



JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 27, 2015

Title	Agenda Item Type
Appellate Procedure: Appendixes	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rule 8.124	January 1, 2016
Recommended by	Date of Report
Appellate Advisory Committee	August 12, 2015
Hon. Raymond J. Ikola, Chair	Contact
	Heather Anderson, 415-865-7691
	heather.anderson@jud.ca.gov

Executive Summary

The Appellate Advisory Committee proposes to amend the rule governing the use of appendixes in lieu of clerk's transcripts in unlimited civil appeals to eliminate the provision encouraging parties to prepare a joint appendix. This change is intended to reduce difficulties, and thus costs, for litigants associated with the efforts to reach a stipulation to use a joint appendix in cases in which litigants do not think this option is feasible.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2016, amend rule 8.124 of the California Rules of Court to eliminate the provision encouraging parties to prepare a joint appendix. The text of the amended rule is attached at page 5.

Previous Council Action

The Judicial Council adopted rule 8.124, which authorizes the use of an appendix in lieu of clerk's transcripts in civil appeals in the Court of Appeal, effective July 1, 1981. As adopted, this rule included a provision stating that "[c]ounsel have a duty to confer and attempt to reach an

agreement concerning a possible joint appendix.” In explanation of this provision, the report to the Judicial Council recommending adoption of the appendix procedure stated that “[a] joint appendix would be more convenient for the court and counsel. While agreement on its contents cannot be mandated, it would seem desirable to require a minimum effort to try to agree.” The council amended the language of this provision in 2001 as part of the overall rewrite of the appellate rules. Subdivision (a)(3) of this rule now provides that “[t]he parties may prepare separate appendixes, but are encouraged to stipulate to a joint appendix.”

Rationale for Recommendation

Under rule 8.124, appellants and respondents may prepare either individual appendixes, which are filed with their respective briefs, or a joint appendix, which must be filed with the appellant’s opening brief. Currently, subdivision (a)(3) of this rule provides that the parties may prepare separate appendixes, but are encouraged to stipulate to a joint appendix. Attorneys have reported that the provision encouraging stipulation to the use of a joint appendix is not necessary and sometimes causes problems for and disputes among litigants.

The view that that this provision is unnecessary stems from the fact that both a joint appendix and an appellant’s appendix are actually required to contain the same items. Under rule 8.124(b)(1), both types of appendixes must contain (1) all the items required to be included in a clerk’s transcript under rule 8.122 and (2) any other item that could be included in a clerk’s transcript that is necessary for proper consideration of the issues on appeal, including “any item that the appellant should reasonably assume the respondent will rely on.” Thus, if the appellant is able to fully anticipate all the items the respondent will need in the appendix, then no respondent’s appendix will be needed—all the items necessary for the appeal will be in the appellant’s appendix, and it will provide a single, unified record in the same way as would a joint appendix.

The practical problem for litigants is that it is generally not possible to be sure at the time the appellant’s or joint appendix must be filed that it actually does include all the items a respondent will need to rely on. As noted above, both an appellant’s and a joint appendix must be filed with the appellant’s opening brief so the Court of Appeal can access the material from the record cited in that brief. In most cases, however, the respondent cannot be sure that an appendix includes all the items the respondent will need to rely on until after the appellant’s brief is filed. The appellant’s brief identifies what issues the appellant is raising on appeal which, in turn, allows the respondent to determine what items from the trial court record are relevant in responding to these issues. By allowing the respondent to file a supplemental respondent’s appendix with his or her brief, the separate appendix procedure anticipates the possibility that some necessary materials may have been left out when an appendix is filed with the appellant’s opening brief. Because the joint appendix procedure does not account for this possibility, respondents are unlikely to want to take the risk of using this procedure and then having to subsequently expend additional time and resources to file a motion to augment the record. As a result, attorneys, Court of Appeal justices, and appellate court staff all report that, despite the encouragement in the current rule, joint appendixes are rarely used. Given this, experienced appellate attorneys have

expressed the view that it is not a good use of their time to try to come to an agreement to use a joint appendix. Based on the provision encouraging the use of joint appendixes, however, some litigants may insist on trying to do this, resulting in disputes between litigants and inefficiencies.

This proposal would delete the provision in current rule 8.124 that encourages parties to file a joint appendix. As in the current rule, the use of a joint appendix would continue to be an option specifically identified in the rule. Thus, this proposed amendment would not prevent litigants from preparing a joint appendix where it is worthwhile to do so. It would, however, eliminate the pressure to spend time on trying to reach a stipulation to use a joint appendix where using this procedure does not make sense.

Comments, Alternatives Considered, and Policy Implications

External comments

The proposed amendments to rule 8.124 were circulated for public comment between April 17 and June 19, 2015, as part of the regular spring comment cycle. Seven individuals or organizations submitted comments on this proposal. Five commentators agreed with the proposal and two did not agree with the proposal. A chart with the full text of the comments received and the committee's responses is attached at pages 6–8. Based on these comments, the committee recommends adopting this proposal as circulated.

One of the commentators who did not agree with the proposal, an executive judicial assistant from a Court of Appeal, expressed concern that this rule change could result in an increase in the use of separate appellant's and respondent's appendixes, which could impact the workload of court employees. Under both the current rule and the proposed amendments to this rule, parties are free to choose whether or not to use joint appendixes. As discussed above, it is the committee's understanding that, under the current rule, joint appendixes are rarely used. Based on this, it is the committee's view that the recommended amendment should not appreciably impact the types of records that the parties are preparing and thus should not impact the workload for court employees. For this reason, the committee declined to modify the proposal based on this comment.

