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REPORT TO THE JUDICIAL COUNCIL

For business meeting on February 28, 2012

Title
Appellate Procedure: Bringing New Authorities to the Attention of the Court of Appeal

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rule 8.254

Recommended by
Appellate Advisory Committee
Hon. Kathryn Doi Todd, Chair

Agenda Item Type
Action Required

Effective Date
July 1, 2012

Date of Report
August 1, 2011

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Executive Summary

The Appellate Advisory Committee recommends adopting a new rule establishing a procedure for bringing new authorities to the attention of the Court of Appeal after a party has filed its final brief. This rule will fill a gap in the California Rules of Court.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective July 1, 2012, adopt rule 8.254 to establish a procedure for bringing new authorities to the attention of the Court of Appeal.

The text of the proposed rules is attached at page 6.

Previous Council Action

The Judicial Council adopted the predecessor to rule 8.520, rule 29.3, regarding briefs on the merits in the California Supreme Court, effective May 6, 1985. This rule, as originally adopted, provided, among other things, that a party could file a supplemental brief to bring to the attention

of the court new authorities, newly enacted legislation, or other intervening matters not available in time to have been included in the party's brief on the merits. Rule 29.3 was repealed and the content readopted as rule 29.1 effective January 1, 2003. Effective January 1, 2007, this rule was renumbered as rule 8.520.

Rationale for Recommendation

Sometimes, after a party has filed his or her brief, a new case addressing an issue on appeal may be decided, or new legislation addressing the issue may be adopted. Rule 8.520(d) of the California Rules of Court establishes a procedure for bringing such new authorities to the attention of the California Supreme Court through supplemental briefing. Currently, however, there is no comparable rule specifying a procedure for bringing new authorities to the Court of Appeal's attention. This creates uncertainty for practitioners about whether and how such new authorities may be presented to the Court of Appeal. It also creates burdens on the court, which may receive requests to present such new authorities in different formats and must determine individually whether each request can be filed.

This proposal would fill the gap in the rules by establishing a procedure for bringing new authorities to the attention of the Court of Appeal. The proposal combines features of rule 8.520 relating to supplemental authority in the California Supreme Court, local Court of Appeal practices with respect to supplemental authority, and rule 28(j) of the Federal Rules of Appellate Procedure relating to supplemental authority in the federal appellate courts.

Unlike in rule 8.520, this proposal does not authorize supplemental briefing. The committee concluded that supplemental briefing would not be necessary in every Court of Appeal case in which new authorities arise and that rule 8.200(a)(4) already permits a party to ask the presiding justice of the Court of Appeal for permission to file supplemental briefing if needed. Instead, the committee proposes a procedure similar to that established by rule 28(j) of the Federal Rules of Appellate Procedure under which parties may submit only a letter alerting the court of the new authority. As is the practice in some districts of the California Court of Appeal, this proposal limits the letter to providing a citation to the new authority and identifying, by citation to a page or pages in a brief on file, the issue on appeal to which the new authority is relevant. The proposed rule explicitly provides that no argument or other discussion of the authority will be permitted in the letter and does not provide for any response by other parties to the letter. An advisory committee comment would clarify that this rule does not preclude a party from asking the presiding justice for permission to file supplemental briefing under rule 8.200(a)(4).

Because, unlike rule 8.520, this proposed rule provides only for submission of a citation to the new authority and not for any argument or discussion, the proposed rule would allow a letter to be filed any time before the Court of Appeal files its opinion. The committee concluded that this proposed time frame was preferable to limiting the filing of a letter only until oral argument

because it allows the court to receive more assistance from the parties in identifying any new authority that might affect the court's decisionmaking process.

As under rule 8.520 in the California Supreme Court, this proposed rule would apply only to new authority that was not available in time to be included in the last brief that the party filed or could have filed—not to existing authority a party learns of after briefing. The proposed rule would also provide that if the letter is served and filed after oral argument is heard, it may address only new authority that was not available in time to be addressed at oral argument.

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. Thirteen individuals or organizations submitted comments on this proposal. Seven commentators agreed with the proposal, four agreed with the proposal if modified, one disagreed 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 stated in the attached comment chart at pages 7–16. The main substantive comments and the committee's responses are also discussed below.

