



Judicial Council of California

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 24-149

For business meeting on September 20, 2024

Title

Appellate Procedure: Deadline for Amicus Curiae Briefs

Agenda Item Type

Action Required

Effective Date

January 1, 2025

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rule 8.200

Date of Report

August 15, 2024

Recommended by

Appellate Advisory Committee
Hon. Louis Mauro, Chair

Contact

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Executive Summary

The Appellate Advisory Committee recommends amending California Rules of Court, rule 8.200 to provide a deadline for filing an application to file an amicus curiae brief when no respondent's brief has been filed. This proposal is intended to close a gap in the current rule.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2025, amend California Rules of Court, rule 8.200 to require that when no respondent's brief has been filed, an application for permission to file an amicus curiae brief must be filed within 34 days after the respondent's brief could have been filed.

The proposed amended rule is attached at page 4.

Relevant Previous Council Action

Rule 8.200 of the California Rules of Court,¹ governing briefs by parties and amici curiae, was adopted as rule 13 in 2002 and renumbered in 2007. Effective January 1, 2008, the Judicial

¹ All further rule references are to the California Rules of Court.

Council amended rule 8.200 to provide that applications to file an amicus brief must be filed no later than 14 days after the last appellant’s reply brief was filed or could have been filed. Other amendments to rule 8.200 are not relevant to this proposal.

Analysis/Rationale

Currently, rule 8.200(c)(1) provides that a person or entity may file an application for permission to file an amicus curiae brief “[w]ithin 14 days after the last appellant’s reply brief is filed or could have been filed under rule 8.212, whichever is earlier.” Under rule 8.212, an appellant’s optional reply brief must be served and filed “within 20 days after the respondent files its brief.”² Thus, in the usual case, an amicus curiae application will be due no later than 34 days after the filing of the respondent’s brief.

Rule 8.200, however, does not state when an amicus curiae application is due when no respondent’s brief is filed and, thus, no reply brief can be filed. To close this gap in the rule, and eliminate any potential confusion, the committee recommends that rule 8.200(c) be amended to provide that, when no respondent’s brief is filed, amicus curiae applications are due “within 34 days after the respondent’s brief could have been filed.” The committee also recommends amending the advisory committee comment to rule 8.200 to provide that the time a respondent’s brief “could have been filed” includes any authorized extension of the deadline specified in rule 8.212 and the default notice period specified in rule 8.220(a).

The committee believes this amendment to rule 8.200(c) will ensure that potential amici curiae are not prejudiced by the respondent’s decision to not file a respondent’s brief. The amendment gives amici curiae the same amount of time to file their application as they would have had if a respondent’s brief had been filed. Accordingly, the amendment helps ensure that amici curiae have sufficient time to research the relevant issues in the case and draft their proposed briefs.

Policy implications

Amending rule 8.200(c) will help ensure that potential amici curiae are able to effectively access the courts. The amendment is therefore consistent with the *Strategic Plan for California’s Judicial Branch*,³ especially the goals of Access, Fairness, Diversity, and Inclusion (Goal I) and Quality of Justice and Service to the Public (Goal IV).

Comments

This proposal was circulated for public comment from March 29 to May 3, 2024, as part of the regular spring comment cycle. Three comments were received: one from the California Lawyers Association, Committee on Appellate Courts (CAC); one from the Family Violence Appellate Project (FVAP); and one from the Orange County Bar Association. All commenters agreed with

² Rule 8.212(a)(3).

³ Available at www.courts.ca.gov/3045.htm.

the proposal. A chart with the full text of the comments received and the committee's responses is attached at pages 5–12.

The invitation to comment asked whether the deadline for amicus curiae applications should be shorter than the proposed 34 days after the respondent's brief could have been filed. CAC and FVAP both opposed a shorter deadline. CAC noted that drafting and filing amicus curiae briefs require significant planning, coordination, and research and that this work is frequently undertaken by nonprofit organizations with limited resources and capacity. FVAP joined in CAC's comments.

