should talk to a lawyer.

If the appellate division permits you to represent yourself, you must put your address, telephone number,



fax number, and email address (if available) on the cover of every document you file with the court and let the court know if this contact information changes so that the court can contact you if needed.

If the appellate division does not permit you to represent yourself, you must hire a lawyer at your own expense or ask the court to appoint a lawyer to represent you.

### 5 How do I get a lawyer to represent me?

The court is required to appoint a lawyer to represent you if you are indigent (you cannot afford to pay for a lawyer) and:

- You were convicted and your punishment includes going to jail or paying a fine of more than \$500 (including penalty and other assessments); or
- You are likely to suffer other significant harm as a result of being convicted; or
- The appeal is before a final judgment, and you are likely to suffer significant harm if you lose the appeal.

See rule 8.851 of the California Rules of Court for more information about when the court is required to appoint a lawyer to represent you.

The court may, but is not required to, appoint a lawyer to represent you on appeal in other circumstances if you are indigent. You are automatically considered indigent if you were represented by the public defender or other court-appointed lawyer in the trial court. You will also be considered indigent if you can show that your income and assets are too low to pay for a lawyer.

If you think you are indigent, you can ask the court to appoint a lawyer to represent you for your appeal. You may use *Request for Court-Appointed Lawyer in Misdemeanor Appeal* (form CR-133) to ask the court to appoint a lawyer to represent you on appeal in a misdemeanor case. You can get form CR-133 at any courthouse or county law library or online at [www.courts.ca.gov/forms](http://www.courts.ca.gov/forms).

If you want a lawyer and you are not indigent or if the court turns down your request to appoint a lawyer, you must hire a lawyer at your own expense. You can get

information about finding a lawyer on the California Courts Online Self-Help Center at [www.courts.ca.gov/selfhelp.htm](http://www.courts.ca.gov/selfhelp.htm) at the “Getting Started” tab.

### 6 Who can appeal?

Only a party in the trial court case can appeal a decision in that case. You may not appeal on behalf of a friend, a spouse, a child, or another relative.

The party that is appealing is called the APPELLANT; in a misdemeanor case, this is usually the party convicted of committing the misdemeanor. The other party is called the RESPONDENT; in a misdemeanor case, this is usually the government agency that filed the criminal charges (on court papers, this party is called the People of the State of California).

### 7 Can I appeal any decision that the trial court made?

No. Generally, you may appeal only the final judgment—the decision at the end that decides the whole case. The final judgment includes the punishment that the court imposed. With the exception listed below, rulings made by the trial court before final judgment generally cannot be separately appealed, but can be reviewed only later as part of an appeal of the final judgment. In a misdemeanor case, the party convicted of committing a misdemeanor usually appeals that conviction or the sentence (punishment) ordered by the trial court. In a misdemeanor case, a party can also appeal:

- Before the trial court issues a final judgment in the case, from an order granting or denying a motion to suppress evidence (Penal Code section 1538.5(j))
- From an order made by the trial court after judgment that affects a substantial right of the appellant (Penal Code section 1466(2)(B))

You can get a copy of these laws at <http://leginfo.legislature.ca.gov/faces/codes.xhtml>.

### 8 How do I start my appeal?

First, you must file a notice of appeal. The notice of appeal tells the other party in the case and the trial court that you are appealing the trial court’s decision. You may use *Notice of Appeal (Misdemeanor)* (form



CR-132) to prepare and file a notice of appeal in a misdemeanor case. You can get form CR-132 at any courthouse or county law library or online at [www.courts.ca.gov/forms](http://www.courts.ca.gov/forms).

Filing the notice of appeal does NOT automatically postpone your punishment, such as serving time in jail, paying fines, or probation conditions.

If you have been sentenced to jail in a misdemeanor case, you have a right to be released either with or without bail while your appeal is waiting to be decided, but you must ask the court to set bail or release you. If the trial court has not set bail or released you after your notice of appeal has been filed, you must ask the trial court to set bail or release you. If the trial court denies your release or sets the bail amount higher than you think it should be, you can apply to the appellate division for release or for lower bail.

Other parts of your punishment, such as fines or probation conditions, will be postponed (“stayed”) only if you request a stay and the court grants your request. If you want a stay, you must first ask the trial court for a stay. You can also apply to the appellate division for a stay, but you must show in your application to the appellate division that you first asked the trial court for a stay and that the trial court unjustifiably denied your request. If you do not get a stay and you do not pay your fine or complete another part of your punishment by the date ordered by the court, a warrant may be issued for your arrest or a civil collections process may be started against you, which could result in a civil penalty being added to your fine.

