RECOMMENDATIONS TO THE CALIFORNIA JUDICIAL COUNCIL TO INCREASE THE EFFICIENCY OF THE APPELLATE PROCESS

October 21, 2021

The California Academy of Appellate Lawyers, one of the nation's first bar organizations devoted to this specialty practice, believes there are compelling reasons today to increase the efficiency of our State's appellate process. The lingering pandemic and other pressures on court staffs call for streamlining measures that will benefit everyone over the long run. Advances in court technology call for maximizing its use. Significant variations in decision times across the State call for responses still fully respecting district and division leadership. And the Supreme Court's recent recommendation to study the processing of criminal appeals calls for attention to civil appeals as well. They are initiated by the same clerks' offices and decided by the same courts.

For the foregoing reasons, the Academy respectfully requests the Judicial Council to consider the recommendations that follow. They stem from a task force the Academy established in February of this year, chaired by its past-president Elliot L. Bien, and have now been approved by the membership. Moreover, the task force circulated its preliminary thoughts in May to a number of other groups and received helpful responses for which we are extremely grateful. Our final recommendations reflect a number of those responses.[1]

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[1] The other members of the Academy's task force are Rex S. Heinke, Thomas P. Murphy, James C. Nielsen, Scott M. Reddie and Brian A. Sutherland. The bar groups that responded to our preliminary comments were the appellate courts committees of the California Lawyers Association and the San Diego and Los Angeles county bar associations and the Academy's own standing committee on rules.

1.

RECORD PREPARATION

As a leading scholar has written: "[b]y most accounts, the most significant source of appellate delay (defined as the time from filing a notice of appeal to final appellate disposition) is the time it takes to prepare the record for appeal. . . . [T]he preparation of the record is a significant problem with the appellate system. " (Clark Kelso, *Report on the California Appellate System*, 45 Hastings L.J. 433, 457 (1994)) Nor is that problem limited to California. As the National Center for State Courts and other organizations reported in 2014, state appellate courts around the country cited "filing of the record" and "transcript preparation" far more than any other factor that "inordinately contribute[s] to delay. . . ." (National Center for State Courts et al., *Model Time Standards for State Appellate Courts* (Aug. 2014), at 9-10) Those factors totaled 47% in the survey.

It is important to note in this connection that, while the calendar preference for criminal appeals fully deserves the attention the Supreme Court has recommended, its underlying purpose is not only to speed up oral arguments. It is designed to reduce the total time for resolving criminal appeals. Accordingly, speeding up earlier phases of the process should be considered along with measures addressing the calendar preference.

a.

REPORTERS' TRANSCRIPTS

Superior court clerks will remain under considerable pressure for the foreseeable future, and their coordination and forwarding of reporters' transcripts to the reviewing court can cause significant delay. The Academy therefore recommends that those tasks be shifted to the parties in civil appeals as often as fairness permits. The option of a clerk-supervised transcript should be offered only to self-represented parties, parties qualifying for a fee waiver under Rule of Court 8.26 (see https://www.courts.ca.gov/documents/ app015info.pdf), and pro-bono counsel who can demonstrate a special need.

There is already one way parties can assume this responsibility, and the Academy believes that method should be greatly expanded. Rule of Court 8.130 allows parties to substitute a certified transcript for a deposit against the court reporters' commencement of work on the project. (Subd. (b)(3)) While the rule doesn't specify how or where the substitution takes place, the Council's APP-003 form answers that question. It requires the certified transcript to be attached to the record designation form, meaning both must always be filed in the superior court.

Allowing parties to submit such transcripts themselves to the reviewing court would reduce delay in most cases, and to obtain them parties need only pay their reporters and monitor their progress. By contrast, pressured superior court clerks can delay significantly in processing transcripts and arranging for their delivery to the reviewing court.

