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## APPELLATE RULES

### RULE 1 APPLICABILITY OF RULES

These rules are intended to supplement the relevant statutes and California Rules of Court (Rules of Court or CRC), including but not limited to rules 8.800-8.936 applicable to the Appellate Division.

Where reference is made in these rules to the Presiding Judge of the Appellate Division, such reference also includes a designee of the Presiding Judge of the Appellate Division.

(Effective 4/22/2021)

### RULE 2 RULES FOR THE APPELLATE DIVISION

#### A. Appellate Division Jurisdiction

- i. The Appellate Division of the Superior Court has jurisdiction over all appeals arising from limited civil, misdemeanor, and infraction cases in Santa Clara County (except small claims appeals and parking citation appeals) and over all motions and petitions filed in the reviewing court for a stay of proceedings in the trial court in connection with these appeals. (Code Civ. Proc., § 77.)
- ii. The Appellate Division has original jurisdiction over all petitions for writs of mandate, prohibition, supersedeas, and review (certiorari) in limited civil, misdemeanor, and infraction cases. (Code Civ. Proc., §§ 1068, subd. (b); 1085, subd. (b); & 1103, subd. (b).)

#### B. Notice of Appeal

- i. Where to File

A notice of appeal to the Appellate Division must be filed in the Superior Court division (trial court) from which the appeal is being taken. Except as otherwise specified in these rules or in the Rules of Court, and except as to most filings pertaining to the appellate record that are properly filed in the trial court, all filings after the notice of appeal in that appellate case must be made in the Appellate Division of the Superior Court, which is located at 191 N. First St. in San Jose. A courtesy copy of the notice of appeal must be separately served on the trial court judge who issued the order or judgment.
- ii. Late Filing of Notice of Appeal and Non-Appealable Orders
  - a. *Criminal or Infraction Cases.* If the notice of appeal is filed late, the clerk will stamp it “Received [date] but not filed” and notify the party that the notice was not filed because it was late. (CRC 8.853(d) & 8.902(d).) If a late notice of appeal is inadvertently filed, the Presiding Judge of the Appellate Division will issue an Order to Show Cause re dismissal or entertain a motion filed by the respondent to dismiss the appeal.
  - b. *Civil Cases.* If a notice of appeal is filed late, the Presiding Judge of the Appellate Division will issue an Order to Show Cause re dismissal or entertain a motion by the respondent to dismiss the appeal.
  - c. *Non-Appealable Orders.* In any appeal in the Appellate Division, if the appeal is initiated by a notice of appeal from a non-appealable order, the Presiding Judge of the Appellate Division may issue an Order to Show Cause re dismissal or entertain a motion by the respondent to dismiss the appeal. Alternatively, and as appropriate in rare cases, the Appellate Division may, in its discretion, treat a notice of appeal from a non-appealable order as a writ petition.

#### C. Appointment of Counsel in Misdemeanor Appeals

There is no right to self-representation in a misdemeanor appeal. A defendant appealing a misdemeanor conviction must be represented by an attorney. A defendant appealing a misdemeanor conviction who had appointed counsel in the trial court or who meets the indigency standards for appointed counsel is entitled to appointed counsel on appeal upon written request. (CRC 8.851(a).) A defendant who wishes to be represented on appeal by appointed counsel may use the Request for Appointment of Counsel (Judicial Council Form CR-133) for this purpose. A defendant who is appealing a misdemeanor conviction and who did not have appointed counsel in the trial court but who wishes the court to appoint counsel on appeal must include with the written request a financial statement establishing indigency, and may use Defendant’s Financial Statement on Eligibility For Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (Judicial Council form CR-105) for this purpose. Both forms are fillable and available for download on the California Courts website. If appointed trial counsel is to represent the defendant on appeal, trial counsel must indicate this in writing on the request for appointment of counsel.

