



## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: September 21, 2018

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Title	Agenda Item Type
Appellate Procedure: Finality of Appellate Division Decisions	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rules 8.887, 8.888, 8.889, 8.935, 8.976, and 8.1005	January 1, 2019
Recommended by	Date of Report
Appellate Advisory Committee	August 2, 2018
Hon. Louis R. Mauro, Chair	Contact
	Sarah Abbott, 415-865-7687 sarah.abbott@jud.ca.gov

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### Executive Summary

The Appellate Advisory Committee recommends amending several California Rules of Court relating to the finality of appellate division decisions. The amendments would require court clerks to send appellate division decisions to the parties on the same day they are filed and tether the date of finality of appellate division decisions to the date they are sent, rather than the date they are filed.

### Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2019, approve the following amendments:

- Amend California Rules of Court, rules 8.888(a)(2) and (b)(2), 8.889(b)(1), 8.935(b)(2), 8.976(b)(2), and 8.1005(b)(1) so that the date of finality for appellate division decisions is triggered by the date on which the court clerk *sends* the decision to the parties, as opposed to the date on which the decision is *filed*; and

- Amend rules 8.887(b), 8.935(a)(1), and 8.976(a)(1) to require court clerks to send appellate division decisions to the parties, electronically when permissible, on the same day they are filed.

The amendments are intended to ensure that parties have sufficient time after receiving notice of appellate division decisions to prepare and file applications for certification for transfer and petitions for rehearing before the time the appellate division loses jurisdiction.

The text of the amended rules is attached at pages 6–9.

### **Relevant Previous Council Action**

The rules governing the appellate division of the superior courts, California Rules of Court, rules 8.800 through 8.936, were repealed and replaced in full effective January 1, 2009. Rule 8.887 was amended in 2011, 2014, and 2018, but the amendments are not relevant to this proposal. Rule 8.888 was amended in 2016 but the amendment is not relevant to this proposal. Rule 8.935 was amended in 2014 to make it parallel to rule 8.887 with respect to the filing of decisions. Rule 8.976 was adopted effective January 1, 2016 and has not been subsequently amended. Rule 8.1005 was adopted as rule 63 effective January 1, 2003, renumbered and amended effective January 1, 2007, and amended effective January 1, 2010 and January 1, 2011, but the amendments are not relevant to this proposal.

### **Analysis/Rationale**

In the appellate division, an application for certification to transfer to the Court of Appeal and a petition for rehearing are due 15 days after the decision is filed.<sup>1</sup> However, the parties generally do not receive immediate electronic notification when an appellate division decision is filed; instead, filed decisions are generally sent by mail. This proposal responds to feedback that, under the current rules, there often is insufficient time to prepare and file applications for certification for transfer and petitions for rehearing before the appellate division loses jurisdiction (i.e., 30 days after the opinion is filed) because:

- Litigants are unfamiliar with the procedure for preparing applications for certification for transfer;
- Most superior courts notify the parties by mail; and
- Despite rules requiring the court clerk to “promptly” file and send all opinions and orders, there are often delays in mailing those decisions.

To remedy this timing issue, the committee recommends amending rules 8.888(a)(2) and (b)(2), 8.889(b)(1), 8.935(b)(2), 8.976(b)(2), and 8.1005(b)(1) so that the date of finality for appellate division decisions is triggered by the date on which the court clerk sends the decision to the parties, as opposed to the date on which the decision is filed.

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<sup>1</sup> See Cal. Rules of Court, rules 8.1005(b) and 8.889(b)(1).

The committee also recommends amending rules 8.887(b), 8.935(a)(1), and 8.976(a) to require court clerks to send appellate division decisions to the parties on the same day they are filed, and to send the decisions electronically when permissible under rule 2.251. These rules currently require the appellate division clerk to “promptly file all opinions and orders of the court and promptly send copies showing the filing date ....”<sup>2</sup> However, it appears that at least in some courts there is a delay between the filing date and the date a decision is sent. The proposed amendments are intended to ensure that litigants are not prejudiced due to appellate division decisions not being sent by the clerk in a timely manner.