It is notable, therefore, that a record-designation form available in the Second Appellate District (https://www.courts.ca.gov/documents/app-003-2DCA.pdf) provides that a certified transcript shall "be lodged directly with the Court of Appeal, Second Appellate District." (Pg. 3, § A(4)) To our knowledge no other district or division has promulgated a similar form or offered a similar option some other way. Accordingly, the Academy recommends a modification of Rule 8.130 and form APP-003 to require direct filing with the court of appeal by all parties not qualifying for a clerk-supervised transcript.

Another significant limitation on party-filing today is the required due date: the same time as the notice of record designation. Our rules appropriately give parties 60 days from notice of entry of a judgment or appealable order to assess their options: to make the sometimes difficult decision whether to pursue an appeal at all, if so on what issues and with which counsel, and whether to explore a settlement in light of the recent disposition and more to come. It is often unrealistic, therefore, to expect parties to commence arrangements for a certified transcript in time to have it filed so soon after the appeal deadline. And that circumstance severely restricts the availability of an option that can significantly reduce appellate delay.

The Academy believes parties should still be required to address their transcript option in a timely notice of record designation. But unless they qualify for a clerk-supervised transcript, the rule should establish a realistic deadline to file the certified transcript themselves and thereby trigger the briefing schedule. The rule should also make clear that unreasonable delay by reporters remains subject to current enforcement methods, and that parties retain their current duty of diligence as to record preparation as well as briefing. But given their new duty and deadline to file the certified transcript, the rule should provide that extensions can be obtained by stipulation for a specified time or by application to the reviewing court for good cause.

If the Council adopts the foregoing recommendations, the Academy sees no need to change the current rule requiring the certified transcript to include "all of the proceedings designated by the party." (Rule 8.130(b)(3)(C)) But if the Council decides to retain the current filing deadline, we recommend a relaxation of the all-or-nothing rule in the interests of delay reduction. If a party could file a certified transcript of some proceedings at the time of its record designation notice, that would speed up preparation of the remaining transcripts.

While that scenario could make it more difficult to achieve consecutive pagination throughout, the Academy believes the delay-reduction benefit outweighs that concern. Most appellate briefs cite transcripts with a date or volume number followed by the page number, and those citations can be looked up just as easily without consecutive pagination throughout. It does not seem worthwhile, therefore, to delay the briefing and decision of such cases while awaiting repagination.

Finally, we recommend a minor but useful change in the rules on agreed and settled statements in lieu of transcripts. They currently require the final versions to be filed at the superior court, but it would reduce those courts' burden and the resulting delay if parties filed these documents, too, at the reviewing court directly.

b.

THE DOCUMENTARY RECORD

Given the pressures on clerks' offices cited previously, the Academy considered the idea of limiting clerk's transcripts in civil appeals to self-represented and fee-waiver parties and pro-bono counsel with a showing of special need. Other litigants would need to pursue either an appendix under Rule 8.124 or the original superior court case file if possible under Rule 8.128.

Given the current state of court technology, however, we concluded that even civil litigants who can afford counsel might often be prejudiced by the elimination of their CT option. Their most likely alternative would be an appendix, but attorneys even in larger firms are often unfamiliar with the applicable technical requirements, and necessary documents are not always easily accessible. Those factors could make it difficult to find willing appellate counsel within a client's budget. But we hope advances in technology will eventually make the appendix option simple enough for everyone so the need for CT's can be reconsidered.

Until then, however, the Council should consider ways to make the appendix option more feasible for self-represented and fee-waiver parties. The Ninth Circuit's Local Rule 30-1.3, for example, provides:

> A party proceeding without counsel need not file excerpts. If such a party does not file excerpts, counsel for appellee or respondent must file Supplemental Excerpts of Record that contain all of the documents that are cited in the pro se opening brief or otherwise required by Rule 30-1.4, as well as the documents that are cited in the answering brief.

