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Brave New ~~World~~ Rules: Changes to the First 18 California Appellate Rules

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See p 57.

Paul D. Fogel

Benjamin G. Shatz

Brave New ~~World~~ Rules: Changes to the First 18 California Appellate Rules

PAUL D. FOGEL / BENJAMIN G. SHATZ

Introduction

Sixty years ago Bernard E. Witkin drafted the Rules of Court governing California appellate practice. These rules affect practitioners, court reporters, judges, justices and clerks, and, of course, litigants, many of whom handle their own appeals. The rules have served California well. However, given almost six decades of experience—which brought appellate decisions interpreting the rules, the enactment of statutes that affect them, advances in technology, and changes in judicial administration and the practice of law—the Judicial Council's Appellate Advisory Committee recognized that an overhaul was in order.

The Advisory Committee charged the Appellate Rules Project Task Force with the task of redrafting the rules. The Task Force, chaired by California Supreme Court Associate Justice Joyce Kennard, includes appellate practitioners, appellate and Judicial Council staff attorneys, and the Reporter of Decisions. The Task Force's goal is to make the rules easier to understand, weed out antiquated provisions, eliminate ambiguities, and update the rules to conform to modern practice. The Task Force is also restructuring the rules into a logical and chronological sequence, removing traps for the unwary, and making alterations to improve the appellate process. Because of the enormity of the task, the Judicial Council is implementing the revisions in installments, which correspond to logical breaks in the rules' sequence. As each batch of revisions is drafted, it is circulated for public comment, fine-tuned in light of the feedback, reviewed by several Judicial Council bodies, and then promulgated by the Council.

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For the first time, the rules will now be accompanied by detailed Advisory Committee Comments, which explain what changes were made and why and state whether they are substantive. Users of the new rules should find these comments useful in understanding and interpreting them.

"[A]ppellate counsel must immediately conform their practices to [the newly revised rules], even as to appeals that were filed before [January 1, 2002]."

The first installment, which revised Rules 1 through 18, took effect on January 1, 2002. Consequently, appellate counsel must immediately conform their practices to them, even as to appeals that were filed before that date. While there is no substitute for a careful review of the changes, the following discussion highlights the most significant revisions that practitioners will ordinarily encounter.

Easier Calculation of Notice of Appeal Deadlines

The notice of appeal is the document that effectively transfers jurisdiction from the trial court to the appellate court. But the appellant must file the notice by the prescribed deadline, or the appeal cannot proceed—there are no exceptions. Indeed, as new Rule 2(e) states, "[i]f a notice of appeal is filed late, the reviewing court must dismiss the appeal." For that reason, accurate calculation of the deadline is crucial, and can make the difference between a viable appeal and malpractice.

The rules regarding notice of appeal deadlines generally remain unchanged, *e.g.*, a notice of appeal is due 60 days after service of a notice of entry of judgment or a file-stamped copy of the judgment. Cal Rules of Ct 2(a). The new rules, however, contain significant revisions when it comes to calculating the deadline in extension or cross-appeal situations.

One problem under the old rules concerned the 30-day extension for filing a notice of appeal from a judgment when a party filed certain posttrial motions, such as a motion for new trial or JNOV or to vacate the judgment. The old rule stated that the extension period began to run on "entry" of the order denying the motion—a date over which the parties had no control, and of which they sometimes had no notice. The new rules remedy this, by starting the 30-day extension period on the more obvious date of service (by the superior court clerk or a party) of the order denying the motion. Cal Rules of Ct 3(a), (b), (c). Like the old rule, the new rule provides that the extension applies only when a "valid" motion or notice of intention to move for a new trial is filed, but for the first time "valid" is defined (in the Appellate Advisory Comment to Rule 3) to mean that the motion or notice "complies with all procedural requirements; it does not mean that the motion must also be substantively meritorious."

The new rules resolve three other ambiguities relating to JNOV motions:

- First, unlike the prior rule, revised Rule 3(c)(1) allows a 30-day extension for filing a notice of appeal after a party's JNOV motion is denied, even if that party did not also move for a new trial.
- Second, the revised rules make clear that, as with other appealable orders, a party has 60 days from the judgment—not 30, as some believed the old rules implied—to file a notice of appeal from an order denying JNOV.
- Third, revised Rule 3(e)(2) establishes a 20-day extension for filing a protective cross-appeal from the vacated judgment after entry of a new judgment pursuant to a JNOV. The Fourth District, Division Two suggested this change in *Lippert v AVCO Community Developers, Inc.* (1976) 60 CA3d 775, 778 and n3, 131 CR 730, but refused the extension because the rule did not expressly allow it.

