

## RESOLUTION 07-03-2010

### DIGEST

#### Criminal Law: Stipulation To Extend Time To File Appellate Briefs

Amends California Rules of Court, rule 8.882 to permit the parties to stipulate to extend the time to file criminal appellate briefs by up to 30 days.

### RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends California Rules of Court, rule 8.882 to permit the parties to stipulate to extend the time to file criminal appellate briefs by up to 30 days. This resolution should be disapproved because it does not apply in all criminal appeals, would create inconsistencies in criminal appellate procedure, and would risk prolonging some criminal appeals based upon professional comity rather than good cause.

Current California Rules of Court provide that every extension of time to file a brief in any criminal appeal requires a judicial determination of good cause. (See, e.g., Rules 8.360(c)(4), 8.520(a)(4), and 8.882(b).) This resolution addresses only Rule 8.882, which applies only to misdemeanor and limited civil appeals in the appellate division of the superior court. The Rule does not apply to infraction appeals, which are also heard in the appellate division of the superior court, and does not apply to criminal appeals heard in the district Court of Appeal; and would therefore create inconsistencies in criminal appellate procedure.

Prolonging a criminal appeal poses the risk of prolonging a defendant's deprivation of liberty or the endangerment of public safety. This resolution would not require any explanation or any judicial review of any reason for which an extension might be requested. Professional courtesy or comity is not an appropriate substitute for the judicial determination of good cause in criminal appellate cases.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that the Judicial Council amend Rules of Court rule 8.882 to read as follows:

- 1 Rule 8.882
- 2 (a) Briefs by parties
- 3 (1) The appellant must serve and file an appellant's opening brief within 30 days after the
- 4 record is filed in the appellate division.
- 5 (2) Any respondent's brief must be served and filed within 30 days after the appellant files
- 6 its opening brief.

- 7 (3) Any appellant's reply brief must be served and filed within 20 days after the  
8 respondent files its brief.
- 9 (4) No other brief may be filed except with the permission of the presiding judge.
- 10 (5) Instead of filing a brief, or as part of its brief, a party may join in a brief or adopt by  
11 reference all or part of a brief in the same or a related appeal.
- 12 (b) Extensions of time
- 13 (1) ~~In a civil case, t~~The parties may extend each period under (a) by up to 30 days by  
14 filing one or more stipulations in the appellate division before the brief is due. Stipulations  
15 must be signed by and served on all parties. The original signature of at least one party  
16 must appear on the stipulation filed in the appellate division; the signatures of the other  
17 parties may be in the form of fax copies of the signed signature page of the stipulation.
- 18 (2) A stipulation under (1) is effective on filing. The appellate division may not shorten  
19 such a stipulated extension.
- 20 (3) Before the brief is due, a party may apply to the presiding judge of the appellate  
21 division for an extension of the time period for filing a brief under (a). The application  
22 must show that there is good cause to grant an extension under rule 8.811(b). ~~In civil~~  
23 ~~appeals t~~The application must also show that:
- 24 (A) The applicant was unable to obtain--or it would have been futile to seek--the  
25 extension by stipulation; or
- 26 (B) The parties have stipulated to the maximum extension permitted under (1) and the  
27 applicant seeks a further extension.
- 28 (4) A party need not apply for an extension or relief from default if it can file its brief  
29 within the time prescribed by (c). The clerk must file a brief submitted within that time if it  
30 otherwise complies with these rules.
- 31 (c) Failure to file a brief
- 32 (1) If a party in a civil appeal fails to timely file an appellant's opening brief or a  
33 respondent's brief, the appellate division clerk must promptly notify the party by mail that  
34 the brief must be filed within 15 days after the notice is mailed and that if the party fails to  
35 comply, the court may impose one of the following sanctions:
- 36 (A) If the brief is an appellant's opening brief, the court may dismiss the appeal;  
37 or
- 38 (B) If the brief is a respondent's brief, the court may decide the appeal on the record, the  
39 appellant's opening brief, and any oral argument by the appellant.
- 40 (2) If the appellant in a misdemeanor appeal fails to timely file an opening brief, the  
41 appellate division clerk must promptly notify the appellant by mail that the brief must be  
42 filed within 30 days after the notice is mailed and that if the appellant fails to comply, the  
43 court may impose one of the following sanctions:
- 44 (A) If the appellant is the defendant and is represented by appointed counsel on appeal, the  
45 court may relieve that appointed counsel and appoint new counsel; or
- 46 (B) In all other cases, the court may dismiss the appeal.
- 47 (3) If the respondent in a misdemeanor appeal is the defendant and the respondent fails to  
48 timely file a brief, the appellate division clerk must promptly notify the respondent by mail  
49 that the brief must be filed within 30 days after the notice is mailed and that if the  
50 respondent fails to comply, the court will decide the appeal on the record, the appellant's  
51 opening brief, and any oral argument by the appellant.
- 52 (4) If a party fails to comply with a notice under (1), (2), or (3), the court may impose the