### **Policy implications**

The committee did not identify any significant policy implications relating to the proposed amendments. While adoption of the proposal would make the rules for finality of appellate division decisions different from the rules governing finality in the Courts of Appeal, the committee believes that this difference is appropriate given the relevant operational differences between the appellate division and the Courts of Appeal, such as the lack of immediate electronic notification of decisions in many appellate divisions.

### **Comments**

The proposed amendments were circulated for public comment between April 9 and June 8, 2018, as part of the regular spring comment cycle. Three organizations and two courts submitted comments on this proposal. Of the five commentators, four agreed with the proposal, and one agreed with the proposal if modified. A chart with the full text of the comments received and the committee’s responses is attached at pages 9–11.

Three commenters (Github Inc., the Orange County Bar Association, and the Superior Court of San Diego County) agreed with the proposal without providing further comment. One commenter, the Committee on Appellate Courts of the Litigation Section of the California Lawyers Association, noted that the proposal “addresses a genuine problem and is a sensible attempt to give parties sufficient time to prepare their pleadings seeking review of adverse decisions in the Appellate Division.”

The only substantive comments were provided by the Superior Court of Los Angeles County. The invitation to comment specifically asked whether, if the amendments to rules 8.887(b), 8.935(a)(1), and 8.976(a) are implemented and court clerks are required to send opinions on the same day they are filed, the other amendments tethering the date of finality to the date of sending are still beneficial. The Superior Court of Los Angeles County answered this question in the affirmative. The committee chose to raise this question because it was not clear if amending the rules in both ways (i.e., a “belt and suspenders” approach) was necessary. Based on the comments received, the committee believes that all of the proposed amendments would be beneficial and should be adopted.

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<sup>2</sup> See Cal. Rules of Court, rules 8.887(b), 8.935(b), and 8.876(b).

The invitation to comment also asked whether rules 8.887, 8.888, 8.935, and 8.976 should be further amended to require the trial court clerk to *serve* all opinions and orders, in order to clarify the date an opinion or order is *sent*. The Superior Court of Los Angeles County responded that “the proposed rule should clarify how to determine the date that a document is sent” but did not propose a specific modification to the proposal. When the Appellate Advisory Committee discussed this issue initially, the committee decided not to add a specific “proof of service” requirement to the proposed amendments to the rules because doing so would be inconsistent with other similar rules and might create confusion for clerks and/or litigants. Moreover, because the proposal would require clerks to send decisions on the same day they are filed, the filing date would necessarily be the sending date, which in turn would be the trigger date for finality. Therefore, after considering the Superior Court of Los Angeles County’s comment, the committee does not believe that further amendment of the rules is necessary to clarify the date on which a decision is sent, as that date should be the same as the filing date.

### **Alternatives considered**

The committee considered not making any changes to these rules, but concluded that the proposed amendments would help ensure that litigants have sufficient time to prepare and file both applications for certification for transfer and petitions for rehearing before the time that the appellate division loses jurisdiction.

The committee further considered whether the amendments tethering the date of finality to the date on which the court clerk sends the decision to the parties are needed if the amendments requiring court clerks to send appellate division decisions to the parties on the same day they are filed are approved. As discussed above, the committee specifically asked for public comment on this question and ultimately determined that all of the proposed amendments would be beneficial.

The committee also considered whether further amendment of rules 8.887, 8.888, 8.935, and 8.976 would be advisable to specifically require the court clerk to *serve* all appellate division opinions and orders on the date they are filed. As discussed above, the committee specifically asked for public comment on this question. Based on the comments received and after further discussion of the issue, the committee determined that no further amendment of the rules is necessary.

Finally, the committee initially considered a proposal to amend the rules to change the trigger for finality of appellate division opinions certified for publication from the date of the publication order to the date that such decisions are posted on the court’s website, to remedy a perceived timing issue with respect to public notice of published appellate division opinions. The committee decided not to recommend these amendments because the timing issue may be resolved by an operational change. This alternative was not part of the proposal included in the invitation to comment.

