



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 27, 2015

Title	Agenda Item Type
Appellate Procedure: Prehearing Conferences	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rule 8.248	January 1, 2016
Recommended by	Date of Report
Appellate Advisory Committee	August 12, 2015
Hon. Raymond J. Ikola, Chair	Contact
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Executive Summary

The Appellate Advisory Committee recommends that rule 8.248, which governs prehearing conferences in the Court of Appeal, be amended to limit the circumstances under which a justice who participates in such a conference is barred from subsequently participating in or influencing the determination of the appeal to when settlement of the case was addressed at the conference. This proposal, which is based on a suggestion from the presiding justice of a Court of Appeal, is intended to facilitate the use of prehearing conferences in appellate proceedings for case management, which can save the parties and the appellate courts time and resources.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2016, amend California Rules of Court, rule 8.248, to limit the circumstances under which a justice who participates in a prehearing conference is barred from subsequently participating in or influencing the determination of the appeal to when the settlement of the case was addressed at the conference. The text of the amended rule is attached at page 4.

Previous Council Action

The Judicial Council adopted rule 8.248, which authorizes prehearing conferences in the Court of Appeal, effective July 1, 1977. The purpose of the rule, as discussed in the October 1976 report to the Judicial Council recommending adoption of the rule, was to provide for settlement conferences in appeals. As adopted, this rule included a provision prohibiting a justice from participating in the determination of an appeal when he or she had participated in a prehearing conference related to that appeal. The Judicial Council has renumbered and amended this rule, but this provision has remained substantively unchanged since 1977.

Rationale for Recommendation

California Rules of Court, rule 8.248, currently allows the presiding justice of a Court of Appeal to order the parties/counsel on appeal to attend a conference to consider narrowing the issues on appeal, settlement, and other relevant matters. Subdivision (c) of this rule currently provides that “[n]either the presiding officer nor any court personnel present at a conference may participate in or influence the determination of the appeal.” This statement effectively forbids any justice who participates in such a conference to be on the panel that decides the matter.

Holding a prehearing conference for case management purposes can be helpful, particularly in large, complex appeals. A prehearing conference can provide an opportunity to discuss such procedural matters as consolidating or severing cases or issues, coordinating briefing schedules, and augmenting the record. This discussion can save the parties and the appellate courts time and resources. However, the current prohibition on subsequent participation in the determination of the appeal appears to discourage the use of these conferences for these case management purposes.

This proposal would make two changes to rule 8.248 intended to facilitate the use of prehearing conferences in appellate proceedings for case management. First, to clarify the potential use of these conferences for case management, it would replace the reference to using prehearing conferences “to consider a narrowing of the issues” with a broader reference to using such conferences “to consider case management issues.” Second, it would limit the prohibition on subsequent participation in the determination of the appeal to situations in which settlement was addressed at the prehearing conference. The committee notes that the California Code of Judicial Ethics canon 3B(12) cautions judges to keep in mind the effect that the judge’s participation in dispute resolution efforts, such as settlement conferences, may have on the judge’s impartiality or the appearance of impartiality. At least two appellate districts have also adopted local settlement conference procedures that are designed to ensure that a justice who facilitates settlement discussions is not involved in any subsequent adjudication of a case.¹ In light of the

¹ The First Appellate District’s local rule 3(c)(1) relating to settlement conferences provides that “[a] justice selected by the court from outside the division to which the appeal is assigned shall preside over the settlement conference.” The Fourth Appellate District’s local rule 4(g)(1) provides that “[a] justice or assigned justice who participates in a settlement conference that does not result in complete settlement shall not thereafter participate in any way in the consideration or disposition of the case on its merits.”

caution in the Code of Judicial Ethics and these existing local procedures, the committee is not proposing a change in the current prohibition on a justice participating in or influencing the determination of the appeal if the justice participated in prehearing conference at which settlement was addressed.

Comments, Alternatives Considered, and Policy Implications

External comments

The proposed amendments to rule 8.248 were circulated for public comment between April 17 and June 19, 2015, as part of the regular spring comment cycle. Four individuals or organizations submitted comments on this proposal. All four commentators agreed with the proposal. A chart with the full text of the comments received and the committee's responses is attached at page 5. Based on these comments, the committee recommends adopting this proposal as circulated.

Alternatives

The committee considered proposing amendments that would have permitted parties to waive the prohibition on a justice who participated in a prehearing conference involving settlement discussions from subsequent participation in the determination of an appeal. Ultimately, both because of the caution in the Code of Judicial Ethics discussed above and because, unlike in the trial court, waivers of potential disqualifications are not typically used in the appellate courts, the committee decided not to pursue such amendments.

The committee also considered not proposing these rule amendments at all. However, the committee concluded that narrowing the current prohibition could facilitate the use of prehearing conferences on appeal for case management purposes, which may reduce costs for litigants and the courts. Given these potential costs savings, the committee concluded that it should propose these rule amendments at this time.

Implementation Requirements, Costs, and Operational Impacts

This proposal will not impose any implementation requirements on the courts because holding these conferences is optional. This amendment should facilitate the use of prehearing conferences on appeal for case management, which may reduce costs for litigants and the courts.

Attachments and Links

1. California Rules of Court, rule 8.248, at page 4
2. Chart of comments, at page 5

Rule 8.248 of the California Rules of Court is amended, effective January 1, 2016, to read:

Rule 8.248. Prehearing conference

(a) Statement and conference

After the notice of appeal is filed in a civil case, the presiding justice may:

- (1) Order one or more parties to serve and file a concise statement describing the nature of the case and the issues presented; and
- (2) Order all necessary persons to attend a conference to consider ~~a narrowing of the~~ case management issues, settlement, and other relevant matters.

(b) Agreement

* * *

(c) Proceedings after conference

- (1) Unless allowed by a filed agreement, no matter recited in a statement under (a)(1) or discussed in a conference under (a)(2) may be considered in any subsequent proceeding in the appeal other than in another conference.
- (2) If settlement is addressed at the conference, other than an inquiry solely about the parties' interest in settlement, neither the presiding officer nor any court personnel present at the conference may participate in or influence the determination of the appeal.

(d) Time to file brief

* * *

SPR15-04**Appellate Procedure: Prehearing Conferences** (amend rule 8.248)

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

	Commentator	Position	Comment	Committee Response
1.	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.
2.	San Diego County Bar Association Appellate Practice Section by Victoria E. Fuller, Chair	A	Our section supports the revision to Rule 8.248, which would allow the presiding judicial officer and court personnel present at a prehearing conference to participate in or influence the determination of the appeal except where settlement is addressed at the conference. The proposed revision allows the court to inquire about the parties' interest in pursuing settlement without thereby disqualifying the judicial officer presiding at the prehearing conference from participating in a merits determination of the appeal, except where settlement is actually discussed. With the Appellate Advisory Committee, we also hope this revision will encourage parties to use the prehearing conference in a manner that would provide cost savings for the litigants as well as the courts.	The committee notes the commentator's support for the proposal; no response required.
3.	State Bar of California Committee on Appellate Courts by John Derrick, Chair	A	The Committee supports this proposal.	The committee notes the commentator's support for the proposal; no response required.
4.	Superior Court of San Diego County by Michael M. Roddy, Executive Officer	A	No narrative comments submitted.	The committee notes the commentator's support for the proposal; no response required.