53 sanction specified in the notice.  
54 (d) Amicus curiae briefs  
55 (1) Within 14 days after the appellant's reply brief is filed or was required to be filed,  
56 whichever is earlier, any person or entity may serve and file an application for permission  
57 of the presiding judge to file an amicus curiae brief. For good cause, the presiding judge  
58 may allow later filing.  
59 (2) The application must state the applicant's interest and explain how the proposed  
60 amicus curiae brief will assist the court in deciding the matter.  
61 (3) The application must also identify:  
62 (A) Any party or any counsel for a party in the pending appeal who:  
63 (i) Authored the proposed amicus brief in whole or in part; or  
64 (ii) Made a monetary contribution intended to fund the preparation or submission  
65 of the brief; and  
66 (B) Every person or entity who made a monetary contribution intended to fund the  
67 preparation or submission of the brief, other than the amicus curiae, its members, or its  
68 counsel in the pending appeal.  
69 (4) The proposed brief must be served and must accompany the application and may be  
70 combined with it.  
71 (5) The Attorney General may file an amicus curiae brief without the presiding judge's  
72 permission, unless the brief is submitted on behalf of another state officer or agency; but  
73 the presiding judge may prescribe reasonable conditions for filing and answering the brief.  
74 (e) Service and filing  
75 (1) Copies of each brief must be served as required by rule 8.25.  
76 (2) Unless the court provides otherwise by local rule or order in the specific case, only the  
77 original brief, with proof of service, must be filed in the appellate division.  
78 (3) A copy of each brief must be served on the trial court clerk for delivery to the judge  
79 who tried the case.  
80 (4) A copy of each brief must be served on a public officer or agency when  
81 required by rule 8.29.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Sacramento County Bar Association

**STATEMENT OF REASONS:**

Existing Law: Parties to a civil appeal may extend the time to file a brief by up to 30-days by filing a stipulation.

This Resolution: Allows the parties to a criminal appeal to extend the time to file a brief by up to 30-days by filing a stipulation, as with civil appeals.

The Problem: Rule 8.882 distinguishes between civil and criminal appeals with respect to the procedure that allows the parties to stipulate to an extension of time to file an appellate brief. Occasionally the parties to a criminal appeal require a nominal extension of time, as do civil

parties. If the parties to a criminal appeal agree to the extension, compelling the preparation of a formal application for an extension of time, and for that matter, the needless time of the bench to consider and rule upon such applications, appears unnecessary, and a waste of resources.

Criminal courts are overburdened. So are the attorneys of the district attorneys' and public defenders' offices. Allowing a 30-day extension of time by agreement of the parties to a criminal appeal, as in civil appeals, promotes judicial efficiency.

## **IMPACT STATEMENT**

This resolution does not affect any other law, statute or rule.

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**RESPONSIBLE FLOOR DELEGATE:** Michael J. Levy

## **COUNTER ARGUMENTS**

### **COMMITTEE ON APPELLATE COURTS**

This resolution would create inconsistencies in criminal appellate procedure and risk prolonging criminal appeals based on professional comity rather than good cause.

The current rules of court provide that every extension of time to file a brief in every criminal appeal in every court requires a judicial determination of good cause. (Rules 8.360(c)(4), 8.520(a)(4), 8.882(b).) The resolution purports to give parties in criminal appeals the same ability as parties in civil appeals to stipulate to an extension of time to file a brief. However, the resolution applies to only a narrow group of criminal appeals. It addresses only rule 8.882, which applies to only misdemeanor and limited civil appeals in the appellate division of the superior court. The rule does not apply to infraction appeals that are similarly heard in the appellate division of the superior court. There does not appear to be any reason why stipulated extensions should be available in misdemeanor appeals but not in infraction appeals that are heard in the same division of the same court. Rather, allowing stipulated extensions in misdemeanor appeals where the defendants remain incarcerated appears more, not less, objectionable than allowing stipulated extensions in infraction appeals where the defendants are subject only to monetary fines. In addition, the resolution does not apply to any criminal appeals heard in the District Court of Appeal. As a result, the resolution creates unwarranted inconsistencies in the law of criminal appellate procedure.

The resolution would also create an inconsistency in the law regarding notice of stipulated extensions. The current rules provide that counsel must deliver a stipulated extension to his or her client "[i]n a civil case." (Rules 8.60(f), 8.810(e).) The prefatory clause is currently unnecessary because there is no such thing as a stipulated extension in anything other than a civil case. Under the resolution, however, the clause would have the effect of treating stipulated

extensions in civil cases differently than in criminal cases. There does not appear to be any justification for this inconsistency. Rather, incarcerated criminal defendants have a greater interest in knowing about stipulated extensions than do civil litigants. As a result, the resolution does not accomplish its intended uniformity between civil and criminal appeals.

There are also compelling interests favoring the current rules requiring a judicial determination of good cause for every extension in every criminal appeal. Prolonging criminal appeals poses the risk of likewise prolonging either the deprivation of the defendant's liberty or the endangerment of public safety. The resolution would theoretically allow parties to prolong criminal appeals in furtherance of professional comity rather than good cause. It does not require a party to explain why an extension is appropriate, does not require the other party to agree that there is actually good cause for the extension, and eliminates judicial review. Although professional comity is important, it is not an appropriate substitute for good cause in criminal cases.

**This position is only that of the State Bar of California's Committee on Appellate Courts. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.**