If a misdemeanor defendant who is represented in the trial court by appointed counsel files a pretrial appeal for which the defendant requests the appointment of counsel, the Appellate Division will appoint trial counsel to represent the defendant in the pretrial appeal, unless trial counsel declines the appointment in a writing filed in the Appellate Division with a proof of service showing service of the document on the defendant, the People, and the Independent Defense Counsel Office.

A misdemeanor defendant who is the respondent in an appeal by the People may also be eligible for appointment of counsel under the authority of *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998 and *Gardner v. Appellate Division of Superior Court* (2019) 41 Cal.App.5th 1139. Any such respondent who had appointed counsel in the trial court will be appointed the same counsel on appeal, unless trial counsel declines the appointment in a writing filed in the Appellate Division with a proof of service showing service of the document on the defendant, the People, and the Independent Defense Counsel Office. A misdemeanor defendant who is a respondent on appeal and who was not represented in the trial court by appointed counsel must retain counsel on appeal or else request in writing the appointment of counsel on and include a sworn statement itemizing their income, necessary living expenses, assets and

liabilities. Judicial Council forms CR-133 (Request for Appointment of Counsel) and CR-105 (Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and record on Appeal at Public Expense) may be used for this purpose.

The Presiding Judge of the Appellate Division, in his or her discretion, may also, upon proper application with a showing of indigency, appoint counsel to any misdemeanor defendant responding to the People's appeal or writ petition made in that defendant's criminal case.

#### **D. Applications and Motions**

All applications must comply with CRC 8.806.

Applications for extensions of time to file records, briefs, or other documents must comply with 8.810 and also provide: (1) the due date for the document to be filed; (2) the length of the extension requested; (3) information about any earlier extensions for the same document that were granted and, if so, how long the extensions were; (4) the opposing party's position on the requested extension; and (5) a proof of service of the extension request on all parties, including, in civil cases, the client for whose benefit the extension is being sought as required by CRC 8.810(e). Applications to extend time must include a proposed order.

Applications for a waiver of fees and costs on appeal to the Appellate Division are governed by CRC 8.818.

Any application or a stay in an unlawful detainer case must meet the requirements of Civil Code section 1176 concerning the deposit of rent.

All motions must comply with CRC 8.808. In addition, motions to withdraw as counsel of record must comply with and CRC 3.1362 and 8.814(c) and Code of Civil Procedure sections 284 and 285. A substitution of attorneys must likewise comply with CRC 8.814(b).

For good cause shown by proper application or motion, the Presiding Judge of the Appellate Division may relieve a party from a default for any failure to comply with these rules, consistently with CRC 8.812.

#### **E. The Record on Appeal**

##### **i. Civil Appeals**

The record on appeal includes those items specified as part of the "normal record" by CRC 8.830. The record on appeal consists of the clerk's transcript, appendices, or agreed statement (CRC 8.830(a)(1)) and may include the reporter's transcript, an agreed statement, or a settled statement on appeal (CRC 8.830(a)(2)). The record must be designated by timely notice filed in the trial court. The parties must comply with the CRC governing the method and time limits for designating the record on appeal and are responsible for assuring that the record is paid for, prepared, and transmitted to the Appellate Division. (CRC 8.831, 8.832(b) & (c), 8.834, 8.835, 8.836, 8.837.)

Any party who wants the Appellate Division to review exhibits admitted, refused, or lodged in the trial court must comply with and cause the exhibits to be transmitted to the Appellate Division in accordance with CRC 8.843.

##### **ii. Misdemeanor and Infraction Appeals**

The record on appeal includes those items specified by CRC 8.860 (misdemeanors) and 8.910 (infractions) as part of the "normal record" on appeal. The clerk's transcript, consisting of the items specified by CRC 8.861 or 8.867 for misdemeanors and 8.912 or 8.920 for infractions, is prepared by the appeals unit of the Superior Court after the notice of appeal is filed and without request or payment by the appellant. (CRC 8.862(a) & 8.913.)