Time to file letter regarding new authorities. The committee specifically sought comments on whether to allow parties to file letters alerting the Court of Appeal to new authorities anytime before the court files its opinion or whether it would be preferable set an earlier deadline for filing these letters, such as the date of oral argument or submission. Six commentators addressed this issue, and they were evenly split on the time frame for filing these letters: three supported allowing parties to file such letters anytime before the court issues its opinion and three supported modifying the proposal to require that such letters be filed earlier. Those commentators who supported the earlier deadline expressed concerns about the impact of the later deadline on the courts' ability to finalize a decision and about opposing parties' ability to respond to new authorities raised after submission. These commentators suggested that requests to file supplemental briefing were a preferable approach for alerting a court to new authorities after submission. The commentators who supported the later deadline emphasized that such an approach would assist the courts in considering the most current and relevant authorities. One of these commentators also suggested that setting an earlier deadline might result in more petitions for rehearing because litigants would use the rehearing procedure to bring later authorities to the courts' attention.

The committee discussed these comments and ultimately decided to recommend that parties be permitted to file letters alerting the Court of Appeal to new authorities anytime before the court files its opinion but also to add an advisory committee note to the rule indicating that the filing of such a letter does not affect the date of submission. The committee concluded that it was highly unlikely that a letter alerting a court to new authorities would be filed on the day a court was ready to issue its opinion and therefore was unlikely to cause disruption for the court in the

issuance of its opinion. In members' experience, the time period between briefing and oral argument is typically longer than the time period between oral argument and issuance of the opinion, so the majority of new authorities are most likely to arise before oral argument. If a new authority arises after oral argument, parties have an incentive to alert the court to this new authority as quickly as possible because they do not know exactly when the court will issue its opinion. This uncertainty also minimizes the possibility of gamesmanship in submitting new authorities. If a letter comes in close to the day the court is ready to issue its opinion, the court should be able to determine fairly quickly whether substantive modification of the decision should be considered in light of the new authority. If not, there would be no disruption in issuance of the opinion. Committee members also thought that if highly consequential new authority came in after oral argument, parties would likely ask to file or the presiding justice would request supplemental briefing, which would result in vacating submission and giving the opposing party an opportunity to respond to the authority. The committee concluded, however, that it would be helpful to clarify that filing of a letter concerning new authority, by itself, does not affect submission of the cause; the submission date would be affected only if the Court of Appeal decided to request supplemental briefing or to otherwise vacate submission. The committee therefore recommends an addition to the advisory committee comment accompanying proposed rule 8.254 addressing this issue.

Another commentator suggested that the rule should provide that letters alerting the court to new authorities are required to be filed as soon as possible. The committee agreed with this suggestion and modified its proposal to incorporate this language into the rule.

This same commentator also suggested that the rule indicate that these letters should be filed at least 14 days before oral argument. The committee considered but decided not to incorporate this change into its proposal. The committee concluded that, since the proposed rule does not provide for the submission argument or other discussion of the authority, it was not necessary to recommend that a letter alerting the court to new authorities be filed in advance of oral argument. In addition, members noted that, in practice, parties typically do not identify supplemental authority until closer to the date of oral argument. Under rule 8.256, the Court of Appeal clerk must send a notice of the time and place of oral argument to all parties at least 20 days before the argument date. Typically, receiving notice of oral argument is the trigger for parties to review the briefing in the case and check for supplemental authority. With the additional requirement that a letter alerting the court to new authorities must be filed as soon as possible after the authorities are discovered and the limitation that if a letter is filed after oral argument is heard, it may address only new authority that was not available in time to be addressed at oral argument, the committee concluded that the proposed rule already created incentives for parties to provide new authority in advance of oral argument.

Other suggestions.

A commentator suggested that if letters alerting the court to new authorities are not served at least 14 days before oral argument, they should be served so that they are received by the other parties on the same date the letters are filed. The committee considered but decided not to

incorporate this suggestion into its proposal. The committee concluded that, when compared with other time-sensitive filings, it was not necessary to set special service requirements for such letters.