The other commentator that did not agree with the proposal saw no harm in encouraging the use of joint appendixes, even if they were infrequently used. It is also the committee's understanding, based on the experiences of committee members and other appellate practitioners, that some attorneys have faced difficulties associated with fruitless efforts to stipulate using a joint appendix. Therefore, the committee's view is that eliminating the language urging litigants to stipulate to joint appendixes should reduce attorney time, and thus litigant costs, without negatively impacting the courts. For this reason, the committee declined to modify the proposal based on this comment.

Alternatives

The committee considered not proposing this rule amendment. However, the committee concluded that eliminating the encouragement to use joint appendixes would reduce costs for

litigants without likely impacting the appellate courts, and thus would improve the administration of justice in appellate proceedings.

Implementation Requirements, Costs, and Operational Impacts

This proposed change would not impose any implementation requirements on courts, and no operational impacts on courts are anticipated.

Attachments and Links

1. Cal. Rules of Court, rule 8.124, at page 5
2. Chart of comments, at pages 6–8

Rule 8.124 of the California Rules of Court is amended, effective January 1, 2016, to read:

1 **Rule 8.124. Appendixes**

2

3 **(a) Notice of election**

4

5 (1)–(2) * * *

6

7 (3) The parties may prepare separate appendixes, ~~but are encouraged to~~ or they may
8 stipulate to a joint appendix.

9

10 **(b)–(g) * * ***

11

SPR15-06**Appellate Procedure Appendixes (Amend Cal. Rules of Court, rule 8.124)**

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

	Commentator	Position	Comment	Committee Response
1.	Jason J. Jarvis Levinson Arshonsky & Kurtz, LLP Sherman Oaks	N	I don't understand the reasoning behind eliminating the suggestion to prepare joint appendices. Just because it doesn't happen all the time doesn't mean the suggestion is a bad one. I like it. It encourages appellant and respondent to work together, hopefully gives the court less to read and certainly gives the court less to read in two different places; FRAP 30 basically says the same thing, and I think it is better to have more not less consistency with FRAP. Just my two cents.	Based on the weight of the public comments and the experience of committee members, the committee is recommending adoption of the proposal as circulated. It is the committee's understanding that under the current rule, joint appendixes are rarely used and that some litigants have experienced difficulties and increased costs associated with fruitless efforts to stipulate to using a joint appendix where the parties do not believe this is workable. As in the current rule, the use of a joint appendix would continue to be an option specifically identified in the rule that litigants could chose to use this option where it was workable. However, attorney time, and thus litigant costs, associated with trying to reach a stipulation to use a joint appendix in cases where it is not a workable option would be reduced.
2.	Orange County Bar Association by Ashleigh Aitken, President	A	No narrative comments submitted.	The committee notes the commentator's support for the proposal; no response required.
3.	San Diego Bar Association by Appellate Practice Section Victoria E. Fuller, Chair	A	Our section supports the revision to Rule 8.124, which removes the language encouraging the use of a joint appendix. We concur that the language is not necessary and sometimes can lead to problems and increased fees for litigants.	The committee notes the commentator's support for the proposal; no response required.

SPR15-06**Appellate Procedure Appendixes** (Amend Cal. Rules of Court, rule 8.124)

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

	Commentator	Position	Comment	Committee Response
4.	Ben Shatz Manatt, Phelps & Phillips, LLP Los Angeles	A	Strongly agree. The proposal correctly analyzes a very real problem and correctly solves it. Thanks!	The committee notes the commentator's support for the proposal; no response required.
5.	State Bar of California by John Derrick, Chair Committee on Appellate Courts	A	The Committee supports this proposal. We believe the rules should remain neutral as to whether litigants employ a joint appendix or separate appendixes. There are certain circumstances in which a joint appendix is useful, and the proposal leaves that option available for such situations. But in our experience, it is inefficient to use a joint appendix in many, if not most, cases. Therefore, we agree with the Appellate Advisory Committee that rule 8.124(a)(3) should not encourage the use of joint appendixes.	The committee notes the commentator's support for the proposal; no response required.
6.	Superior Court of San Diego County by Michael M. Roddy, Executive Officer	A	<ul style="list-style-type: none"> • Would the proposal provide cost savings? No costs savings to the court, but we support this proposal to clear any confusion between the parties. • What would the implementation requirements be for courts? Minimal training and minimal procedure change. • Would 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, but it is noted that 	The committee notes the commentator's support for the proposal and appreciates the responses to the specific questions on the invitation to comment.

SPR15-06**Appellate Procedure Appendixes** (Amend Cal. Rules of Court, rule 8.124)

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

	Commentator	Position	Comment	Committee Response
			self-help resources on the Judicial Council website would ideally also have to be amended accordingly, including but not limited to Chapter 3 of The California Court of Appeal Step by Step, Civil Appellate Practices and Procedures for the Self-Represented in the Fourth Appellate District Division One	
7.	Kristina Zaldana, Executive Judicial Assistant First District Court of Appeal	N	I do not agree with the proposed change to omit the language encouraging the use of joint appendices due to the extra expenses incurred by the court to accommodate the consequences of such a proposal. If granted, court employees would spend more time reviewing the various records submitted by both parties, instead of having the ability to review a consolidated, joint record which enhances overall court efficiency and timeliness. Thank you for your consideration.	Based on the weight of the public comments and the experience of committee members, the committee is recommending adoption of the proposal as circulated. It is the committee's understanding that under the current rule, joint appendixes are rarely used so the recommended amendment should not impact the types of records that the parties are choosing to prepare or that court is currently receiving. As in the current rule, the use of a joint appendix would continue to be an option specifically identified in the rule. The parties would thus remain free to use joint appendixes where that was workable in the particular appeal.