With regard to appealable orders, new Rule 3(d) makes clear that motions for reconsideration under CCP §1008 will extend the deadline to file a notice of appeal from an appealable order to 30 days after the service of the order denying the reconsideration motion. This resolves a split of authority between cases like *Rojes v Riverside Gen. Hosp.* (1988) 203 CA3d 1151, 1159, 250 CR 435, disapproved on other grounds in 225 CA3d at 1606, which reasoned that reconsideration motions should extend the time to appeal, and *Conservatorship of Coombs* (1998) 67 CA4th 1395, 1398, 79 CR2d 799, which held to the contrary. (New Rule 3(d) alternatively extends the deadline to appeal after a motion to reconsider an appealable order to 90 days after the first motion to reconsider is filed, or 180 days after entry of the appealable order.)

Finally, and also to assist in the timely filing of cross-appeals, the superior court's notification to all parties of the filing of a notice of appeal must now show its date of mailing. Cal Rules of Ct 1(d)(2). That date serves as the trigger for the 20-day extension of time to file a notice of cross-appeal.

Reporter's Transcript Designation, Nondesignation, and Completion Due Date

Reporter's Transcript designations remain due 10 days after filing the notice of appeal, but the designation must now specify the date of each proceeding to be tran-

scribed and may identify which portions of the proceeding(s), if any, should not be included in the transcript. Cal Rules of Ct 4(a)(4). And court reporters must now supply to any party, on request, unless the superior court orders otherwise, a copy of the reporter's transcript in computer-readable format. Cal Rules of Ct 4(f)(4). This requirement appears in CCP §269(c) and Govt C §69954, but is now included in the rules.

The new rules resolve two areas of uncertainty regarding a reporter's transcript preparation. Under the old rules, an appellant who wished to proceed without a reporter's transcript did not need to file a designation. But the superior court could never be sure whether the failure to designate was intentional or inadvertent. Indeed, some superior court clerks would place such appeals into default to "encourage" the appellant to file a designation or clarify that none was requested. Revised Rule 4(a)(1) eliminates the uncertainty and requires appellants to file, within the 10-day designation period, a designation or a notice of intent to proceed without a reporter's transcript.

Second, the trigger date for the court reporter to prepare the transcript has been changed. It is now the date the superior court serves the reporter with a party's designation (Rule 4(f)(1)), not the date the reporter receives the designation from the party—a date neither the court nor the parties could easily track.

Improved Clerk's Transcripts

Revised Rule 5 makes several improvements concerning the clerk's transcript. The required contents have been expanded and now must include, among other things, any notice of intention to move for new trial, motion to vacate the judgment, motion for JNOV or reconsideration (and subsequent order), and the register of actions ("docket sheet"), if one exists. This last item is intended to assist the court of appeal in assessing the completeness of the clerk's transcript. Cal Rules of Ct 5(b).

Parties may now designate only the relevant portions of documents. Cal Rules of Ct 5(a)(4). The hope is that, by eliminating duplicate or irrelevant materials, the clerks will be able to expedite the completion of the transcript and keep costs down. A party's designation should now clearly identify portions of documents to be omitted, noting specific page or exhibit numbers. Advisory Committee Comment to Rule 5(a).

Old Rule 5 assumed that the superior court clerk retained custody of all exhibits and could readily include them in the clerk's transcript if a party designated them. While this may have been true in the distant past, many courts now routinely return exhibits to the parties after a trial. Accordingly, new Rule 5(a)(5) requires that parties who are in possession of exhibits that a party has designated for inclusion in the clerk's transcript deliver them promptly to the superior court clerk.

Old Rule 5's option of allowing the parties to file a stipulated designation for the clerk's transcript has been deleted as superfluous. The respondent's failure to file a counterdesignation is now seen as an agreement with the appellant's designation. The new rule also eliminates the requirement that the clerk's estimate of the transcript's cost exclude the cost of copying exhibits that the respondent has designated. The burden on the court clerk in apportioning costs outweighs any possible utility that this provision once may have had.

Under new Rule 5(c), the clerk must (1) notify the appellant of the estimated cost of the transcript for the appellant and the court of appeal, and (2) notify all other parties of the estimated cost of a copy. Within 10 days of the notice, the appellant and any other party wishing to purchase a copy of the clerk's transcript must deposit the estimated cost (or apply for a waiver). Cal Rules of Ct 5(c)(3).

Easier Appendix Creation, Broader Appendix Sanctions, and a New Due Date for the Joint Appendix

The court of appeal used to operate in the dark about whether the appellant would be proceeding by way of a clerk's transcript or appendix. Now the superior court must serve on the court of appeal copies of any designation or nondesignation of a reporter's transcript and any election to proceed by way of an appendix. Cal Rules of Ct 4(d)(1), 5.1(a)(3). One important change is that the superior court must now serve a copy of the docket sheet on appellate counsel so counsel will know which documents were filed in the action and can determine which ones should be included in the appendix. Cal Rules of Ct 5.1(a)(3)(B). Counsel must then include the docket sheet in the appendix. Cal Rules of Ct 5.1(b)(1)(A), 5(b).