Another commentator suggested that the proposed rule should be modified to allow for a letter of up to 350 words explaining the relevance of the new authority and permit other parties to file a letter of similar size responding to this letter. Several years ago, the committee considered and circulated for public comment a proposal that would have allowed for a letter of 350 words and a response by the opposing party. This approach was strongly opposed by the presiding justices of several of the Court of Appeal districts. The committee therefore concluded that it would be preferable to recommend a different approach that did not include these elements.

Alternatives Considered

In addition to the alternatives suggested in the public comments, the committee also considered not recommending adoption of a rule regarding presenting new authorities to the Court of Appeal. However, as discussed above, the absence of a rule creates uncertainty for practitioners about whether and how such new authorities may be presented to the Court of Appeal. It also creates burdens on the courts, which may receive requests to present such new authorities in different formats and must determine individually whether each request can be filed. The committee concluded that a new rule addressing this issue would provide helpful guidance for practitioners and would reduce burdens on the courts associated with receiving and responding to requests to present new authorities in different formats.

Implementation Requirements, Costs, and Operational Impacts

The proposal should not result in appreciable implementation requirements, costs, or operational impacts and should reduce burdens on courts associated with receiving and responding to requests to present new authorities in different formats.

Attachments

1. Cal. Rules of Court, rule 8.254, at page 6
2. Comment chart, at pages 7–16

Rule 8.254 of the California Rules of Court is adopted, effective July 1, 2012, to read:

Title 8. Appellate Rules

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

Chapter 2. Civil Appeals

Article 4. Hearing and Decision in the Court of Appeal

Rule 8.254. New Authorities

(a) Letter to court

If a party learns of significant new authority, including new legislation, that was not available in time to be included in the last brief that the party filed or could have filed, the party may inform the Court of Appeal of this authority by letter.

(b) Form and content

The letter may provide only a citation to the new authority and identify, by citation to a page or pages in a brief on file, the issue on appeal to which the new authority is relevant. No argument or other discussion of the authority is permitted in the letter.

(c) Service and filing

The letter must be served and filed before the court files its opinion and as soon as possible after the party learns of the new authority. If the letter is served and filed after oral argument is heard, it may address only new authority that was not available in time to be addressed at oral argument.

Advisory Committee Comment

This rule does not preclude a party from asking the presiding justice for permission to file supplemental briefing under rule 8.200(a)(4). A letter filed under this rule does not change the date of submission under rule 8.256.

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Appellate Procedure: Bringing New Authorities to the Attention of the Court of Appeal (adopt Cal. Rules of Court, rule 8.254)

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

	Commentator	Position	Comment	Proposed Committee Response
1.	Appellate Court Committee San Diego County Bar Association By Cecilia O. Miller, Chair	A	We enthusiastically support the proposed adoption of rule 8.254 and comment only to respond to the committee's request for guidance on whether it would be preferable to set a deadline for submission of a letter advising of new authorities earlier than the issuance of an opinion. For the benefit of both the courts and the parties, we believe that an earlier deadline would be preferable. We are concerned that allowing such letters to be filed up until the time the court issues an opinion could result in situations where letters are received *as* the court finalizes an opinion. If, for example, a letter is received in the morning of the day that an opinion is to be issued, must the process of issuing the opinion be halted to allow the court to consider the letter? If the opinion nevertheless issues immediately, parties may believe the court did not consider this new authority, leading to an increase in petitions for rehearing. Further, if such letters are allowed to be filed after oral argument but before the opinion is issued, opposing counsel will have no opportunity to address the new authority. Accordingly, we propose setting the date of submission as the deadline for letters informing the court of new authority. We are of the opinion that no harm would result from this earlier deadline. If new authority becomes available after the submission date, but before the issuance of the opinion, a party could simply request leave to file supplemental	No response required. The committee appreciates this input but is recommending that parties be permitted to file letters alerting the Court of Appeal to new authorities anytime before the court files it opinion. The committee concluded that it was highly unlikely that a letter alerting a court to new authorities would be filed on the day a court was ready to issue its opinion and therefore was unlikely to cause disruption for the court in the issuance of its opinion. In members' experience, the time period between briefing and oral argument is typically longer than the time period between oral argument and issuance of the opinion, so that the bulk of new authorities are most likely to arise before oral argument. If new authority does arise after oral argument, parties have an incentive to alert the court to this new authority as quickly as possible because they do not know exactly when the court will issue its opinion. If a letter does come in close to the day the court is ready to issue its opinion, the court should be able to determine fairly quickly whether modification of the decision should be considered in light of the new authority. If not, there would