The invitation to comment also asked whether the deadline for amicus curiae applications when no respondent's brief is filed should be based on the date the opening brief was filed, as opposed to the date the respondent's brief could have been filed. CAC opposed this alternative, noting that in cases in which a respondent obtains an extension of time to file the respondent's brief, the deadline for filing an amicus curiae brief would fall *before* the respondent's brief was due. This would create a situation where the amicus curiae, not knowing whether the respondent would actually file a brief and thus not knowing which rule 8.200(c)(1) deadline would apply, would have to protect its ability to participate by filing its proposed brief before the respondent's brief. Both CAC and FVAP noted that this result would result in less useful amicus briefs, as the briefs could not address the issues raised in the respondent's brief.

Alternatives considered

The committee considered the alternative of not taking any action but concluded that the amendment would benefit the courts and potential amici curiae. The committee considered recommending adoption of a shorter deadline or running the deadline from the filing of the appellant's opening brief but concluded that either alternative would prove unworkable for the reasons identified by the commenters.

Fiscal and Operational Impacts

Other than training for court staff to advise them of the rule change, the committee anticipates no fiscal or operational impacts.

Attachments and Links

1. Cal. Rules of Court, rule 8.200, at page 4
2. Chart of comments, at pages 5–12

Rule 8.200 of the California Rules of Court is amended, effective January 1, 2025, to read:

1 **Rule 8.200. Briefs by parties and amici curiae**

2
3 **(a)–(b) * * ***

4
5 **(c) Amicus curiae briefs**

6
7 (1) Within 14 days after the last appellant’s reply brief is filed or could have been filed
8 under rule 8.212, whichever is earlier, any person or entity may serve and file an
9 application for permission of the presiding justice to file an amicus curiae brief. If no
10 respondent’s brief is filed, the application is due within 34 days after the
11 respondent’s brief could have been filed. For good cause, the presiding justice may
12 allow later filing.

13
14 **(2)–(6) * * ***

15
16 (7) The Attorney General may file an amicus curiae brief without the presiding justice’s
17 permission, unless the brief is submitted on behalf of another state officer or agency.
18 The Attorney General must serve and file the brief within 14 days after the last
19 appellant’s reply brief is filed or could have been filed under rule 8.212, whichever is
20 earlier, ~~and~~. If no respondent’s brief is filed, the Attorney General must serve and file
21 the amicus curiae brief within 34 days after the respondent’s brief could have been
22 filed. The brief must provide the information required by (2) and comply with (5).
23 Any party may serve and file an answer within 14 days after the brief is filed.

24
25 **Advisory Committee Comment**

26
27 **Subdivision (a)(2). * * ***

28
29 **Subdivision (b). * * ***

30
31 **Subdivision (c)(1).** The time within which a reply brief “could have been filed under rule 8.212” includes
32 any authorized extension of the deadline specified in rule 8.212. The time within which a respondent’s
33 brief “could have been filed” includes any authorized extension of the deadline specified in rule 8.212 and
34 the 15-day default notice period specified in rule 8.220(a).

SPR24-04

Appellate Procedure: Deadline for Amicus Curiae Briefs (amend Cal. Rules of Court, rule 8.200)

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

	Commenter	Position	Comment	Committee Response
1.	<p>California Lawyers Association, Litigation Section, Committee on Appellate Courts</p> <p>by Saul Bercovitch, Associate Executive Director, Governmental Affairs</p>	AM	<p>The Committee on Appellate Courts (CAC) of the California Lawyers Association’s Litigation Section submits this response to the Invitation to Comment on SPR24-04. Established in 2018, the California Lawyers Association is a nonprofit, voluntary organization comprising thousands of licensed attorneys that is dedicated to the professional advancement of attorneys practicing in the State of California. The CAC consists of over twenty experienced appellate practitioners and court staff, drawn from a wide range of practice areas. As part of its mission, the CAC frequently shares its views regarding proposals to change rules that govern appellate practice.</p> <p>In SPR24-04, the Advisory Appellate Committee proposes 1) amending California Rules of Court, rules 8.200(c)(1) and (c)(7) to clarify that “[i]f no respondent’s brief is filed, the [amicus curiae] application is due within 34 days after the respondent’s brief could have been filed,” and 2) amending the Advisory Committee Comment to clarify that the 15-day default notice period contained in rule 8.220(a) (Default Letter) should be counted in determining when the respondent’s brief or reply brief “could have been filed.” The CAC supports these changes. The CAC opposes the alternative approach, which would amend rules 8.200(c)(1) and (c)(7) to require amicus “applications to be filed 79 days after the appellant’s opening brief was actually filed.”</p>	<p>No response necessary.</p> <p>The committee appreciates the feedback and notes the commenter’s support for making the amicus curiae application due within 34 days after the respondent’s brief could have been filed. To ensure that potential amici curiae have sufficient time to conduct research, draft their proposed brief, and file their applications, the committee has decided not to recommend the alternative approach that would base the amicus curiae application deadline on the date the opening brief has been filed.</p>

