



Judicial Council of California · Administrative Office of the Courts

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: February 28, 2012

Title	Agenda Item Type
Appellate Procedure: Briefs	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rules 8.212, 8.360, and 8.882	January 1, 2013
Recommended by	Date of Report
Appellate Advisory Committee Hon. Kathryn Doi Todd, Chair	August 1, 2011
	Contact
	Heather Anderson, 415-865-7691 heather.anderson@jud.ca.gov

Executive Summary

The Appellate Advisory Committee recommends amending the rules relating to briefs to (1) alert rule users to the fact that there may be statutory limitations on extensions of briefing time; (2) clarify when to file briefs when there is a cross-appeal; and (3) clarify who must be served with the People's brief in felony appeals in which the appellant is the People. These changes will make the rules clearer and easier to follow.

Recommendation

The Appellate Committee recommends that the Judicial Council, effective January 1, 2013:

1. Amend rules 8.212 and 8.882 to clarify that the stipulated extensions provided under these rules are available "unless otherwise provided by statute;"
2. Amend the Advisory Committee Comment accompanying rule 8.212 to
 - a. Add a provision indicating that extensions of briefing time are limited by statute in some cases;

- b. Add a provision noting that rule 8.216 addresses the sequence and timing of briefing when there is a cross-appeal and that, in such cases, the cross-appellant's combined respondent's brief and opening brief typically must be filed within the period for filing a respondent's brief; and
 - c. Update references concerning electronic service addresses and a web address.
3. Add a new Advisory Committee Comment accompanying rule 8.882 containing the same content as the proposed additions to the comment to rule 8.212; and
4. Amend rule 8.360 to clarify that:
 - a. The People's briefs must be served on appellate counsel for each defendant who is a party to the appeal and on the district appellate project; and
 - b. If the district attorney is representing the People, the district attorney must also serve one copy of its brief on the Attorney General.

The text of the proposed rules is attached at pages 5–8.

Previous Council Action

The predecessor to rule 8.212, rule 16, regarding the time for filing briefs in civil appeals in the Court of Appeal, was adopted by the Judicial Council effective July 1, 1943. As adopted, this rule provided that the appellant's opening brief must be filed within 30 days after the record is filed, that the respondent's brief must be filed within 30 days after the appellant's opening brief is filed, and that parties may stipulate to extend each briefing period by up to 60 days. This rule was subsequently repealed and new rule 15 addressing this topic was adopted effective January 1, 2002 and as rule 8.212 effective January 1, 2007. Effective January 1, 2010, this rule was amended to provide that the appellant's opening brief must be filed within 40 days after the record is filed.

The predecessor to rule 8.882, regarding the time for filing briefs in civil appeals in the superior court appellate division, rule 5 of the Appellate Department Rules, was adopted by the Judicial Council effective September 15, 1945. Rule 5 did not provide for stipulated extensions of briefing time. This rule was renumbered as rule 105 in 1962. All of the appellate division rules were repealed and new appellate division rules were adopted by the Judicial Council effective January 1, 2009. As originally adopted, rule 8.882 did not provide for stipulated extensions of briefing time, but before it took effect on January 1, 2009, it was amended to provide that parties may stipulate to extend each briefing period by up to 30 days.

The predecessor to rule 8.360, rule 37, regarding briefs in felony appeals in the Court of Appeal, was adopted by the Judicial Council effective July 1, 1943. As adopted, this rule did not specifically address service of briefs by the People. Effective July 1, 1995, this rule was amended to provide that the People were required to serve two copies of their briefs on the defendant's counsel, if appointed. Effective January 1, 2004, rule 37 was repealed and replaced with rule 33,

which provided, in relevant part, that for each appealing defendant, the People must serve two copies of their briefs on the defendant's appellate counsel and one copy on the district appellate project. This rule was renumbered as rule 8.360 effective January 1, 2007.

