

NEW YEAR, NEW RULES

By David Ettinger

It's that time of year again. The temperature is dropping, the presents have been opened, the rush for those last tax deductions is on and the California Rules of Court are changing. Below are select changes relevant to civil appellate practice. You can see all the changes at www.courtinfo.ca.gov/rules/amendments/jan2008-2.pdf. The good news is that the Judicial Council did only a little renumbering this year.

1. Loose Lips and All That

For privacy reasons, new Rule 1.20(b) generally prohibits inclusion in any document filed in court of Social Security and financial account numbers.

2. For You Bluebook Fans

New Rule 1.200 gives document filers in all courts the option of using either the California Style Manual or the Bluebook for citation format. The Advisory Committee Comment to Rule 8.204(b), however, will continue to "encourage" appellate brief writers to follow the California Style Manual.

3. Stop Exaggerating

Court of Appeal clerks always have backed up their notices of the need for action with promises of dire consequences for a failure to comply. The promises are overstatements, however, because the courts have discretion not to impose the promised penalties. Thus, for example, when an appellant receives a 15-day briefing notice under Rule 8.220, the party is now told that not filing within the 15-day

grace period will result in the court's dismissing the appeal, even though the rule provides only that the court may dismiss the appeal as a sanction for noncompliance.

Under new amendments to the rules, the promises are being accurately downgraded to mere threats. Amended Rule 8.220(a)(1), for example, will require the clerk's notice to say that, if the appellant's opening brief is not filed within the 15-day grace period, "the court may dismiss the appeal."

Similar changes are being made to the rules on notices concerning (1) failures to pay appellate filing fees (Rule 8.100(c)(2)) and deposits (Rule 8.100(d)(1)), (2) late civil case information statements (Rule 8.100(g)(3)), (3) failures to procure the record (Rule 8.140(a)), and (4) missing certificates of interested entities or people (Rules 8.208(d)(2), 8.490(i)(4)).

4. What Part of "Extended" Don't You Understand?

Certain post-judgment events (such as new trial or judgment-notwithstanding-verdict motions, or another party's appeal) can, under Rule 8.108,



David Ettinger is a partner with the civil appellate law firm of Horvitz & Levy in Encino.

“extend” the normal time to appeal. Sometimes, however, the so-called extension period under the rule will expire before the normal time to appeal (for instance, if the court denies a new-trial motion less than 30 days after notice of entry of the judgment). When that happens, does the party get the full normal time, or does the party have to appeal within the shorter “extension” period?

Some earlier case law had held the “extension” period could shorten the normal time to appeal. So, when Rule 8.108 was revised several years ago (it was Rule 3 back then, but that’s another story), the Advisory Committee Comment to the revision specifically instructed that “the rule operates only to increase any time to appeal otherwise prescribed; it cannot shorten the time” (original emphasis). If that weren’t clear enough, the Advisory Committee Comment language is being moved into the text of Rule 8.108(a) itself.

5. Speaking of Extensions ...

Rule 8.108 will provide a new extension period. Under new subdivision (b)(2), when a party accepts an additur or remittitur, the time to appeal from the judgment will be extended “until 30 days after the date the party serves the acceptance.” Yeah, but what happens if the party doesn’t serve the acceptance? Good question.

6. A Stay, You Say?

A few form changes for supersedeas writ petitions. Most appellate practitioners probably do this, but Rule 8.112(a)(4) will require the petition to include “a statement of the case sufficient to show that the petitioner will raise substantial issues on appeal, including a fair summary of the material facts, the issues that are likely to be raised on appeal, and any oral statement by the court supporting its rulings related to these issues.” Also, it will require the petitioner to provide as an exhibit “[a]ny application for a stay filed in the trial court and

any opposition to that application.” Finally, the documents supporting the petition will be required, as with other writ petitions (see Rule 8.490(d)(1)), to “be bound together at the end of the petition or in separate volumes not exceeding 300 pages each” with consecutively numbered pages, to “be indexed by number or letter,” and to “begin with a table of contents listing each document by its title and its index-tab number or letter.”