### 9 Is there a deadline for filing my notice of appeal?

Yes. Except in the very limited circumstances listed in rule 8.853(b), in a misdemeanor case, you must file your notice of appeal within **30 days** after the trial court makes (“renders”) its final judgment in your case or issues the order you are appealing. (You can get a copy of rule 8.853 at any courthouse or county law library or online at [www.courts.ca.gov/rules](http://www.courts.ca.gov/rules)). The date the trial court makes its judgment is normally the date the trial court issues its order saying what your punishment is (sentences you). **This deadline for filing the notice of appeal cannot be extended. If your notice of appeal is late, the appellate division will not be able to consider your appeal.**

### 10 How do I file my notice of appeal?

To file the notice of appeal in a misdemeanor case, you must bring or mail the original notice of appeal to the clerk of the trial court that made the judgment or issued the order you are appealing. It is a good idea to bring or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

There is no fee for filing the notice of appeal in a misdemeanor case. You can ask the clerk of that court if there are any other requirements for filing your notice of appeal.

After you file your notice of appeal, the clerk will send a copy of your notice of appeal to the office of the prosecuting attorney (for example, the district attorney, county counsel, city attorney, or state Attorney General).

### 11 If I file a notice of appeal, do I still have to go to jail or complete other parts of my punishment?

### 12 What do I need to do after I file my appeal?

You must tell the trial court (1) whether you have agreed with the respondent (“stipulated”) that you do not need parts of the normal record on appeal, and (2) whether you want a record of what was said in the trial court (this is called a record of the “oral proceedings”) sent to the appellate division and, if so, what form of that record you want to use. You may use *Notice Regarding Record on Appeal (Misdemeanor)* (form CR-134) for this notice. (You can get form CR-134 at any courthouse or county law library or online at [www.courts.ca.gov/forms](http://www.courts.ca.gov/forms)). You must file this notice either:

- Within 20 days after you file your notice of appeal; or, if it is later,



- Within 10 days after the court decides whether to appoint a lawyer to represent you (if you ask the court to appoint a lawyer within 20 days after you file your notice of appeal).

local rule permitting this and you and the respondent (the prosecuting agency) agree (“stipulate”) to this, you can use the *official electronic recording* itself as the record, instead of a transcript.

- c. You can use a *statement on appeal*.

Read below for more information about these options.

#### a. Reporter’s transcript

**When available:** In some misdemeanor cases, a court reporter is there in the trial court and makes a record of the oral proceedings. If a court reporter made a record of your case, you can ask to have the court reporter prepare a transcript of those oral proceedings, called a “reporter’s transcript.” You should check with the trial court to see if a court reporter made a record of your case before you choose this option. Some courts also have local rules that establish procedures for deciding whether a statement on appeal or a transcript of only some of the oral proceedings will be a good enough record to consider the issues you are raising on appeal. You should check whether the court has such a local rule.

**Cost:** Ordinarily, the appellant must pay for preparing a reporter’s transcript. The court reporter will provide the clerk of the trial court with an estimate of the cost of preparing the transcript and the clerk will notify you of this estimate. If you want the reporter to prepare a transcript, you must deposit this estimated amount or one of the substitutes allowed under rule 8.866 with the clerk within 10 days after the clerk sends you the estimate. However, under rule 8.866 you can decide to use a different form of the record or take other action instead of proceeding with a reporter’s transcript.

If, however, you are indigent (you cannot afford to pay the cost of a reporter’s transcript), you may be able to get a free transcript. If you were represented by the public defender or another court-appointed lawyer in the trial court, you are automatically considered indigent. If you were not represented by a court-appointed lawyer in the trial court, you can complete and file *Defendant’s Financial Statement on Eligibility for Appointment*

### 13 In what cases does the appellate division need a record of what was said in the trial court?

You do not *have* to send the appellate division a record of what was said in the trial court. But if you want to raise any issue in your appeal that would require the appellate division to consider what was said in the trial court, the appellate division will need a record of these oral proceedings. For example, if you are claiming that there was not substantial evidence supporting the judgment, order, or other decision you are appealing, the appellate division will need a record of the oral proceedings. Since the appellate division judges were not there for the proceedings in the trial court, an official record of these oral proceedings must be prepared and sent to the appellate division for its review.