Rationale for Recommendation

Statutory limits on extension of briefing time (rules 8.212 and 8.882)

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

Some statutes, however, limit extensions of briefing time. For example, under Public Resources Code section 21167.6(h), extensions are limited to one 30-day extension for the opening brief and one 30-day extension for "preparation of responding brief." To alert rule users to the existence of these potential limitations, this proposal would amend rules 8.212 and 8.882 to provide that stipulated extensions are available "unless otherwise provided by statute." In addition, the advisory committee comment accompanying rule 8.212 would be amended and a new comment added to rule 8.882 to indicate that the ability to extend briefing time may be limited by statute, such as Public Resources Code section 21167.6.

Briefing periods when there is a cross-appeal (rules 8.212 and 8.882)

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

Despite rules 8.216 and 8.884, some members of the Appellate Advisory Committee have encountered parties who are confused about the applicable briefing period when there is a cross-appeal. To help prevent this confusion, this proposal would make two clarifying changes to the advisory committee comment accompanying rule 8.212. First, it would add language to the

comment noting that rule 8.216 addresses the sequence and timing of briefing when there is a cross-appeal. Second, it would add language noting that, in such cases, the cross-appellant's combined respondent's brief and opening brief typically must be filed within the period for filing a respondent's brief. Similar language would be included in the new advisory committee comment to rule 8.882.

Service of briefs in felony appeals when the appellant is the People (rule 8.360)

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

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

Comments, Alternatives Considered, and Policy Implications

Comments

This proposal was circulated between April 21 and June 20, 2011, as part of the regular spring 2011 comment cycle. Nine individuals or organizations submitted comments on this proposal. Eight commentators agreed with the proposal, and one did not indicate a position on the proposal. The full text of the comments received and the committee responses are set out in the attached comment chart at pages 9–11. One commentator suggested additional changes to rule 8.212 for the committee's future consideration. The committee has already recently considered one of these suggestions, but will consider the other during an upcoming committee year.

Alternatives Considered

The committee considered not recommending any changes to these rules. The committee concluded, however, that the proposed amendments would provide helpful guidance to litigants without imposing appreciable costs on the courts and therefore that it is preferable to amend the rules.

Implementation Requirements, Costs, and Operational Impacts

The proposal should not result in appreciable implementation requirements, costs, or operational impacts.

Attachments

1. Cal. Rules of Court, rules 8.212, 8.360, and 8.882 at pages 5–8
2. Comment Chart at page 9–11

Rules 8.212, 8.360, and 8.882 of the California Rules of Court are amended, effective January 1, 2013, to read:

Title 8. Appellate Rules

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

Chapter 2. Civil Appeals

Article 3. Briefs in the Court of Appeal

Rule 8.212. Service and filing of briefs

(a) Time to file

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

(b) Extensions of time

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

(2)–(4) * * *

1 (c) Service

2
3 (1) * * *

4
5 (2) One electronic copy or four paper copies of each brief must be served on the
6 Supreme Court as provided in either (A) or (B).

7
8 (A) One copy of each brief may be served on the Supreme Court electronically by
9 sending the copy to the Supreme Court’s electronic ~~notification~~ service
10 address.

11
12 (i) * * *

13
14 (ii) * * *

15
16 (B) * * *

17
18 (3) * * *

19
20 **Advisory Committee Comment**

21
22 **Subdivision (a).** Note that the sequence and timing of briefing in appeals in which a party is both
23 appellant and respondent (cross-appeals) are governed by rule 8.216. Typically, a cross-appellant’s
24 combined respondent’s brief and opening brief must be filed within the time specified in (a)(2) for the
25 respondent’s brief.

26
27 **Subdivision (b).** Extensions of briefing time are limited by statute in some cases. For example, under
28 Public Resources Code section 21167.6(h) in cases under section 21167, extensions are limited to one 30-
29 day extension for the opening brief and one 30-day extension for “preparation of responding brief.” ~~In~~
30 criminal cases, stipulated extensions of time to file briefs are prohibited by rule. (See rule 8.360(c)(4).)