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	Commentator	Position	Comment	Proposed Committee Response
			briefing on the new authority. This procedure would allow opposing counsel to address the new authority. Whichever deadline is adopted, however, we commend the committee for addressing this issue, which is of great importance to appellate practitioners.	be no disruption in issuance of the opinion. Committee members also thought it was likely that if there were highly consequential new authority after oral argument, parties would most likely ask the presiding justice to permit supplemental briefing.
2.	Appellate Defenders, Inc., California Appellate Project - San Francisco, and the First District Appellate Project By Mat Zwerling, Executive Director	AM	We recommend modifying the proposed amendment to rule 8.254(b) (form and content) itself to include the following language now in the Advisory Committee Comment: "This rule is not intended to prevent a party from asking the presiding justice for permission to file supplemental briefing under rule 8.200(a)(4)." This crucial information should be in the body of the rule. The committee has specifically requested comment on the timing of new-authority letters. We support the timing incorporated into the proposed rules, allowing such submissions at any time prior to issuance of the opinion. Setting an earlier deadline—such as until oral argument—could impede decision-making based on the most current and relevant authorities (including any post-argument, pre-opinion authorities) and may result in more petitions for rehearing.	The committee considered this suggestion but concluded that it was preferable to leave this provision in the advisory committee comment. The committee appreciates this input and is recommending that parties be permitted to file letters alerting the Court of Appeal to new authorities anytime before the court files it opinion.
3.	California Academy of Appellate Lawyers	AM	Although the Academy supports the proposal, we respectfully suggest that the proposed rule be modified to allow a brief explanation of the	Several years ago, the committee considered and circulated for public comment a proposal that would have permitted a letter of 350 words and a

	Commentator	Position	Comment	Proposed Committee Response
			relevance of the new authority in a letter not to exceed 350 words and to permit the opposing party an opportunity to respond, also limited to 350 words. We believe that allowing the parties to briefly explain the applicability of the new authority would aid the court in understanding the parties' positions and, given the 350-word limit, would not impose any undue burden on the court. Furthermore, the comment to the proposed rule makes it clear that the rule would not foreclose discretionary requests for supplemental briefing on, or in response to, new authorities. Giving the parties the right to make an explanation limited to 350 words would likely reduce the number of requests for permission to file longer supplementary briefs.	response by the opposing party. This approach was strongly opposed by the Presiding Justices of several of the Court of Appeal districts primarily because they viewed it as permitting supplemental briefing which would then require vacating submission. The committee therefore concluded that it would be preferable to recommend a different approach that did not include these elements. If a party believes it is important to provide the court with discussion or analysis of the new authority, as noted by the commentator, the party can always request permission to file supplemental briefing.
4.	Committee on Appellate Courts State Bar of California Benjamin Shatz, Chair	AM	The Committee supports this proposal, subject to modification. This proposal would establish a new rule, 8.254, for expeditiously bringing new authorities to the attention of a Court of Appeal. The Committee agrees that the current lack of a uniform statewide rule creates uncertainty for practitioners. Such a rule should encourage informing the court of pertinent authority (so it can make a correct decision) while being fair to the parties and expeditious. The Committee agrees that the continuing ability of a party to request leave to file a	No response required.