Depending on what form of the record you choose to use, you will be responsible for paying to have the official record of the oral proceedings prepared (unless you are indigent) or for preparing an initial draft of this record yourself. If you do not take care of these responsibilities, a record of the oral proceedings in the trial court will not be prepared and sent to the appellate division. If the appellate division does not receive this record, it will not be able to consider what was said in the trial court in deciding whether a legal error was made and it may dismiss your appeal.

### 14 What are the different forms of the record?

There are three ways a record of the oral proceedings in the trial court can be prepared and provided to the appellate division in a misdemeanor case:

- If a court reporter was there during the trial court proceedings, the reporter can prepare a record called a “*reporter’s transcript*.”
- If the proceedings were officially electronically recorded, the trial court can have a transcript prepared from that recording; or if the court has a



*of Counsel and Reimbursement and Record on Appeal at Public Expense* (form CR-105), to show that you are indigent. You can get form CR-105 at any courthouse or county law library or online at

[www.courts.ca.gov/forms](http://www.courts.ca.gov/forms). The court will review this form to decide whether you are indigent.

If the court finds that you are indigent, a court reporter made a record of your case, and you show that you need a transcript, the court must provide you with a free transcript. Whether you need a transcript depends on the issues you are raising on appeal. If the issues you are raising on appeal include that there was not substantial evidence supporting the judgment, order, or other decision you are appealing or that there was misconduct in your case that harmed you, that is generally enough to show that you need a transcript. If you ask for a reporter's transcript, the court may ask you what issues you are raising on appeal and may decide that a statement on appeal or a transcript of only some of the oral proceedings will be a good enough record to consider the issues you are raising.

If the court finds that you are not indigent, it will send you a notice and you will have a chance to pick another form of the record or take other actions listed in rule 8.866.

**Completion and delivery:** Once you deposit the estimated cost of the transcript or one of the substitutes allowed under rule 8.866 or show the court you are indigent and need a transcript, the clerk will notify the reporter to prepare the transcript. When the reporter completes the transcript, the clerk will send the reporter's transcript to the appellate division along with the clerk's transcript.

**b. Official electronic recording or transcript from an official recording**

**When available:** In some misdemeanor cases, the trial court proceedings are officially recorded on approved electronic recording equipment. If your case was officially recorded, you can ask to have a transcript prepared from that official electronic recording. You should check with the trial court to

see if your case was officially electronically recorded before you choose this option. As with reporter's transcripts, some courts also have local rules that establish procedures for deciding

whether a statement on appeal or a transcript of only some of the oral proceedings will be a good enough record to consider the issues you are raising on appeal. You should check whether the court has such a local rule.

If the court has a local rule for the appellate division permitting this and all the parties agree ("stipulate"), a copy of the official electronic recording itself can be used as the record of the oral proceedings instead of preparing a transcript. You should check with the trial court to see if your case was officially electronically recorded and check to make sure there is a local rule permitting the use of the recording itself before choosing this option. If you choose this option, you must attach a copy of your agreement with the other parties (called a "stipulation") to your notice regarding the oral proceedings.

**Cost:** Ordinarily, the appellant must pay for preparing a transcript or making a copy of the official electronic recording. The court will send you an estimate of the cost for this transcript or the copy of the electronic recording. If you still want this transcript or recording, you must deposit this amount with the court. However, you can also choose to use a statement on appeal instead, or take one of the other actions listed in rule 8.868.

If, however, you are indigent (you cannot afford to pay the cost of the transcript or recording), you may be able to get a free transcript or recording. If you were represented by the public defender or another court-appointed attorney in the trial court, you are automatically considered indigent. If you were not represented by a court-appointed lawyer in the trial court, you can complete and file *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form CR-105) to show that you are indigent. You can get form CR-105 at any courthouse or county law library or online at [www.courts.ca.gov/forms](http://www.courts.ca.gov/forms). The



court will review this form to decide whether you are indigent.

If you are indigent, an official electronic recording of your case was made, and you show that you need a transcript, the court must provide you with a free transcript. As with reporter's transcripts, whether you need a transcript depends on the issues you are raising on appeal. If the issues you are raising on appeal include that there was not substantial evidence supporting the judgment, order, or other decision you are appealing or that there was misconduct in your case that harmed you, that is generally enough to show that you need a transcript. If you ask for a transcript, the court may ask you what issues you are raising on appeal and may decide that a statement on appeal or a transcript of only some of the oral proceedings will be a good enough record to consider the issues you are raising.

If the court finds that you are not indigent, it will send you a notice and you will have a chance to use a statement on appeal instead or take one of the other actions listed in rule 8.868.