31
32 Subdivision (b)(2) clarifies that a party seeking an extension of time from the presiding justice must
33 proceed by application under rule 8.50 rather than by motion under rule 8.54.

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

41
42 **Subdivision (e).** “Electronic ~~notification~~ service address” is defined in rule ~~2.250~~ 8.70. The Supreme
43 Court’s electronic filing address can be found on the California Courts website at
44 ~~www.courtinfo.ca.gov/courts/supreme~~ www.courts.ca.gov/appellatebriefs.htm.

1 **Chapter 3. Criminal Appeals**

2
3 **Article 3. Briefs, Hearing, and Decision**

4
5 **Rule 8.360. Briefs by parties and amici curiae**

6
7 **(a)–(c) * * ***

8
9 **(d) Service**

- 10
11 (1) Defendant’s appellate counsel must serve each brief for the defendant on the People
12 and the district attorney, and must send a copy of each to the defendant personally
13 unless the defendant requests otherwise.
14
15 (2) The proof of service under (1) must state that a copy of the defendant’s brief was
16 sent to the defendant, or counsel must file a signed statement that the defendant
17 requested in writing that no copy be sent.
18
19 (3) ~~For each appealing defendant, t~~The People must serve two copies of their briefs on
20 the ~~defendant’s~~ appellate counsel for each defendant who is a party to the appeal and
21 one copy on the district appellate project. If the district attorney is representing the
22 People, one copy of the district attorney’s brief must be served on the Attorney
23 General.
24
25 (4) A copy of each brief must be served on the superior court clerk for delivery to the
26 trial judge.

27
28 **(e)–(f) * * ***

29
30
31 **Division 2. Rules Relating to the Superior Court Appellate Division**

32
33 **Chapter 4. Briefs, Hearing, and Decision in Limited Civil and Misdemeanor Appeals**

34
35 **Rule 8.882. Briefs by parties and amici curiae**

36
37 **(a) Briefs by parties**

- 38
39 (1) The appellant must serve and file an appellant’s opening brief within 30 days after
40 the record is filed in the appellate division.
41
42 (2) Any respondent’s brief must be served and filed within 30 days after the appellant
43 files its opening brief.

- 1
2 (3) Any appellant’s reply brief must be served and filed within 20 days after the
3 respondent files its brief.
4
5 (4) No other brief may be filed except with the permission of the presiding judge.
6
7 (5) Instead of filing a brief, or as part of its brief, a party may join in a brief or adopt by
8 reference all or part of a brief in the same or a related appeal.
9

10 **(b) Extensions of time**

- 11
12 (1) Except as otherwise provided by statute, in a civil case, the parties may extend each
13 period under (a) by up to 30 days by filing one or more stipulations in the appellate
14 division before the brief is due. Stipulations must be signed by and served on all
15 parties. The original signature of at least one party must appear on the stipulation
16 filed in the appellate division; the signatures of the other parties may be in the form
17 of fax copies of the signed signature page of the stipulation.
18

19 (2)–(4) * * *

20
21 **(c)–(e) * * ***

22
23 **Advisory Committee Comment**

24
25 **Subdivision (a).** Note that the sequence and timing of briefing in appeals in which a party is both
26 appellant and respondent (cross-appeals) are governed by rule 8.884. Typically, a cross-appellant’s
27 combined respondent’s brief and opening brief must be filed within the time specified in (a)(2) for the
28 respondent’s brief.

29
30 **Subdivision (b).** Extensions of briefing time are limited by statute in some cases. For example, under
31 Public Resources Code section 21167.6(h) in cases under section 21167 extensions are limited to one
32 30-day extension for the opening brief and one 30-day extension for “preparation of responding brief.”