### **Fiscal and Operational Impacts**

No fiscal impacts are expected, though some training of court staff will likely be required.

## **Attachments and Links**

1. Cal. Rules of Court, rules 8.887, 8.888, 8.889, 8.935, 8.976, and 8.1005, at pages 6–9
2. Chart of comments, at pages 10–12

Rules 8.887, 8.888, 8.889, 8.935, 8.976, and 8.1005 of the California Rules of Court are amended, effective January 1, 2019, to read:

1 **Rule 8.887. Decisions**

2  
3 (a) \* \* \*

4  
5 (b) **Filing the decision**

6  
7 The appellate division clerk must promptly file all opinions and orders of the court  
8 and ~~promptly on the same day~~ send copies (by e-mail where permissible under rule  
9 2.251) showing the filing date to the parties and, when relevant, to the trial court.

10  
11 (c) \* \* \*

12  
13  
14 **Rule 8.888. Finality and modification of decision**

15  
16 (a) **Finality of decision**

17  
18 (1) Except as otherwise provided in this rule, an appellate division decision,  
19 including an order dismissing an appeal involuntarily, is final 30 days after  
20 the decision is ~~filed~~ sent by the court clerk to the parties.

21  
22 (2) If the appellate division certifies a written opinion for publication or partial  
23 publication after its decision is filed and before its decision becomes final in  
24 that court, the finality period runs from the ~~filing date of~~ the order for  
25 publication is sent by the court clerk to the parties.

26  
27 (3) \* \* \*

28  
29 (b) **Modification of judgment**

30  
31 (1) \* \* \*

32  
33 (2) An order modifying a decision must state whether it changes the appellate  
34 judgment. A modification that does not change the appellate judgment does  
35 not extend the finality date of the decision. If a modification changes the  
36 appellate judgment, the finality period runs from the ~~filing date of~~ the  
37 modification order is sent by the court clerk to the parties.

38  
39 (c) \* \* \*

1 **Rule 8.889. Rehearing**

2  
3 (a) \* \* \*

4  
5 (b) **Petition and answer**

6  
7 (1) A party may serve and file a petition for rehearing within 15 days after the  
8 following, whichever is later:

9  
10 (A) The decision is ~~filed~~ sent by the court clerk to the parties;

11  
12 (B) A publication order restarting the finality period under rule 8.888(a)(2),  
13 if the party has not already filed a petition for rehearing, is sent by the  
14 court clerk to the parties;

15  
16 (C) A modification order changing the appellate judgment under rule  
17 8.888(b) is sent by the court clerk to the parties; or

18  
19 (D) ~~The filing of A~~ consent is filed under rule 8.888(c).

20  
21 (2)–(4) \* \* \*

22  
23 (c)–(d) \* \* \*

24  
25  
26 **Rule 8.935. Filing, finality, and modification of decisions; rehearing; remittitur**

27  
28 (a) **Filing of decision**

29  
30 (1) The appellate division clerk must promptly file all opinions and orders of the  
31 court and ~~promptly~~ on the same day send copies (by e-mail where  
32 permissible under rule 2.251) showing the filing date to the parties and, when  
33 relevant, to the trial court.

34  
35 (2) \* \* \*

36  
37 (b) **Finality of decision**

38  
39 (1) \* \* \*

40  
41 (2) Except as otherwise provided in (3), all other appellate division decisions in a  
42 writ proceeding are final 30 days after the decision is ~~filed~~ sent by the court  
43 clerk to the parties.

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(3) \* \* \*

(c)–(e) \* \* \*

**Rule 8.976. Filing, finality, and modification of decisions; remittitur**

**(a) Filing of decision**

The appellate division clerk must promptly file all opinions and orders in proceedings under this chapter and ~~promptly on the same day~~ send copies (by e-mail where permissible under rule 2.251) showing the filing date to the parties and, when relevant, to the small claims court.

**(b) Finality of decision**

(1) \* \* \*

(2) Except as otherwise provided in (3), all other decisions in a writ proceeding under this chapter are final 30 days after the decision is ~~filed~~ sent by the court clerk to the parties.