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	Commenter	Position	Comment	Committee Response
			<p>1. CAC supports the proposed 34-day deadline after the respondent’s brief could have been filed</p> <p>The CAC supports the proposal, as it addresses a genuine problem for parties and appellate courts in determining the amicus curiae brief deadline in appeals where no respondent’s brief is filed. We caution against the alternative approach.</p> <hr/> <p>The deadline should not be shorter than 34 days. Many amicus curiae briefs are submitted by nonprofit organizations (e.g., legal aid organizations) and institutions with limited resources and capacity, and they need the 34-day period to prepare the amicus brief in addition to their direct services work (which already far exceeds their capacity) or to secure pro bono counsel to assist them with it. The process can take longer when pro bono counsel is involved, as pro bono counsel may be unfamiliar with the topic before they become involved. Also, amicus curiae briefs often involve extensive legal and academic research, which can be time-consuming for counsel. They can also involve numerous interested parties, either that are directly involved in the drafting of the brief (or their own related briefs) or are contributing behind the scenes on broader public policy aspects of the case. In many cases, the amicus brief needs to be reviewed by multiple individuals before it can be filed. For these reasons, we do not recommend shortening the timeframe.</p>	<p>See above response.</p> <hr/> <p>See above response.</p>

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		<p>2. CAC cautions against the alternative approach of a 79-day deadline after the appellant’s opening brief is filed</p> <p>The alternative approach could significantly prejudice and frustrate the purpose of amicus curiae if the respondent is granted an extension and amicus curiae’s deadline precedes the respondent’s brief. As such, the amicus curiae will not be able to address the issues raised in the respondent’s brief, depriving the court of a full briefing of the issues from broader interested parties and public policy arguments. A hypothetical may help elucidate the problem.</p> <p>The opening brief is filed on May 1, 2024. On May 30, the respondent requests and is granted a 30-day extension, making July 1 the deadline for the respondent’s brief (because the deadline falls on Saturday, June 29). The appellate court then sends the Default Letter on July 5.[See Footnote 1]. The respondent’s new deadline is July 22 (because the deadline falls on Saturday, July 20). The respondent files its brief on July 22, which is 82 days after the opening brief was filed. The amicus curiae brief is due on July 19—79 days after the opening brief is filed.</p> <p>Under the alternative approach, amicus curiae would have to guess whether respondent files a brief because its deadline (79 days) would be before the respondent files its brief (82 days). That creates problems for amicus curiae regardless of whether respondent files a brief. If the amicus curiae waits to see if the respondent files a brief—</p>	See above response.
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		<p>so it can consider or address the arguments made therein—and the respondent does not do so, then amicus curiae risks losing the opportunity to file a brief [See Footnote 2]. If amicus curiae timely files (within the 79-day period) and the respondent later files a brief, then amicus curie will have been deprived of the opportunity to address information that will help the court in resolving the issues in the respondent’s brief. Or it will be forced to undertake the burdensome process of drafting and requesting leave to file an amended amicus brief—a process not expressly contemplated by the rules. Both options frustrate the purpose of an amicus curiae brief, which is to allow amicus curiae to bring to the court’s attention matters that the parties did not address.</p> <p>In sum, we believe that the adverse consequences resulting from the alternative approach caution against its adoption.</p> <p><i>Footnote 1:</i> In our experience, the Default Letter is not always sent the day after the respondent’s brief is due. In this hypothetical, the Default Letter is sent three court days (July 4 is a court holiday) after respondent’s deadline. But even if the Default letter is sent the day after, respondent’s deadline would be July 17—only two days before amicus’s deadline, which is an insufficient amount of time for amicus to meaningfully consider and address the issues in respondent’s brief.</p> <p><i>Footnote 2:</i> While Rule 8.200(c)(1) gives the presiding justice authority to allow tardy amicus briefs, the right to do so is not guaranteed and the</p>	