	Commentator	Position	Comment	Proposed Committee Response
			supplemental brief (to be noted in the comment to the new rule) makes it appropriate to limit letters under rule 8.254 to new authorities "not available in time to be included in the last brief that the party filed" and to preclude argument in such letters. The Committee recommends, however, that new rule 8.254(c) read as follows: "The letter must be served and filed as soon as possible and in any event before the decision of the Court of Appeal is final in that court. When practical, a letter should be served and filed at least 14 days in advance of any scheduled oral argument. If the letter is served less than 14 days before oral argument, or at any time after oral argument, the letter must be delivered to all other parties in a manner calculated to ensure receipt by every other party not later than when the letter is filed with the court." Regarding our first sentence, the Committee thoroughly discussed the considerations bearing on the deadline to submit such a letter. Because a decision should be correct, the Committee believes that parties should be allowed to submit significant new authority by letter to the Court of Appeal up to the point that the decision is final in that court. A letter under the proposed rule would be the most expeditious means to advise the court of new authority at the last minute. There was some concern on the Committee that losing parties would liberally	The committee appreciates this input and is recommending that parties be permitted to file letters alerting the Court of Appeal to new authorities anytime before the court files it opinion, not until the opinion is final.

	Commentator	Position	Comment	Proposed Committee Response
			assert post-briefing authorities during the 30 days before finality, if the deadline were extended beyond issuance of the opinion, but on balance the Committee favors extending the deadline to finality of the opinion. The "as soon as possible" language in our first sentence borrows from rule 28(j) of the Federal Rules of Appellate Procedure. Our second sentence, stating an expectation of filing by 14 days before oral argument when practical, also borrows from rule 28(j) (which uses 7 days). The Committee favors such a guideline and believes that this approach will prove useful in practice.	The committee agrees with this suggestion and has modified its proposal to include this language. The committee considered but decided not to recommend this change. While the Circuit Advisory Committee Note to rule 28-6 of Circuit Rules for the United States Court of Appeals for the Ninth Circuit recommends that letters concerning supplemental authorities be filed at least 14 days before oral argument and California Rules of Court, rule 8.520 requires that supplemental briefs bringing new authorities to the California Supreme Court be filed no later than 10 days before the date set for oral argument, this appears to be tied to the fact that these rules provide for the submission of and response to argument or other discussion of these authorities. Since this proposal does not provide for such argument or response, the committee concluded that it is not necessary for the rule to include such a time limit. Furthermore, given that notice of oral argument in the California Court of Appeal is typically sent only 20 days before the date of oral argument, the suggested deadline for submitting a letter concerning new authorities would be difficult for parties to meet.

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			Regarding our third sentence, the Committee thinks it is necessary to require that letters filed shortly before oral argument, or after oral argument, be served on every other party as expeditiously as they are filed.	The committee considered but decided not to recommend this change. While there are statutes and rules that require expeditious methods of service in certain circumstances in the trial courts, the committee is not aware of any other appellate rules the impose requirements such as those suggested by the commentator, even where the other party must file a response to the served document. There are many circumstances in which the time for parties in appellate proceedings to receive and react to documents served by another party is very short. For example, in juvenile dependency cases in which the child is not an appellant but has appellate counsel, the child must serve and file any brief within 10 days after the respondent's brief is filed. The committee believes it would not be appropriate to impose special service requirements for letters concerning new authorities when no such requirements are imposed in circumstances involving even greater time pressure.
5.	County Counsel, County of Los Angeles By James Owens - Assistant County Counsel	N	Proposed rule 8.254 would allow a party to submit only a letter alerting the court of the new authority by providing a citation to the new authority and identifying, by citation to a page or pages in a brief on file, the issue on appeal to which the new authority is relevant. No argument or other discussion of the authority is permitted in the letter and the rule does not provide for any response by other parties to the letter. Rule 8.200(a)(4) would still allow a party to ask the presiding justice of the Court of Appeal for permission to file supplemental	The committee appreciates this input but is recommending that parties be permitted to file letters alerting the Court of Appeal to new authorities anytime before the court files it opinion.