(3) \* \* \*

(c)–(d) \* \* \*

**Rule 8.1005. Certification for transfer by the appellate division**

(a) \* \* \*

**(b) Application for certification**

(1) A party may serve and file an application asking the appellate division to certify a case for transfer at any time after the record on appeal is filed in the appellate division but no later than 15 days after:

(A) The decision is ~~filed~~ sent by the court clerk to the parties;

(B) A publication order restarting the finality period under rule 8.888(a)(2) is sent by the court clerk to the parties;



1 (C) A modification order changing the appellate judgment under rule  
2 8.888(b) is sent by the court clerk to the parties; or

3

4 (D) ~~The filing of a~~ A consent is filed under rule 8.888(c).

5

6 (2)–(5) \* \* \*

7

8 (c)–(e) \* \* \*

9

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

#	Commenter	Position	Comment	Committee Response
1	California Lawyers Association, Committee on Appellate Courts of the Litigation Section	A	The Committee on Appellate Courts supports this proposal. The proposal addresses a genuine problem and is a sensible attempt to give parties sufficient time to prepare their pleadings seeking review of adverse decisions in the Appellate Division.	The committee notes the commenter’s support for the proposal; no response required.
2	Github, Inc., By Isabelle E. Jarrott Gamerco, New Mexico	A	Welcome	The committee notes the commenter’s support for the proposal; no response required.
3	Orange County Bar Association By Nikki P. Miliband President	A		The committee notes the commenter’s support for the proposal; no response required.
4	Superior Court of Los Angeles County	AM	<p>Suggested Modification: The proposed rule should clarify how to determine the date that a document is sent.</p> <p>Request for Specific Comments: <b>Does the proposal appropriately address the stated purpose?</b> Yes. <b>If the amendments to rules 8.887(b), 8.935(a)(1), and 8.976(a) are implemented and court clerks are</b></p>	<p>The committee notes the commenter’s support for the proposal if modified.</p> <p>The committee appreciates this suggestion. However, because the proposal will amend the rules so that decisions are sent on the same day they are filed, the date that a document is sent will be the same as the filing date. Therefore, the committee does not believe that further amendment of the rules is necessary.</p> <p>No response required.</p>

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#	Commenter	Position	Comment	Committee Response
			<p><b>required to send opinions on the same day they are filed, are the other amendments still beneficial?</b> Yes.</p> <p><b>To clarify the date an opinion or order is sent, should rules, 8.887, 8.888, 8.935, and 8.975 require the trial court clerk to serve all opinion and orders?</b> Yes and the proposed rule should clarify how to determine the date that a document is sent.</p> <p><b>What would the implementation requirement be for courts? For example, training staff (please identify position and expected hour of training), revising processes and procedures (please describe), changing case management systems.</b> No additional training needed.</p> <p><b>Is it feasible for court clerks to send appellate division opinions on the same day they are filed, electronically when permissible.</b> Yes.</p> <p><b>What are the impediments to court clerks providing parties with</b></p>	<p>No response required.</p> <p>The committee appreciates this suggestion, but for the reasons stated above the committee believes that no further amendment of the rules is necessary.</p> <p>The committee appreciates this input.</p> <p>The committee appreciates this input.</p>

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

#	Commenter	Position	Comment	Committee Response
			<p><b>immediate electronic notice of appellate division opinions as is done in the court of Appeal?</b>                      This court has not yet implemented electronic court filing for our Appellate department.</p> <p><b>Under the proposed procedure in the appellate division, will the Court of Appeal be able to determine the date a decision or order was sent?</b>                      Yes.</p> <p><b>Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?</b>                      Yes.</p> <p><b>How well would this proposal work in court of different sizes?</b>                      It should work the same in all courts.</p>	<p>The committee appreciates this input.</p> <p>The committee appreciates this input.</p> <p>The committee appreciates this input.</p> <p>The committee appreciates this input.</p>
5	Superior Court of San Diego County By Michael M. Roddy Executive Officer	A		The committee notes the commenter’s support for the proposal; no response required.