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			current rule does not expressly state that this situation is “good cause” to grant an exception to the deadline. And this would just create unnecessary motion practice for the courts.	
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2.	Family Violence Appellate Project by Shuray Ghorishi, Senior Managing Attorney Oakland	A	<p>The following comment is submitted by Family Violence Appellate Project (FVAP) regarding the Judicial Council’s Invitation to Comment number SPR24-04. FVAP is a State Bar-funded legal services support center and the only nonprofit organization in California dedicated to representing survivors of domestic violence and other forms of gender-based abuse in civil appeals for free. FVAP is devoted to ensuring survivors can live in healthy, safe environments, free from abuse. This includes filing amicus curiae briefs in federal and state cases that raise important issues for abuse survivors. To date, FVAP has filed amicus curiae briefs in over 63 cases—nearly half of which were filed in the California Courts of Appeal.</p> <p>FVAP strongly supports the proposal to amend California Rules of Court, rule 8.200(c)(1) and (c)(7) to clarify that an amicus curiae application is due “34 days after the respondent’s brief could have been filed,” and to amend the Advisory Committee Comment to clarify that the 15-day default notice period should be calculated in determining that time. We are grateful to the Council for considering and responding to many of FVAP’s past suggestions, including its work on SPR24-04.</p> <p>For the reasons outlined in the comments submitted by the Committee on Appellate Courts (CAC) of the California Lawyers Association’s</p>	<p>No response necessary.</p> <p>The committee appreciates the feedback and notes the commenter’s support for making the amicus curiae application due within 34 days after the respondent’s brief could have been filed.</p> <p>To ensure that potential amici curiae have sufficient time to conduct research, draft their proposed brief, and file their applications, the</p>

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	Commenter	Position	Comment	Committee Response
			<p>Litigation Section, FVAP opposes the alternative approach and making the deadline shorter than 34 days.</p>	<p>committee has decided not to recommend the alternative approach that would base the amicus curiae application deadline on the date the opening brief has been filed.</p>
			<p>To avoid repetition, we will not recite the reasons in CAC’s comments, except to say that we entirely agree with them. The alternative approach could create a situation where amicus curiae would have to file their brief before the respondent’s brief. That would be more akin to the federal rule, where amicus curiae must file their brief shortly after the appellant’s brief. (See Fed. Rules App. Proc., rule 29(a)(6).) In our experience, California’s rule is superior, as it allows amicus curiae enough time to grapple with the issues in respondent’s brief, so that the court has a complete briefing of how the issues raised in the case impact broader communities. Naturally, this leads to more well-informed jurisprudence. Because the alternative approach has the potential to foreclose amicus curiae’s opportunity to do this, we oppose it.</p>	<p>See above response.</p>
			<p>Moreover, although amicus curiae will need to calculate when respondent’s brief “could have been filed” under the proposal, we do not foresee this as too cumbersome of a task, since many (if not most) amicus curiae briefs are not submitted by self-represented litigants, but rather attorneys representing organizations, institutions, and governments’ interests.</p>	<p>The committee agrees that potential amici curiae will not find calculating the deadline under the proposed rule cumbersome.</p>

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			In sum, we support the proposal, oppose the alternative approach, and urge the Council to keep the length of time to 34 days.	The committee appreciates the feedback and notes the commenter’s support for making the amicus curiae application due within 34 days after the respondent’s brief could have been filed.
3.	Orange County Bar Association by Christina Zabat-Fran President	A	The proposed rule is appropriate.	The committee appreciates the feedback and notes the commenter’s support for the proposal.