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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: February 28, 2012

Title
Appellate Procedure: Ensuring Tribal Receipt of Records on Appeal in Juvenile Cases

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 8.409

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

Family and Juvenile Law Advisory Committee
Hon. Kimberly J. Nystrom-Geist, Cochair
Hon. Dean Stout, Cochair

California Tribal Court/State Court Forum
Hon. Richard C. Blake, Cochair
Hon. Harry E. Hull, Jr., Cochair

Agenda Item Type
Action Required

Effective Date
January 1, 2013

Date of Report
October 28, 2011

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Executive Summary

The Appellate Advisory Committee, the Family and Juvenile Law Advisory Committee, and the California Tribal Court/State Court Forum recommend amending the rule governing sending the record in juvenile appeals to clarify that if an Indian tribe has intervened in a case, a copy of the record of that case must be sent to that tribe. This change will ensure that a tribe that has become party to a case through intervention receives a copy of the record, as do other parties to a juvenile court proceeding.

Recommendation

The Appellate Advisory Committee, the Family and Juvenile Law Advisory Committee, and the California Tribal Court/State Court Forum recommend that the Judicial Council, effective January 1, 2013, amend rule 8.409 of the California Rules of Court to require that, if an Indian tribe has intervened in a juvenile case, a copy of the record on appeal in that case be sent to appellate counsel for that Indian tribe or, if the tribe is not represented, to the tribe itself.

The text of the proposed rules is attached at page 5.

Previous Council Action

The Judicial Council adopted a general rule on appellate proceedings in juvenile cases, rule 39, effective July 1, 1977. That rule did not specifically address sending the record to parties, but generally provided that the rules regarding felony appeals applied to appeals in juvenile proceedings. Effective January 1, 1994, the Judicial Council adopted a special rule, rule 39.1A, regarding appeals from orders or judgments terminating parental rights or freeing children from parental custody and control. That rule specifically required the clerk to transmit copies of the appellate record in these appeals "to the attorneys for appellant, respondent, the child, and the appointed counsel administrator for the district appellate project." On January 1, 2005, all of the rules relating to juvenile appeals were repealed and replaced with new rules. Rule 37.2 adopted at that time generally addressed preparing and sending the record in juvenile appeals and specifically required that a copy of the appellate record be sent "to the appellate counsel for the appellant, the respondent, and the minor." Effective January 1, 2007, this rule was renumbered as rule 8.408. Effective January 1, 2010, this rule was amended and renumbered as rule 8.409.

Rationale for Recommendation

In May 2010, former Chief Justice Ronald M. George established the California Tribal Court/State Court Forum to discuss issues of mutual importance to tribal and state justice systems. This forum is composed of tribal court judges from throughout the state, local state court judges and justices, and the chairs of several Judicial Council advisory committees. The forum is charged with identifying issues concerning the working relationship between tribal and state courts and ways to address these issues.

One of the issues identified involves receipt of the record on appeal by an Indian tribe that has intervened in a juvenile case involving an Indian child. Under state statutes, an Indian child's tribe has the right to intervene at any point in a custody proceeding involving that Indian child (Welf. & Inst. Code, § 224.4). This right is part of state and federal laws designed to protect the essential tribal relations and best interests of Indian children (see Welf. & Inst. Code, § 224 et seq., and the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.)).

To participate effectively in the appellate process, an Indian tribe that has intervened in a case must timely receive a copy of the record on appeal as do the other parties in the case. Currently, however, rule 8.409(d), regarding sending the record in juvenile appeals, requires that copies of

the record be sent to the appellate counsel only for the appellant, the respondent, and the minor. This proposal would amend rule 8.409 to specifically require that a copy of the record also be sent to appellate counsel for any Indian tribe that has intervened in the case or, if the tribe is not represented, to the tribe itself.

Comments, Alternatives Considered, and Policy Implications

This proposal was circulated between April 21 and June 20, 2011, as part of the regular spring 2011 comment cycle and it was mailed to appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court administrators and clerks, attorneys, social workers, probation officers, and other juvenile law professionals. Ten individuals or organizations submitted comments on this proposal. Eight commentators agreed with the proposal, two agreed with the proposal if modified, 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 6 through 7. The main substantive comments and the committee's responses are also discussed below.