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			briefing if needed. With regard to the proposed deadline, the committee indicated the deadline allows the court to receive more assistance from the parties in identifying any new authority that might impact the court's decision-making process. However, allowing the parties to file the letter after oral argument does not give the parties an opportunity to address or distinguish the new case and appears to allow the court to take into consideration a case that was not presented to them in the parties' briefs or argument. A request for supplemental letter briefing after oral argument would be at the court's discretion and, if denied, would not allow the parties to address the case substantively, which may result in more petitions for rehearing. Perhaps allowing the parties to file a letter bringing new authority to the court's attention should be applicable only until the time of oral argument because then the parties could request additional letter briefing and, if denied, address the new authority at oral argument. Also, the court or a party (under rule 8.200(a)(4)) could still request supplemental briefing should a new case come out after oral argument.	
6.	Judith McConnell, Presiding Justice Court of Appeal, Fourth District, Division One	AM	I agree with the proposed revisions to rule 8.254 except insofar as it allows the parties to file a letter at any time before the appellate court issues its opinion; instead, I believe that, based on pragmatic considerations, the deadline for submitting such a letter should be the date of submission of the appeal. Specifically, I am	The committee appreciates this input but is recommending that parties be permitted to file letters alerting the Court of Appeal to new authorities anytime before the court files it opinion. The committee's view is that if a letter does come in close to the day the court is ready to issue its opinion, the court should be able to

	Commentator	Position	Comment	Proposed Committee Response
			concerned that the belated deadline set forth in the current proposal may result in disruptions in the issuance of an opinion that is otherwise in the process of being filed, a situation that is not justified for a new authority that simply provides additional support for a party's existing arguments or authorities. A party that seeks to cite new authority raising a matter qualitatively different than its previous arguments or authorities will not be prejudiced by the earlier deadline because even after the submission date, it may bring such a matter to the appellate court's attention by a making a motion to a file supplemental brief regarding the new authority or by a petition for rehearing, either of which will include a mechanism by which the opposing party can respond to such new authority, if necessary.	determine fairly quickly whether substantive modification of the decision should be considered in light of the new authority. If not, there would be no disruption in issuance of the opinion. Committee members also thought it was likely that if there were highly consequential new authority after oral argument, parties would most likely ask to file or the presiding justice would request supplemental briefing, which, as suggested by the commentator, would give opposing parties an opportunity to respond.
7.	Orange County Bar Association By John Hueston	A	No specific comment.	No response required.
8.	Orange County Public Defender's Office By Deborah Kwast – Public Defender	A	No specific comment.	No response required.
9.	Rules and Legislation Committee of the State Bar of California's Litigation Section By Reuben A. Ginsburg - Co-chair	A	The Rules and Legislation Committee agrees with the proposal, but suggests that rule 8.254 or a comment to the rule should expressly state that a letter submitted pursuant to the rule does not affect the submission of a cause unless the Court of Appeal orders otherwise. Rule 8.256(d)(1) states, "A cause is submitted	The committee agreed with this suggestion and is recommending adding a note to the advisory committee comment accompanying proposed rule 8.254 indicating that filing of a letter concerning new authority does not impact submission of the cause.

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			when the court has heard oral argument or approved its waiver and the time has expired to file all briefs and papers, including any supplemental brief permitted by the court." The word "papers" is not defined. (See rule 8.10, definitions.) If a letter citing new authority may be filed at any time before the opinion is filed under rule 8.254, the question may arise whether such a letter is a "paper[]" under rule 8.256(d)(1) and whether the filing of such a letter affects the date of submission. To dispel any uncertainty in this regard, the committee suggests that either rule 8.254 or a comment to the rule should expressly state that the letter does not affect the submission of a cause, unless the Court of Appeal orders otherwise. In response to the specific request for comments on page 2 of the invitation to comment, the committee believes that it is appropriate to allow a letter citing new authority at any time before the opinion is filed to ensure that the Court of Appeal is aware of and has the opportunity to address any pertinent new authority.	The committee appreciates this input and is recommending that parties be permitted to file letters alerting the Court of Appeal to new authorities anytime before the court files it opinion
10.	Superior Cout of Los Angeles County	A	Add similar provisions for limited appeals.	The committee appreciates this suggestion and will consider it in an upcoming committee year.
11.	Superior Court of Monterey County By Rosalinda Chavez – ACEO	A	No specific comment.	No response required.
12.	Superior Court of Sacramento County By Robert Turner – ASO II Research	NI	No specific comment.	No response required.

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	& Evaluation Division			
13.	Superior Court of San Diego County By Michael M. Roddy Executive Officer	A	No specific comment.	No response required.

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