If an appellant wishes to include in the record on appeal a record of the oral proceedings, the appellant must timely file in the trial court a notice of election to proceed on appeal with either the reporter's transcript, official electronic recording, or a statement on appeal. (CRC 8.864, 8.869 & 8.915.) Appellant must thereafter comply with the CRC to ensure the timely preparation and transmittal of the record of the oral proceedings to the Appellate Division.

Any party who wants the Appellate Division to review exhibits admitted, refused, or lodged in the trial court must comply with CRC 8.870 in misdemeanor cases or 8.921 in infraction cases.

##### **iii. Limited Record of Oral Proceedings**

In an appeal by a defendant or the People in a misdemeanor case from a post-conviction order, including but not limited to an order revoking, reinstating, or modifying probation, the normal record of oral proceedings will be limited to the sentencing proceeding at which the defendant was first granted probation and the hearing on the revocation, reinstatement, or modification appealed from. (CRC 8.865(b).)

##### **iv. Electronic Recordings/Trial Court's Election in Lieu of Statement on Appeal**

Under CRC 8.835, 8.868, and 8.915, when the trial court proceedings were officially recorded under Government Code section 69957, subdivision (a), the court may permit the original of an electronic recording of the trial court proceedings, or a copy made by the court, to be transmitted as the record of the oral proceedings without being transcribed. (CRC 8.830(a)(2)(B), 8.835, 8.864, 8.868, 8.917.)

If the trial court proceedings were reported by a court reporter or officially electronically reported under Government Code section 69957 and the trial court judge determines that it would save court time and resources, instead of correcting a proposed statement on appeal under CRC 8.837, 8.869, or 8.916, the trial court judge may:

- (1) order that the original of an official electronic recording of the trial court proceedings, or a copy made by the court, be transmitted as the record of the oral proceedings without being transcribed. The court will pay for any copy of the official electronic recording ordered under this subdivision; or
- (2) order that the transcript be prepared as the record of the oral proceedings. The court will pay for any transcript ordered under this rule.

## v. Proposed Statements on Appeal—Service on Trial Judge

A party filing a proposed statement on appeal under CRC 8.837, 8.869, or 8.916, or any response thereto, must separately serve the trial judge who presided over the relevant proceedings with a courtesy copy of the proposed statement on appeal or response.

## vi. Augmenting or Correcting the Appellate Record

Any party may move to augment or correct the record on appeal. (CRC 8.841, 8.873, 8.923.)

A motion to augment the record must include a copy of the matters sought to be included in the record, if available. If those matters include oral proceedings as to which no transcript has yet been prepared, the motion must include information as to the date, time, and location of the hearing, and, if applicable, the name and contact information of the court reporter.

Omissions from the normal appellate record must proceed by notice of omission filed in the trial court under CRC 8.841(c), 8.873(b), and 8.923(b). Courtesy copies of notices of omission must also be emailed to [appealsclerks@scscourt.org](mailto:appealsclerks@scscourt.org) with a subject line that reads “COURTESY COPY re [trial court case name & number & title of document]” with this information provided for reference.

**F. Briefs**

After the record on appeal has been filed, the clerk of the Appellate Division will issue a notice setting the briefing schedule in accordance with CRC 8.881 and 8.926. That schedule may be altered by order of the Presiding Judge of the Appellate Division.

The format and content of briefs filed in an unlimited civil or misdemeanor appeal must comply with CRC 8.883, and in an infraction appeal with CRC 8.928. All briefs must be served on the opposing party and on the trial court and must contain a proof of service. Even if electronically filing appellate briefs, the party must also provide four hard copies of the brief to the Appellate Division clerk within five days after the electronic filing.

In misdemeanor appeals, all briefs filed under *People v. Wende* (1979) 25 Cal.3d 436 must be prominently labeled “Filed Under *People v. Wende*” on the cover. *Wende* briefs must also include a declaration of counsel under penalty of perjury averring that his or her client has been advised of counsel’s view that there are no arguable issues to be raised on appeal and of the client’s right to submit his or her own supplemental briefing within 30 days after the service and filing of the *Wende* brief.