Broad support for proposal

This proposal received broad support from local superior courts and attorneys. The State Bar, a local county counsel office, a local public defender's office, a local bar association, and an appellate project submitted comments in support of the proposal.

Issues raised by commentators

Commentators raised three issues:

1. whether the rule could be revised to permit electronic transmission of the transcript;
2. whether the rule could be revised to reduce court costs associated sending the transcript; and
3. whether the federal and state Indian Child Welfare Act notice rules applied.

Discussion of comments, alternatives considered, and policy implications

Of the two commentators who agreed with the proposal if modified, one recommended a section allowing for the electronic transmission of the transcript to the parties. This comment is beyond the scope of this proposal. While the proposed rule revision recommended by the commentator may have merit, it cannot be considered without its circulation for public comment. To do otherwise, would be to take action without a full vetting of the commentator's proposal.

The second commentator raised the costs associated with providing copies of transcripts, as their court did not routinely provide transcripts to tribes. The alternatives considered were (1) to withdraw the proposal; (2) to revise the proposal to require only that the notice of intent to file an appeal be given to the intervening tribe, as the commentator suggested; or (3) to require the transcript be sent to intervening tribes.

The first option was considered and rejected because the existing rule, as followed by some courts, has resulted in Indian tribes that have intervened in a case not receiving a copy of the record on appeal as do the other parties in the case. The second option was considered and rejected, because the proposal would not require that a transcript be sent to every Indian tribe that received notice of the initial action, but only those tribes that have intervened in the case and thus become parties. It is the understanding of the committees and the forum that very few tribes intervene in these cases and therefore providing transcripts to these tribes will not impose large new costs on the courts. It is also our understanding that currently, both courts and tribes incur additional costs, beyond the cost of providing the appellate record, if tribes that intervened and wish to participate in the appellate proceedings have to prepare and the courts have to consider requests that they receive the appellate record.

This commentator also recommended clarifying in the rule whether the federal and state Indian Child Welfare Act notice rules applied. The notice rules do not. Pursuant to federal and state law (25 U.S.C. 1912 (a); 25 C.F.C. 23.11; Welf & Inst. Code section 224.2, only notices of hearings must be sent by registered or certified mail with return receipt requested addressed to the tribal chairperson, unless the tribe has designated another agent for service. In response to this comment, the rule is amended to include an Advisory Committee Comment addressing this issue.

Implementation Requirements, Costs, and Operational Impacts

Depending on current practices, this proposal should either reduce costs for tribes and for superior courts or have no appreciable implementation costs. In those courts that currently provide copies of the record on appeal to Indian tribes that have intervened in juvenile cases, this proposed amendment should have no impact. In those courts that do not currently routinely provide copies of these records to Indian tribes that have intervened in juvenile cases, there are likely to be some additional costs associated with providing copies of these records, but this proposed amended should also reduce costs associated with the tribe having to make and the court having to consider motions to obtain a copy of the record.

Attachments

1. Cal. Rules of Court, rule 8.409 at page 5–6
2. Chart of Comments, at pages 7–8

Rule 8.409 of the California Rules of Court is amended, effective January 1, 2013, to read:

Title 8. Appellate Rules

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

Chapter 5. Juvenile Appeals and Writs

Article 2. Appeals

Rule 8.409. Preparing and sending the record

(a)–(c) * * *

(d) Sending the record

(1) When the transcripts are certified as correct, the superior court clerk must immediately send:

(A) * * *

(B) One copy of each transcript to the appellate counsel for the appellant, the respondent, ~~and~~ the minor, and the minor's Indian tribe if the tribe has intervened.

(2) If appellate counsel has not yet been retained or appointed for the appellant, the respondent, or the minor when the transcripts are certified as correct, the clerk must send that counsel's copy of the transcripts to the district appellate project. If a tribe that has intervened is not represented by counsel when the transcripts are certified as correct, the clerk must send that counsel's copy of the transcripts to the tribe.

Advisory Committee Comment

Subdivision (a). Subdivision (a) calls litigants' attention to the fact that a different rule (rule 8.416) governs *sending* the record in appeals from judgments or orders terminating parental rights and in dependency appeals in certain counties. Rule 8.408(b) governs *preparing and certifying* the record in those appeals. (See rule 8.416(c)(1) ["The record must be prepared and certified as provided in rule 8.409(b)"].)