**Completion and delivery:** Once you deposit the estimated cost of the transcript or the official electronic recording with the clerk or show the court you are indigent and need a transcript, the clerk will have the transcript or copy of the recording prepared. When the transcript is completed or the copy of the official electronic recording is prepared, the clerk will send the transcript or recording to the appellate division along with the clerk's transcript.

### **c. Statement on appeal**

**Description:** A statement on appeal is a summary of the trial court proceedings approved by the trial court judge who conducted those proceedings (the term "judge" includes commissioners and temporary judges).

**When available:** If the trial court proceedings were not recorded either by a court reporter or by official electronic recording equipment, or if you do not want to use either of these forms of the

record, you can choose ("elect") to use a statement on appeal as the record of the oral proceedings in

the trial court (please note that it may take more of your time to prepare a statement on appeal than to use either a reporter's transcript or electronic recording, if they are available).

**Contents:** A statement on appeal must include:

- A statement of the points you (the appellant) are raising on appeal;
- A summary of the trial court's rulings and judgment; and
- A summary of the testimony of each witness and other evidence that is relevant to the issues you are raising on appeal.

(See rule 8.869 of the California Rules of Court for more information about what must be included in a statement on appeal and the procedures for preparing a statement. You can get this rule at any courthouse or county law library or online at [www.courts.ca.gov/rules.htm](http://www.courts.ca.gov/rules.htm).)

**Preparing a proposed statement:** If you choose to use a statement on appeal, you must prepare a proposed statement. If you are not represented by a lawyer, you must use *Proposed Statement on Appeal (Misdemeanor)* (form CR-135) to prepare your proposed statement. You can get form CR-135 at any courthouse or county law library or online at [www.courts.ca.gov/forms](http://www.courts.ca.gov/forms).

**Serving and filing a proposed statement:** You must serve and file your proposed statement in the trial court within 20 days after you file your notice regarding the record of the oral proceedings. "Serve and file" means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") a copy of the proposed statement to the prosecuting attorney and any other party in the way required by law.
- Make a record that the proposed statement has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)*



(form APP-109) can be used to make this record. The proof of service must show who

served the proposed statement, who was served with the proposed statement, how the proposed statement was served (by mail or in person), and the date the proposed statement was served.

- File the original proposed statement and the proof of service with the trial court. You should make a copy of the proposed statement you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the proposed statement to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at [www.courts.ca.gov/selfhelp-serving.htm](http://www.courts.ca.gov/selfhelp-serving.htm).

**Review and modifications:** The prosecuting attorney and any other party have 10 days from the date you serve your proposed statement to serve and file proposed changes (called “amendments”) to this statement. The trial court judge then reviews both your proposed statement and any proposed amendments filed by the prosecuting attorney and any other party. The judge will then make or order you to make any corrections or modifications to the statement needed to make sure that the statement provides a complete and accurate summary of the relevant testimony and other evidence.

**Completion and certification:** If the judge makes or orders you to make any corrections or modifications to the proposed statement, the corrected or modified statement will be sent to you, the prosecuting attorney, and any other party for your review. If you disagree with anything in the judge’s statement, you will have 10 days from the date the statement is sent you to serve and file objections to the statement. The judge then reviews any objections, makes any additional corrections to the statement, and certifies the

statement as a complete and accurate summary of the relevant testimony and other evidence.

**Sending the statement to appellate division:** Once the trial court judge certifies the statement on appeal, the trial court clerk will send the statement to the appellate division along with the clerk’s transcript.

### 15 Is there any other part of the record that needs to be sent to the appellate division?

Yes. There are two other parts of the official record that need to be sent to the appellate division:

- **Documents filed in the trial court:** The trial court clerk is responsible for preparing a record of the written documents filed in your case, called a “clerk’s transcript,” and sending this to the appellate division. (The documents the clerk must include in this transcript are listed in rule 8.861 of the California Rules of Court. You can get a copy of this rule at any courthouse or county law library or online at [www.courts.ca.gov/rules.htm](http://www.courts.ca.gov/rules.htm).)
- **Exhibits submitted during trial:** Exhibits, such as photographs, that were admitted in evidence, refused, or lodged (temporarily placed with the court) in the trial court are considered part of the record on appeal. If you want the appellate division to consider such an exhibit, however, you must ask the trial court clerk to send the original exhibit to the appellate division within 10 days after the last respondent’s brief is filed in the appellate division. (See rule 8.870 of the California Rules of Court for more information about this procedure. You can get a copy of this rule at any courthouse or county law library or online at [www.courts.ca.gov/rules](http://www.courts.ca.gov/rules).) Sometimes, the trial court returns an exhibit to a party at the end of the trial. If the trial court returned an exhibit to you or another party and you or the other party ask for the exhibit to be sent to the appellate division, the party who has the exhibit must deliver that exhibit to the appellate division as soon as possible.