7. Whole in One

Instead of permitting separate designations of the clerk’s and reporter’s transcripts (or of their substitutes, like appendixes or settled statements), new Rule 8.121 will provide for filing a single “notice ... designating the record on appeal.”

8. More Paper, Please

Rules 8.120(b)(1)(D) and 8.124(b)(1)(A) require a clerk’s transcript or an appendix to contain various post-trial motion documents that could establish an extension of the time to appeal: “[a]ny notice of intention to move for a new trial, or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order, and any order on such motion and any notice of its entry.” Those rules as amended - the first one renumbered as Rule 8.122(b)(1)(D) - also will require inclusion of “supporting and opposing memoranda and attachments.”

9. I’ve Got Your Administrative Record Right Here

New Rule 8.123 provides a special procedure for designating records of administrative proceedings that were admitted in evidence, refused or lodged in Superior Court. And don’t go stuffing those administrative records into an appendix, either. See new Rule 8.124(b)(2)(C).

10. And a One, And a Two ...

When making an augment motion, you have to attach

“a copy, if available, of any document or transcript” that you’re asking the court to add to the record. Rule 8.155(a)(2). The amended rule will specify that the attached copies “must be consecutively numbered, beginning with the number one.” Those of you who prefer starting your consecutive pagination with your favorite number will be out of luck soon - unless, of course, your favorite number is 1.

11. Fast Friends

There are no time limits for submitting an amicus curiae brief in the Court of Appeal. Soon there will be, however. Amended Rule 8.200(c)(1) will require a prospective amicus to submit an application to file an amicus curiae brief (along with the proposed brief itself) “[w]ithin 14 days after the last appellant’s reply brief is filed or could have been filed.” If you show good cause, the presiding justice will have the authority to permit a later filing.

12. Isn’t That Interesting?

Rule 8.208(c)(1) requires a party to file a certificate of interested entities or people “at the time [the party] files its first document in the Court of Appeal.” Under the revised rule (which will be subdivision (d)(1)), a party will file the certificate either with its “principal brief” or with a motion, application or opposition to a motion or application that is filed before the party’s principal brief.

The amended rule also will provide a procedure for filing the certificate under seal “[i]f the identity of [the] party has not been publicly disclosed in the proceedings.” The same will be true for certificates in writ petitions. New Rule 8.490(i)(3).

And, for you form lovers (you know who you are), the Judicial Council is putting together a new optional certificate form.

13. E-gads!

Instead of requiring you to serve the Supreme Court

with four paper copies of your Court of Appeal brief, amended Rule 8.212(c)(2)(A) will give you the option of sending one electronic copy. A bunch of specs for the electronic service copy (like don’t send the Supreme Court any viruses) are in the revised rule. The Advisory Committee Comment to the rule says that the Supreme Court’s “electronic filing address” will be on the court’s Web site.

14. Moving Violation

Amended Rule 8.276(a)(3) will authorize a Court of Appeal to impose sanctions for filing a frivolous motion.

15. And Writ Petitions, Too

The Court of Appeal also will have the specific authority to impose sanctions for filing a frivolous writ petition. See new Rule 8.490(n).

16. Costly Change

The rule concerning costs on appeal has been renumbered as Rule 8.278. Also, “[f]iling fees” are being added to the list of recoverable costs. Rule 8.278(d)(1)(A). Didn’t know those weren’t on the list, did you?

17. Good Enough

Now, if a potential amicus curiae wants to submit its brief to the Supreme Court after the 30-day period provided in the rule, the amicus must show “specific and compelling reasons for the delay.” Under amended Rule 8.520(f)(2), the amicus will need to show only old-fashioned “good cause.”

18. Going Up?

Rule 8.1008(b) is being amended to allow 15 days, instead of the current 8, for a party to petition the Court of Appeal to transfer a case to itself from the appellate division of the Superior Court. The rule also is taking away the opposing party’s right to file an answer to the petition; An answer will be permitted only if the Court of Appeal asks for one.