Parties no longer need to include conformed copies of documents in the appendix, except those that are necessary to show the timeliness of the appeal. Advisory Committee Comment to Rule 5.1(c). The old rule, which required conformed copies of all documents, was often unenforced, and often caused parties to spend substantial time attempting to obtain those copies from the court or opposing counsel. A word to the wise, however: All documents in an appendix need to have been filed in the action, and the filing of the appendix constitutes a representation to that effect.

". . . Rule 5.1(f) expands the court's power to impose monetary or other sanctions to punish any act that violates Rule 5.1, including sanctions for filing an appendix that contains inaccurate copies of documents."

Another new requirement prohibits the inclusion of (1) documents in an appendix that are "not necessary for proper consideration of the issues" on appeal, and (2) transcripts of oral proceedings that could have been made part of the reporter's transcript. Cal Rules of Ct 5.1(b). And the due date for filing a joint appendix is now earlier: The appellant must file it with the appellant's opening brief rather than the respondent's brief. Cal Rules of Ct 5.1(d)(2). In addition, Rule 5.1(d)(1)(A) makes clear that each party must be served with a copy, "unless otherwise agreed by the parties or ordered by the reviewing court." Finally, Rule 5.1(f) expands the court's power to impose monetary or other sanctions to punish any act that violates Rule 5.1, including filing an appendix that contains inaccurate copies of documents. Under the old rule, the party's or attorney's act must have been "[w]illful or grossly negligent." Advisory Committee Comment to Rule 5.1(f).

Appellate Brief Format

The most significant change to appellate briefs that parties produce on a computer or word processor is the demise of the 50-page limit. Parties no longer need to (nor should) "cram" text or footnotes or adjust the font size to meet a page limit. Rather, a 14,000-word limit now applies to each of the three principal briefs. To ensure compliance, counsel must furnish a signed certificate with the brief, stating the number of words it contains. Cal Rules of Ct 14(c)(1), (4). In addition, parties may now include attachments of up to 10 pages of material from the appellate record, such as key exhibits or orders. Rule 14(d). These attachments are in addition to the copies of unpublished non-California decisions that a party cites and must attach to the brief. Advisory Committee Comment to Rule 14(d). See Cal Rules of Ct 977(c).

Briefs of Amicus Curiae

Amicus practice in the courts of appeal now conforms with California Supreme Court practice. This means that applicants wishing to file amicus briefs must submit their proposed brief with their application. Cal Rules of Ct 13(b)(3). Unlike in the supreme court, however, there is no deadline for filing amicus briefs. The better practice, of course, is to seek leave to file early, before the court of appeal is ready to draft an opinion.

Brief Deadlines

Rule 15(b)(1) reaffirms the parties' right to grant self-executing stipulations of time up to 60 days to file appellate briefs. The 15-day grace period under Rule 17 remains, and Rule 15(b)(3) clarifies that parties need not apply for an extension if they can file the brief within the grace period. Parties who apply for an extension must explain that they have already stipulated to the 60-day extension or could not obtain a stipulation. Cal Rules of Ct 15(b)(2).

When a party is both appellant and respondent (*e.g.*, in a cross-appeal situation), the parties must now submit a joint briefing proposal (or separate proposals if they cannot reach agreement) from which the court will derive a briefing sequence and due dates. Cal Rules of Ct 16(a). Briefs by parties who appear in a dual capacity must be combined in a single document, but such parties may use up to double the number of words permitted in a principal brief (*e.g.*, a combined respondent's/cross-appellant's opening brief may contain 28,000 words). Cal Rules of Ct 16(b)(1). This is a difference from the federal rules, which retain the 14,000-word limit for combined briefs. Fed R App P 28(h), 32(a)(7); 9th Cir R 32–1.

Exhibit Transmission

The old rules called for transmission of original exhibits to the court of appeal after oral argument had been set. Parties must now request transmission of exhibits within 10 days after the respondent's brief is due. Cal Rules of Ct 18(a). If designated exhibits are in a party's possession, that party may now send those exhibits directly to the court of appeal. Cal Rules of Ct 18(b)(2). These revisions will enable the court to review the exhibits at the same time it reviews the briefs and prepares a draft opinion or calendar memorandum.

Preview of Coming Attractions

The Task Force has completed the second installment of revisions, which cover Rules 19 through 29.9, and the Administrative Office of the Courts has circulated it for comment. These rules address topics such as oral argument, rehearing petitions, petitions for review, and supreme court practice. The proposed revisions primarily reword and update the current rules, although there are some substantive changes. For example, there is a 20-day minimum notice period for oral argument, and the period for finality of a court of appeal opinion starts anew when the court orders publication of a previously unpublished opinion. Once these new rules are enacted, look for the sequel to this article, "Brave New Rules Revisited."