SPR11-08**Appellate Procedure: Briefs** (amend Cal. Rules of Court, 8.212, 8.360, and 8.882)

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

	Commentator	Position	Comment	Committee Response
1.	Appellate Court Committee San Diego County Bar Association By Cecilia O. Miller, Chair	A	Our committee supports the revisions to rules 8.212, 8.360 and 8.882 without comment.	No response required.
2.	Committee on Appellate Courts State Bar of California Benjamin Shatz, Chair	A	No specific comment.	No response required.
3.	County Counsel, County of Los Angeles By James M. Owens, Assistant County Counsel	A	With regard to only a portion of the proposed changes, we agree with the amendments to rule 8.212 that rule 8.216 addresses the sequence and timing of briefing when there is a cross-appeal and add language that the cross-appellant's combined respondent's brief and opening brief typically must be filed within the period for filing a respondent's brief. As we are filing more cross-appeals in juvenile dependency matters, clarification of the sequence and timing of briefing would be helpful.	No response required.
4.	Judith McConnell, Presiding Justice Court of Appeal, Fourth District, Division One	A	I support the proposed changes to clarify the time for filing of appellate briefs and the service of the opening brief in felony appeals in which the People appeal. In the next cycle of proposed rule changes, I also request that the Committee consider two additional amendments to rule 8.212(b). First, I suggest an additional amendment to rule 8.212(b)(I), relating to stipulated extensions of time for the filing of briefs, to shorten the period that the parties may stipulate to extend the time for filing of a reply brief from 60 days to 20, or 40 days at the most. The current 60-day period	No response required. The committee recently considered a similar suggestion and decided not to pursue it. In considering that previous proposal, the committee sought input about whether stipulated extensions of the time to submit reply briefs caused problems with scheduling oral argument in the Courts of

SPR11-08

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

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

	Commentator	Position	Comment	Committee Response
			<p>for reply briefs slows down the time for processing many civil appeals. Moreover, since the authorized time for filing a reply brief without an extension is 20 days (rather than 40 days, as with an appellant's opening brief, or 30 days for a respondent's brief) and because the issues are already fully framed by the earlier briefing, a 60-day extension period for the reply brief is unnecessarily long.</p> <p>Second, I propose that the Committee consider modifying rule 8.212 (b)(2), which provides that a stipulated extension is effective upon filing and cannot be shortened by the court, to specify that the reviewing court may shorten a stipulated extension of time in civil cases in which calendar priority has been granted. As currently written, the rule treats all civil cases equally, in circumvention of statutes that provide for priority for certain cases, and infringes upon the court's powers under Code of Civil Procedure section 128, subdivision (a).</p>	<p>Appeal. In the majority of districts, this was not a problem. The committee also received input on this suggestion from practitioners. They noted that the ability to stipulate to extensions of this period is critical to them for several reasons, including (1) the combination of the shorter briefing period and fact that they do not control when the period begins to run makes can make it particularly difficult to plan for and meet the deadline for filing a reply brief; (2) unlike for appellants' opening brief and respondents' brief, there is no 15-day "grace period" for reply briefs under rule 8.220; and (3) attorneys cannot rely on seeking an extension from the presiding judge because different districts and divisions differ greatly in terms of their willingness to grant extensions – some grant no extensions. Taken together, this information suggested that the 60-day extension period was helpful to practitioners and was not interfering with calendaring in most districts.</p> <p>The committee appreciates this suggestion and will consider it during an upcoming committee year.</p>

SPR11-08**Appellate Procedure: Briefs** (amend Cal. Rules of Court, 8.212, 8.360, and 8.882)

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

	Commentator	Position	Comment	Committee Response
5.	Orange County Bar Association By John Hueston, President	A	No specific comment.	No response required.
6.	Orange County Public Defender's Office By Deborah Kwast – Public Defender	A	No specific comment.	No response required.
7.	Superior Court of Monterey County By Rosalinda Chavez – ACEO	A	No specific comment.	No response required.
8.	Superior Court of Sacramento County By Robert Turner – ASO II Research & Evaluation Division	NI	No specific comment.	No response required.
9.	Superior Court of San Diego County By Michael M. Roddy Executive Officer	A	No specific comment.	No response required.