A milder California version of that rule would allow qualifying appellants to file an appendix limited to the most essential documents and ask the respondent, if not equally disadvantaged, to file a more complete supplemental appendix as necessary.

Finally, whether or not the Council decides to offer an abbreviated-appendix option for self-represented and fee-waiver parties, it should find a way to caution *all* civil litigants that invoking their CT option would likely delay their appeal. A notice in the record designation form, for example, could encourage appellants to consider the speedier alternative of an appendix or the original case file if either is possible. And self-represented parties should be advised to consult a local self-help center or other advisory service if one is available.

2.

THE BRIEFING PHASE

The Academy is unaware of any significant complaints about delay in the briefing phase of appeals. Indeed, the *Model Time Standards for State Appellate Courts* reported that only 22% of the responding courts saw briefing as a significant delay factor — less than half of the 47% citing record preparation. Our task force nonetheless considered possible alternatives to stipulated extensions in civil appeals and the automatic 15-day "grace period" extension upon missing the final due date. (Rules 8.212(b) & 8.220(a)) In criminal and juvenile appeals, by contrast, extension stipulations are not allowed but the grace period extension is 30 days. (Rules 8.360(c)(5) & 8.412(b)(5))

After considering the responses from other groups, the Academy has concluded that stipulated briefing extensions in civil cases are worth retaining for several reasons. They avoid the judicial and staff time required to process applications, help secure briefs of higher quality that better assist the courts in deciding the case, and also promote a spirit of cooperation between the parties that sometimes leads to settlement. Nor do we see a net benefit from eliminating the short grace period in civil cases. But if the Council believes stipulations or the grace period allow too much delay in briefing, the Academy recommends establishing a longer initial due date followed by a shorter stipulation period.

3.

THE DECISION-MAKING PROCESS

As noted earlier in this report, the underlying purpose of calendar preferences is to reduce the total time from notice of appeal to disposition, not only speed up oral arguments. Accordingly, the Academy respectfully submits a recommendation about another aspect of the decision-making process before turning to the calendaring issue.

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STREAMLINING SIMPLER CIVIL CASES

One idea circulated by our task force was adoption of a new Rule of Court encouraging more frequent use of memorandum opinions in simpler civil appeals. The Academy agrees, and also recommends another way to help achieve that result and reduce delay in other cases as well. The Council should encourage and assist courts to identify simpler civil cases as soon as possible so staff preparation can be streamlined as well as the opinion.

The main inspiration for this idea is the so-styled Strankman Commission, officially the Appellate Process Task Force established in 1997, whose final report in 2000 strongly encouraged greater use of memorandum opinions. But the report also identified an institutional obstacle: the lengthy internal memoranda prepared by court staff. As the report explained, "[e]diting the complete internal memorandum into a memorandum opinion would likely entail more work than simply converting the internal memorandum into a regular opinion." (P. 46) And experience suggests little has changed since 2000. (See Shatz, *The Score after a Score* (Daily Journal 1/5/21).)

Expectations for internal memoranda could change, however, if the Rules of Court asked both sides to explain up-front, in a separate section of their principal brief, whether they believe the case is suitable for a shorter opinion, and if so to add a reference to that effect on the cover. The rule could also direct their attention to such matters as the complexity of the case, the presence of any criteria for publication or Supreme Court review, and the need for a speedier disposition. And for parties who know at the outset that they prefer a shorter opinion, the Council should invite them to so advise the court by adding a question to the Civil Case Information Statement ("CCIS") and allow any subsequent comment by the respondent.

The rule should also encourage courts to decide on a shorter opinion promptly, subject to reconsideration on further review, if a principal brief or a CCIS makes an appropriate showing. That way staff could be directed to limit their preparatory work accordingly and make shorter opinions much more frequent.

We note, finally, that the foregoing steps would not only expedite the resolution of simpler cases. They would expedite other cases too by freeing up more staff and judicial time to work on them. Nor would they alter the calendar preference established for juvenile, criminal, and other cases. They would simply help all cases be readied for calendaring more quickly.