**16 What happens after the record is prepared?**

As soon as the record of the oral proceeding is ready, the clerk of the trial court will send it to the appellate division along with the clerk's transcript. When the appellate division receives this record, it will send you a notice telling you when you must file your brief in the appellate division.

**17 What is a brief?**

A brief is a party's written description of the facts in the case, the law that applies, and the party's argument about the issues being appealed. If you are represented by a lawyer in your appeal, your lawyer will prepare your brief. If the appellate division has permitted you to represent yourself, you will have to prepare your brief yourself. You should read rules 8.880–8.891 of the California Rules of Court, which set out the requirements for preparing, serving, and filing briefs in misdemeanor appeals, including requirements for the format and length of those briefs. You can get copies of these rules at any courthouse or county law library or online at [www.courts.ca.gov/rules.htm](http://www.courts.ca.gov/rules.htm).

**Contents:** If you are the appellant (the party who is appealing), your brief, called the "appellant's opening brief," must clearly explain what you believe are the legal errors made in the trial court. Your brief must refer to the exact places in the clerk's transcript and the reporter's transcript (or other record of the oral proceedings) that support your argument. Remember that an appeal is not a new trial. The appellate division will not consider new evidence, such as the testimony of new witnesses or new exhibits, so do not include any new evidence in your brief.

**Serving and filing:** You must serve and file your brief in the appellate division by the deadline the court set in the notice it sent you, which is usually 30 days after the record is filed in the appellate division. "Serve and file" means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the brief to the respondent (the prosecuting agency) and any other party in the way required by law.

- Make a record that the brief has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to

make this record. The proof of service must show who served the brief, who was served with the brief, how the brief was served (by mail or in person), and the date the brief was served.

- File the original brief and the proof of service with the appellate division. You should make a copy of the brief you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the brief to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and at [www.courts.ca.gov/selfhelp-serving.htm](http://www.courts.ca.gov/selfhelp-serving.htm).

**If you do not file your brief by the deadline set by the appellate division, the court may dismiss your appeal.**

**18 What happens after I file my brief?**

Within 30 days after you serve and file your brief, the respondent (the prosecuting agency) may, but is not required to, respond by serving and filing a respondent's brief. If the respondent does not file a brief, the appellant does not automatically win the appeal. The court will decide the appeal on the record, the appellant's brief, and any oral argument by the appellant.

If the respondent serves and files a brief, within 20 days after the respondent's brief was served, you may, but are not required to, serve and file another brief replying to the respondent's brief. This is called a "reply brief."

**19 What happens after all the briefs have been filed?**

Once all the briefs have been served and filed or the time to serve and file them has passed, the court will notify you of the date for oral argument in your case unless your case presents no arguable issues for the court to



consider. If your case presents no arguable issues, the court will not hold oral argument.

### **20 What is oral argument?**

“Oral argument” is the parties’ chance to explain their arguments to the appellate division judges in person. You do not have to participate in oral argument if you do not want to; you can notify the appellate division that you want to “waive” (give up) oral argument by serving and filing a notice within 7 days after the notice of oral argument was sent by the court. You can use *Notice of Waiver of Oral Argument (Misdemeanor)* (form CR-138) to waive oral argument.

If all parties waive oral argument, and the appellate division approves the waiver and takes the oral argument off calendar, the judges will decide your appeal based on the briefs and the record that were submitted. But if one party waives oral argument and another party or parties do not, the appellate division will hold oral argument with any party or parties who choose to participate, including any party who asked to waive oral argument.

If you choose to participate in oral argument, each party will have up to 10 minutes for argument, unless the court orders otherwise. If the appellate division has permitted you to represent yourself, remember that the judges will already have read the briefs, so you do not need to read your brief to the judges. It is more helpful to tell the judges what you think is most important in your appeal or ask the judges if they have any questions you could answer.

### **21 What happens after oral argument?**

After the oral argument is held (or all parties waive oral argument and the court approves the waiver), the judges of the appellate division will make a decision about your appeal. The appellate division has 90 days after oral argument (or the date its waiver was approved) to decide the appeal. The clerk of the court will mail you a notice of that decision.