Subdivision (d). Subsection (1)(B) clarifies that when a minor's Indian tribe has intervened in the proceedings, the tribe is a party who must receive a copy of the appellate record. The statutes that require notices to be sent to a tribe by registered or certified mail return receipt requested and generally be addressed to the tribal chairperson (25 U.S.C. 1912 (a), 25 C.F.R. 23.11 and Welf. & Inst. Code 224.2) do not apply to the sending of the appellate record.

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Juvenile Law: Ensuring Tribal Receipt of Appellate Records (amend Cal. Rules of Court, rule 8.409)

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

	Commentator	Position	Comment	Committee Response
1.	Court of Appeal, Fourth District, Division One Hon. Judith McConnell, Presiding Judge	A	I agree with the proposed changes to rule 8.409 to provide the record on appeal to an Indian tribe that has intervened in a juvenile appeal.	No response required.
2.	First District Appellate Project Matt Zwerling, Executive Director	A	We concur with the proposal.	No response required.
3.	Los Angeles County Counsel's Office. James M. Owens Assistant County Counsel	A	No specific comments.	No response required.
4.	Orange County Bar Association John Hueston, President	A	No specific comments.	No response required.
5.	Orange County Public Defender's Office, Deborah A. Kwast Public Defender	A	No specific comments.	No response required.
6.	Superior Court of Monterey County Rosalinda Chavez, ACEO	A	No specific comments.	No response required.
7.	Superior Court of Riverside County Michael Capelli, Court Staff	AM	It is recommended that proposed rule 8.409 be modified to add a section allowing for the electronic transmission of the transcript to all applicable parties.	This recommendation goes beyond the scope of this proposal. However, the recommendation is addressed by the Court Technology Advisory Committee's proposal, circulated for comment in this cycle (SPR11-27), which extends the electronic filing and service pilot program and permits, under some circumstances, the electronic filing of a document by a party or trial court in any appeal.
8.	Superior Court of Sacramento County Robert Turner, ASO II Research & Evaluation Division		The Superior Court of California, County of Sacramento has reviewed the proposal but does not have any comments to submit	No response required.
9.	Superior Court of San Diego County Mike M. Roddy, Court Executive	AM	Currently, we are only serving a tribe with a copy of the Notice of Appeal or Notice of	The proposal would not require the transcript be sent to every Indian tribe that received notice of

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	Commentator	Position	Comment	Committee Response
	Officer		Intent. Serving the tribe with a copy of the transcript would mean an additional copy to be made as well as delivery costs of the copy. Transcripts can be very lengthy since it always includes all documents up to the date of the appeal so this will increase costs for the court. In cases where the clerk must send a copy of a transcript to the Indian child's tribe, the rule should clarify whether ICWA rules for notice are applicable – specifically, whether the transcript must be sent to the tribe by registered or certified mail with return receipt requested (WIC § 224.2(a)(1)) and whether it must be addressed to the tribal chairperson, unless the tribe has designated another agent for service (WIC § 224.2(a)(2)).	the initial action, but only those tribes that have intervened in the case and thus become parties. It is our understanding that very few tribes intervene in these cases and therefore that providing transcripts to these tribes will not impose large new costs on the courts. In addition, it is also our understanding that both courts and tribes incur additional costs, beyond the cost of the providing the appellate record, if tribes that intervened and wish to participate in the appellate proceedings have to prepare and the courts have to consider requests to receive the appellate record. The ICWA rules for notice are not applicable. Pursuant to federal and state law (25 U.S.C. 1912 (a); 25 C.F.C. 23.11; Welf & Inst. Code section 224.2, only Notice of Hearings must be sent by registered or certified mail with return receipt requested addressed to the tribal chairperson, unless the tribe has designated another agent for service. The forum and the committees have added language in the Advisory Committee Comment clarifying that these notice statutes and regulations do not apply to sending the certified transcripts.
10.	State Bar of California, Committee on Appellate Courts Benjamin Shatz, Chair	A	The Committee supports the proposal. Attorneys who practice in this area are comfortable with the notion that provision of the record to the "tribe" will ensure adequate receipt and enable the tribe to represent its interests on appeal.	No response required.