To the extent reasonably and practically possible, and as applicable, the Appellate Division voluntarily complies with CRC 8.90, which applies in the Courts of Appeal, concerning privacy and the use of names in written opinions or decisions (See e.g., CRC 8.90(b)(4) [victims in criminal proceedings] & (b)(10) [persons in other circumstances in which personal privacy interests support not using the person’s name].) Parties must likewise respect privacy concerns in the manner in which third parties are named in briefs publicly filed in the Appellate Division.

**G. New Authorities**

Parties wishing to bring new authorities to the attention of the Appellate Division after briefing or oral argument has concluded must comply with CRC 8.254, as applicable in the Courts of Appeal.

**H. Electronic Filing**

Even where electronic filing is not made mandatory by Rule 6 of the General Court and Administration Rules, parties are strongly encouraged to file documents electronically in the Appellate Division. Electronic filing is especially recommended for notices of omission from the record on appeal, motions to augment the record on appeal, or any filing or request by which the filer wishes to expedite submission of an appeal or seeks any action by the Appellate Division before decision on the merits. When electronically filing an affidavit, declaration, or any document requiring a signature, filers must comply with CRC 2.257. Electronically filed documents should be in .pdf format converted electronically from the native word processing format, rather than by optical scan of a print version. If the electronic filer has no alternative to an optical scan, optical character recognition or other text recognition is recommended.

**I. Writs**

A writ petition filed in the Appellate Division must comply with all applicable statutes and the CRC. (See, Code Civ. Proc., §§ 1067-1108; CRC 8.824, 8.930-8.936.) Writ petitions must be filed within any specifically applicable statutory period or generally within the statutory period for the filing of a notice of appeal. The writ petition must be served on all parties and the trial court. Any request for a stay must appear prominently on the cover of the writ petition and must identify the date of any impending action or proceeding that will occur absent a stay and the trial judge before whom the case is pending. A petition for writ of supersedeas filed in connection with an appeal must comply with CRC 8.824.

(Effective 4/22/2021)

**RULE 3 RULES IN THE SUPERIOR COURT FOR APPEALS TO THE DISTRICT COURT OF APPEAL****A. Transcript in Lieu of Settled Statement on Appeal**

If a party is proceeding on appeal by use of a settled statement and the oral proceedings were reported by a court reporter, the trial judge may order that a transcript be prepared as the record of the oral proceedings instead of correcting or certifying a proposed statement on appeal if the trial judge determines that doing so would save court time and resources. The court will pay for any transcript so ordered. (CRC 8.137(f)(2).)

**B. Proposed Settled Statement on Appeal—Service on Trial Judge**

A party filing an application or motion, as applicable, to use a proposed settled statement on appeal under CRC 8.137, 8.346, or 8.407, or a proposed settled statement or any response thereto, must separately serve the trial judge who presided over the relevant proceedings with a courtesy copy of the application or motion, and the proposed settled statement, or response thereto.

**C. Notice of Omission from Normal Record**

In addition to being filed, a notice of omission from the appellate record submitted under CRC 8.155(b), 8.340(b), or 8.410(a) must be brought to the attention of the Superior Court appeals unit by emailing a courtesy copy of the notice to [appealsclerks@scscourt.org](mailto:appealsclerks@scscourt.org) with a subject line that reads "COURTESY COPY re [trial court case name & number & title of document]" with this information provided for reference.

**D. Record of Administrative Proceedings**

CRC 8.123 applies to appeals where the record of an administrative proceeding was admitted into evidence, refused, or lodged in the superior court. For ease of transmission to the Court of Appeal as part of the appellate record, parties who wish to place an administrative record before the trial court are encouraged to electronically file such record in the Odyssey case file (rather than submitting a paper copy to the superior court) in addition to providing the individual trial judge with an electronic copy and/or any requested excerpts.

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