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EXPEDITING DISPOSITIONS

While the Academy took no position on the merits of *Eisenberg v. Third Appellate District et al*. (S269691), we welcome the resulting Supreme Court recommendation that the Judicial Council study the calendar preference in criminal cases. We suggest, however, that all reviewing courts be taken into account in this study, not just one, because the *Court Statistics Reports* over the last decade show a considerable disparity of the slowest dispositions for both criminal and civil appeals. There are also many possible reasons for slower dispositions, including judicial and staff vacancies, other personnel issues, the management methods of presiding justices, and their openness to inter-court case transfers and temporary assignments.

Given those many factors, and the discretion conferred on all presiding justices, the Academy believes one valuable step would be increasing both internal and public awareness of this issue on an ongoing basis. The Strankman Commission, for example, while recognizing the discretionary element of inter-court case transfers, concluded that they required some institutional support:

> in order to ensure that workload adjustment be given serious consideration, and to alleviate the need for it to be raised by a particular district, . . . workload adjustment should be made an agenda item which the Administrative Presiding Justices Advisory Committee must consider every year. In this way, the burden of raising the issue is taken away from any particular district which may make it easier for the issue to be discussed. (Strankman Report, p. 40)

The Commission thus recommended a rule requiring an annual report by that advisory committee "regarding the workload of the available justices" and whether any case transfers or temporary judicial reassignments should be considered. (*Id*., p. 41) The Academy agrees, because the regular attention should increase support for appropriate measures. But we also recommend that at least quarterly reports be sent to all presiding justices about statewide disposition times. And, if technologically possible, notifications should be sent out automatically whenever delays at any court reach a certain point.

Increasing public awareness would also be helpful, as indicated by a survey report commissioned by the Council, published in 2005 by the National Center for State Courts, entitled *Trust and Confidence in the California Courts*. One finding was that "[r]eporting regularly to the public on court job performance is viewed as important by a majority of the survey respondents. That responsibility also emerged as the greatest unmet expectation of the courts." (P. 6) Especially given the recent publicity about disposition delays, it would serve the

public and courts alike to issue communications from time to time about efforts being made to reduce delay and the progress being attained whatever the pace may be.

Because calendar preferences are statutory, however, the Council should also consider reinforcing them in two ways. First, Rule of Court 8.240 requires a motion by any party in a civil case seeking a calendar preference. While that is sometimes a discretionary matter, as the Advisory Committee Comment points out, it also points out that other civil preferences are mandatory and require no motion. Thus, the Comment explains that the requirement of a motion "is not intended to bar the court from ordering preferences without a motion. . . ." But the Academy recommends reinforcing mandatory preferences in the existing rule, or a new one, by addressing them affirmatively and providing appropriate guidance.

Second, the Council should consider reinforcing all the statutory preferences in their proper order, favoring juvenile and criminal appeals (Welf. & Inst. Code §§ 395(a) & 800(a); Code Civ. Proc. §§ 44 & 45), by addressing the ultimate calendaring requirement when a preference applies. One option, akin to the prescribed time for action on petitions for review, would be establishing a maximum time from close of briefing to oral argument subject to a prescribed extension period when necessary. Or, given the underlying purpose of preferences, the time limits could be established from close of briefing to disposition rather than oral argument. If uniform time limits appear out of reach, however, the Council should consider setting forth guidelines and procedures to be followed to implement the Legislature's intent.

CONCLUSION

The Academy greatly appreciates this opportunity to submit its recommendations to the Judicial Council, and stands ready to assist the evaluation and follow-up any way we can. We will also be sending copies of this report to all the groups consulted by our task force and other interested parties, once again welcoming any comments they may have to improve the final outcome.

Finally, please direct any questions or comments about this report to the chair of the Academy's task force, Elliot L. Bien, at elb@biencounsel.com.