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August 7, 2009

VIA FEDERAL EXPRESS

Presiding Justice Conrad Rushing
Associate Justice Eugene M. Premo
Associate Justice Franklin D. Elia
Court of Appeal, Sixth District
333 W. Santa Clara Street, Suite 1060
San Jose, CA 95113-1717

Re: *Drummond v. Desmarais*
Court of Appeal No. H031659

Dear Presiding Justice Rushing and Associate Justices
Premo and Elia:

The California Academy of Appellate Lawyers (CAAL) consists of California lawyers with substantial experience in the appellate courts, and is interested in cases that involve important issues of appellate practice. Because of that interest, the CAAL respectfully suggests that the court modify its opinion in this matter by deleting or modifying footnote three on page six, which broadly states that the inclusion in an appendix of a document that is not file-stamped constitutes a violation of rule 8.124(g) of the California Rules of Court.

Requiring appendix documents to be file-stamped is contrary to a rule change made by the Judicial Council in 2002. Even before 2002, file-stamped copies were not required. Rather, former rule 5.1(c)(1) provided, "Document copies shall be conformed to show the date of filing in the trial court, if the clerk's date-stamp does not appear on them." (Former Cal. Rules of Court, rule 5.1(c)(1).) In 2002, however, the Judicial Council determined that even the conformed-copy requirement was generally too onerous.

The Advisory Committee Comment to the 2002 rule revision explained: "Former subdivision (c)(1) required that any document not bearing a clerk's date stamp be conformed to show its filing date. Revised subdivision (c) deletes this requirement. In current practice, served copies of filed documents often bear no clerk's date stamp and are not conformed. The elimination of this requirement is a

Presiding Justice Conrad Rushing
Associate Justice Eugene M. Premo
Associate Justice Franklin D. Elia
Re: *Drummond v. Desmarais*
August 7, 2009
Page 2

substantive change intended to relieve the parties of the burden of obtaining conformed copies at the cost of considerable time and expense, thereby expediting the preparation of the appendix and the processing of the appeal.” (Advisory Com. com. (2002), California Civil Practice Statutes and Rules (Thompson-West 2006) foll. rule 5.1(c)(1), p. 2176.)

The current Advisory Committee Comment to rule 8.124 (the successor to former rule 5.1) likewise states that “[i]n current practice, served copies of filed documents often bear no clerk’s date stamp and are not conformed by the parties serving them,” and that the rule “does not require such documents to be conformed” in the appendix. (Advisory Com. com., 23 pt. 2 West’s Ann. Code, Rules (2006 ed.) foll. rule 8.124(d).) Both the 2002 and current comments thus make clear that the Judicial Council did *not* intend that parties who opt to use an appendix rather than a clerk’s transcript should be burdened with the expense of retrieving the superior court file and obtaining file-stamped copies of all documents to be included in the appendix.

The Advisory Committee Comments are reinforced by other provisions such as rule 8.122(b)(2), which provides that in the clerk’s transcript, only certain specified documents of possible jurisdictional importance are required to reflect the date of filing. The counterpart rule governing the contents of an appendix, rule 8.124(b)(1)(A), likewise provides that only the documents referenced in rule 8.122(b)(2) are required to reflect the filing date. And even as to those dates, a party may add its own notation regarding the filing date, and is not required to provide a file-stamped copy. (See Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 4:210, p. 4-46 [“‘Conformed’ copies (bearing the clerk’s date file stamp) are not required. However, the appendix still must show document filing dates necessary to determine timeliness of the appeal”].) Rule 8.124(g) ensures that such dates are accurate, since it provides that “[f]iling an appendix constitutes a representation that the appendix consists of accurate copies of documents in the superior court file.” (Cal. Rules of Court, rule 8.124(g).)

Importantly, the absence of file-stamped copies in an appendix should not leave appellate courts guessing about the filing dates of any appendix documents, even those not of jurisdictional importance. An appendix must contain the “register of actions, if any,” and the register of actions verifies the filing dates of appendix documents. (Cal. Rules of Court, rules 8.122(b)(1)(F), 8.124(b)(1)(A); see also rule 8.124(a)(2).) And as a convenience to the court, some practitioners use the register of actions to add filing

Presiding Justice Conrad Rushing
Associate Justice Eugene M. Premo
Associate Justice Franklin D. Elia
Re: *Drummond v. Desmarais*
August 7, 2009
Page 3

dates to the caption pages of documents even when not required to do so by rule 8.124(b)(1)(A).

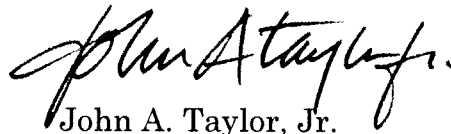
Moreover, in order to reduce the burden on the superior court clerks to prepare clerk's transcripts, the Rules of Court are clearly drafted to encourage the use of appendices rather than clerk's transcripts. For example, rule 8.124(a) allows a respondent to *preempt* the appellant's designation of a clerk's transcript, by filing an election to use an appendix within 10 days after the filing of the notice of appeal. (See Advisory Com. com., 23 pt. 2 West's Ann. Code, Rules (2009 supp.) foll. rule 8.124(a) ["Under this provision either party may elect to have the appeal proceed by way of an appendix. A respondent's timely election to use an appendix will govern unless the superior court orders otherwise. This election procedure differs from all other appellate rules governing designation of a record on appeal. In those rules, the appellant's designation, or the stipulation of the parties, determines the type of record on appeal"].) Requiring file-stamped copies of each document included in an appendix would place a great burden on the parties, often requiring the retention of an attorney service to retrieve copies from the superior court file. In many instances, multiple trips are required for files that are in use by the superior court or that have been misplaced. The preparation of appendices already requires far more attorney time than simply designating a clerk's transcript, and the requirement that only *file-stamped* copies may be included in an appendix is likely to result in even fewer parties electing to use appendices, placing a greater burden on superior court clerk's offices to prepare clerk's transcripts in a larger number of cases.

Finally, footnote three conflicts with a recent decision of another appellate district in *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967. In that case, the court held that "conformed copies are not required for documents included in an appendix," citing the most recent Advisory Committee Comment quoted above. (*Id.* at p. 988.) Thus, this court's opinion either (1) creates a conflict on a procedural issue that the Supreme Court might have to resolve, or (2) is likely to lead to a different application of the Rules of Court between different appellate districts, in conflict with

Presiding Justice Conrad Rushing
Associate Justice Eugene M. Premo
Associate Justice Franklin D. Elia
Re: *Drummond v. Desmarais*
August 7, 2009
Page 4

the intent of the rules to establish uniform procedures governing appeals on a state-wide basis.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John A. Taylor, Jr.", written in a cursive style.

John A. Taylor, Jr.
for the California Academy of
Appellate Lawyers

JAT:rld

cc: See attached service list

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On August 7, 2009, I served true copies of the following document(s) described as **LETTER TO THE COURT OF APPEAL, SIXTH DISTRICT DATED AUGUST 7, 2009** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 7, 2009, at Encino, California.

Raeann Diamond

SERVICE LIST
Drummond v. Desmarais
H031659

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