### **22 What should I do if I want to give up my appeal?**

If you decide you do not want to continue with your appeal, you must file a written document with the appellate division notifying it that you are giving up (this is called “abandoning”) your appeal. You can use *Abandonment of Appeal (Misdemeanor)* (form CR-137) to file this notice in a misdemeanor case. You can get form CR-137 at any courthouse or county law library or online at [www.courts.ca.gov/forms.htm](http://www.courts.ca.gov/forms.htm).

If you decide not to continue your appeal and it is dismissed, you will (with only very rare exceptions) permanently give up the chance to raise any objections to your conviction, sentence, or other matter that you could have raised on the appeal. If you were released from custody with or without bail or your sentence or any probation conditions were stayed during the appeal, you may be required to start serving your sentence or complying with your probation conditions immediately after your appeal is dismissed.

*Clerk stamps date here when form is filed.*

**DRAFT**

**11-21-19**

**Not approved by the Judicial Council**

**Instructions**

- This form is only for requesting that the court appoint a lawyer to represent a defendant in a **misdemeanor** appeal.
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131-INFO at any courthouse or county law library or online at [www.courts.ca.gov/forms](http://www.courts.ca.gov/forms).
- The court is required to appoint a lawyer to represent you if you are indigent (you cannot afford to pay for a lawyer) and:
  - (1) You were convicted and your punishment includes going to jail or paying a fine of more than \$500 (including penalty and other assessments); or
  - (2) You are likely to suffer other significant harm as a result of being convicted; or
  - (3) The appeal is before a final judgment, and you are likely to suffer significant harm if you lose the appeal.
- Fill out this form and make a copy of the completed form for your records.
- Take or mail the completed form to the clerk’s office for the same trial court where the notice of appeal was filed. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

*You fill in the name and street address of the court that issued the judgment or order you are appealing:*

**Superior Court of California, County of**

*You fill in the number and name of the trial court case in which you are appealing the judgment or order:*

**Trial Court Case Number:**

**Trial Court Case Name:**

*You fill in the appellate division case number (if you know it):*

**Appellate Division Case Number:**

**1 Your Information**

a. Name of **Defendant** (the party who is filing this **request**):

Name: \_\_\_\_\_

Street address: \_\_\_\_\_  
*Street City State Zip*

Mailing address (if different): \_\_\_\_\_  
*Street City State Zip*

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

b. **Defendant’s lawyer** (skip this if the **defendant** is filling out this form):

Name: \_\_\_\_\_ State Bar number: \_\_\_\_\_

Street address: \_\_\_\_\_  
*Street City State Zip*

Mailing address (if different): \_\_\_\_\_  
*Street City State Zip*

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

Fax: \_\_\_\_\_



**Information About Your Case**

- 2 Were you/was your client represented by the public defender or another court-appointed lawyer in the trial court proceedings in this case? (Check a or b.)
  - a.  Yes
  - b.  No (Complete and attach Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (form MC-210) showing that you/your client cannot afford to hire a lawyer. You can get form MC-210 at any courthouse or county law library or online at www.courts.ca.gov/forms.)

3 If you have been convicted, describe the punishment the trial court gave you/your client in this case (check all that apply and fill in any required information):

- a.  Jail time
- b.  A fine (including penalty and other assessments) (fill in the amount of the fine): \$ \_\_\_\_\_
- c.  Restitution (fill in the amount of the restitution): \$ \_\_\_\_\_
- d.  Probation (fill in the amount of time on probation): \_\_\_\_\_
- e.  Other punishment (describe any other punishment that the trial court gave you/your client in this case):  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

f.  Describe any significant harm that you are/your client is likely to suffer because of this conviction:  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

4 If this appeal is before a final judgment, describe any significant harm that you are/your client is likely to suffer if you lose/your client loses the appeal:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**Notice to Defendant:** If you were represented by appointed counsel in the trial court and the trial court finds that you are able to pay all or part of the cost of that counsel, at the conclusion of the proceedings, the court may also determine after a hearing whether you are able to pay all or a portion of the cost of any attorney appointed to represent you in this appeal. If the court determines that you are at that time able to pay, the court will order you to pay all or part of such cost. Such orders will have the same force and effect as a judgment in a civil action and will be subject to enforcement.

Date: \_\_\_\_\_

\_\_\_\_\_  
 Type or print name

\_\_\_\_\_  
 Signature of defendant or attorney