

## RESOLUTION 03-07-2006

### DIGEST

#### Limited Civil Appeals—Failure to Designate Record

Adds California Rules of Court, rule 128, to create a procedure in appeals from limited jurisdiction matters where a party fails to do any act required to procure the record.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends California Rules of Court, rule 128, to create a procedure in appeals from limited jurisdiction matters where a party fails to do any act required to procure the record. This resolution should be approved in principle because it would conform the rules for limited jurisdiction appeals to those for unlimited jurisdiction appeals.

Currently, California Rules of Court, rule 8, sets forth the procedure the court follows when a party fails to do any act required to procure the record on appeal. This resolution imports the language of that rule into a new rule 128, thereby making the procedures for limited jurisdiction appeals the same as those for unlimited jurisdiction appeals. This will result in a clearer, fairer process for the parties to limited jurisdiction matters.

### SECTION/COMMITTEE REPORT

#### COMMITTEE ON APPELLATE COURTS

APPROVE IN PRINCIPAL

The proposed amendments make sense, fill existing gaps in the rules, and parallel the counterpart provisions in the rules governing appeals in unlimited civil 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.*

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations

recommends that the Judicial Council add California Rules of Court, rule 128, and renumber existing rule 128 to 128.1 without change, as follows:

1 Rule 128. Failure to procure the record.

2 (a) [Notice of default] If a party fails to timely do an act required to procure the  
3 record, the superior court clerk must promptly notify the party by mail that it must do the act  
4 specified in the notice within 15 days after the notice is mailed, and that failure to comply  
5 will result in one of the following sanctions:

6 (1) if the defaulting party is the appellant, the appeal will be dismissed; or

7 (2) if the defaulting party is the respondent, the appeal will proceed on the record  
8 designated by the appellant.

9 (b) [Sanctions] If a party fails to comply with a notice given under (a), the superior  
10 court clerk must promptly notify the reviewing court of the default, and the reviewing court  
11 may impose one of the following sanctions:

12 (1) if the defaulting party is the appellant, the reviewing court may dismiss the  
13 appeal, but may vacate the dismissal for good cause; or

14 (2) if the defaulting party is the respondent, the reviewing court may order the appeal  
15 to proceed on the record designated by the appellant, but the respondent may obtain relief  
16 from default by motion under rule 104 upon a showing of good cause.

17 (c) [Motion for sanctions] If the superior court clerk fails to give a notice required by  
18 (a), a party may serve and file a motion for sanctions under (b) in the reviewing court, but  
19 the motion must be denied if the defaulting party cures the default within 15 days after the  
20 motion is served.

21  
22 Rule 128.1. Correction and certification of record

23 (a) [Request for correction of record] Immediately on the completion of the clerk's  
24 and reporter's transcripts the clerk shall mail notice thereof to all parties, and within 10 days  
25 after mailing of such notice, any party may file a request for correction of such transcripts.  
26 If no request for correction is filed within such time, the clerk shall certify the record as  
27 correct.

28 (b) [Hearing and certification] If any party files a request for correction of the  
29 transcripts within such time, the clerk shall set a time not more than 10 days thereafter for  
30 certification of the transcripts by the judge who tried the case, and shall give not less than 5  
31 days' notice thereof by mail to all parties. At the time set or at the time to which the judge  
32 may continue the hearing, he shall determine the request for correction, and if none is  
33 allowed, shall certify the transcripts as correct. If corrections are allowed by the judge, he  
34 shall fix the time within which they shall be made by the clerk or reporter, and on the  
35 transcripts being corrected as directed, shall certify them as correct. If no time for  
36 correction is fixed by the trial judge, the corrections shall be made by the clerk or reporter  
37 within 30 days after their allowance. The parties at any time may stipulate that the whole or  
38 any portion of the record is correct, and such stipulation shall render unnecessary the  
39 certification by either the clerk or judge of the record or the portion stipulated to by the  
40 parties.

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

PROPONENT: San Diego County Bar Association

#### STATEMENT OF REASONS

Existing Law: Unlike California Rules of Court governing appeals in unlimited civil appeals (see Cal. Rules of Ct. rule 8), current court rules governing limited civil appeals do not address the failure of a party to timely designate the appellate record. Similarly, there are no provisions in the court rules providing notice to parties of default for failure to timely designate the appellate record in limited civil appeals.

This Resolution: Would add identical language set forth in California Rules of Court rule 8 governing the failure to timely designate the appellate record an unlimited civil appeal to the court rules governing limited civil appeals as new rule 128. It would renumber current rule 128 governing correction and certification of the record as rule 128.1 without substantive change.

The Problem: Current court rules governing limited civil appeals do not provide a clear means to address default based on a party's failure to file timely designate the record in limited civil appeals. In some counties, the court requires a defaulting party to obtain relief by motion to the appellate division. In other counties, the appeal generally languishes without court action unless one of the parties moves for relief or moves for dismissal. This is cumbersome compared to the rules governing appeals from unlimited civil cases in which the clerk mails notice of default giving the offending party 15 days to correct the default. Likewise, it is unfair that a party in a limited civil appeal with less monetary value at stake faces more cumbersome procedures to cure a default than if the party was on appeal in an unlimited civil case.

#### IMPACT STATEMENT

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

AUTHOR AND/OR PERMANENT CONTACT: Darin L. Wessel, Maxie Rheinheimer Stephens & Vrevich, llp, 555 W. Fifth Street, 31<sup>st</sup> Floor, Los Angeles, CA 90013, voice 213-996-8362, fax 213-996-8361, e-mail dlw@mrsvlaw.com

RESPONSIBLE FLOOR DELEGATE: Darin L. Wessel