TO: Judicial Council of California
Appellate Advisory Committee
invitations@jud.ca.gov

FROM: Committee on Appellate Courts, Litigation Section

DATE: February 11, 2020

RE: Invitations to Comment on Proposed Rules W20-01 and W20-02

The Committee on Appellate Courts of the Litigation Section of the California Lawyers Association submits the following responses to the proposed rule changes. The invitations to comment contain requests for feedback on specific questions, and the Committee has addressed these specific points only to the extent that it has substantive suggestions.

Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals, W20-01

The Committee on Appellate Courts supports this proposal. The proposed amendments to Rule 8.851 sufficiently implement the ruling in *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, by requiring the appellate division to appoint counsel for an indigent defendant facing a misdemeanor charge when an appeal is taken by either party before judgment, if the appeal arises from a "critical stage" of the criminal proceedings.

The Request for Specific Comment asks whether subdivision (a)(2) of the rule should be amended to specifically authorize the appellate division to appoint counsel even if the proceedings are not at a critical stage, and the Committee supports that further amendment. The Committee does not anticipate that this provision would be invoked often, and the appellate division would have the discretion to decline any unwarranted request for appointment of counsel at a non-critical stage. In the Committee's view, the appellate division is in the best position to determine whether an individual request for counsel is unwarranted, and its discretionary authority should not be limited as a whole based on theoretical concerns that the rule could have unintended consequences.

The Committee suggests the following amendment to Rule 8.851, subdivision (a)(2): "On application, the appellate division may appoint counsel for any other indigent defendant charged with or convicted of a misdemeanor."

Appellate Procedure, Juvenile Law: Access to Juvenile Case Files in Appellate Court Proceedings, W20-02

The Committee on Appellate Courts supports this proposal. In response to the Request for Specific Comments, the Committee provides the following:

- Should the definition of "records in the juvenile case file" in rule 8.401(b) more closely track the definition of "juvenile case file" in rule 5.552(a) or Welfare and Institutions Code section 827(e)?

The Committee believes the definition of "records in the juvenile case file" in rule 8.401(b) should more closely track the definition of that term as provided in section 827(e), rather than the definition as provided in rule 5.552(a). Many of the items contemplated by rule 5.552(a) are never presented to the juvenile court itself (such as "[d]ocuments made available to . . . social workers"). Those items therefore could not properly be presented in connection with the appellate review process, and permitting parties to access such items would only serve to increase the risk of public disclosure or provide access to otherwise irrelevant material.

Relatedly, the Committee is concerned that the definition in the proposed amendment to rule 8.401(b) is ambiguous. As presently drafted, "records in the juvenile case file" would only encompass "a document, paper, . . . or other thing filed in the juvenile court." It is therefore susceptible to an interpretation that a successful petitioner could access only those materials formally "filed" with the juvenile court. However, Welfare & Institutions Code section 827(e) contemplates access to all things "filed in that case *or made available to*. . . and thereafter retained" by the court. Section 827(a)(6) similarly seems to contemplate access to all "records in a juvenile case file"—regardless of whether they were formally filed, or merely lodged or retained. That is, the statute contemplates access to lodgings or other documents which were reviewed and retained by the court, and which might therefore be made part of the record on appeal, but which were never officially docketed or "filed" with the court. The Committee therefore recommends that the proposed rule be modified to address this ambiguity.

- Does the proposed information sheet, form JV-291-INFO, provide the information necessary for an individual to understand the right to appeal and the process for requesting access to records in the juvenile case file? Should other information be included?

The Committee believes that JV-291-INFO provides the necessary information regarding appeals by persons who are not children, parents, or legal guardians. For additional clarity, the information sheet could also describe the presumptions applicable to children, parents, or legal guardians. However, the information sheet is relatively

clear as drafted, and information for children, parents, and legal guardians is available from other sources. The Committee therefore does not believe this additional guidance is affirmatively necessary.

- Should rule 5.552 require that the parent and county counsel receive notice if a petition for access is filed by an adult who is a former or current dependent and is seeking access to their case file for the purpose of education, employment, immigration, and/or military enlistment?

The Committee does not believe that Rule 5.552 should further specify circumstances under which a parent or county counsel must receive notice. Rule 5.552(c)(1) already specifies that parents and county counsel are generally entitled to receive notice whenever a petition for access has been filed. Moreover, while public policy supports notifying a parent or county counsel of documents filed in connection with *minor* children, public policy does not seem to support notifying parents of their *adult* children's requests. Rather, it would seem to favor the adult petitioner's right to privacy.

- Rule 5.552 does not require that a parent's attorney of record receive notice when a petition for access is filed. Should the rule require such notice?

The Committee believes that Rule 5.552 should specify that notice must be given to attorneys of record whenever petitions for access are filed. Juvenile proceedings generally require that attorneys be notified of any filing relevant to their client. (See Rule 5.502(27).) The Committee sees no reason to depart from this general rule.

CONTACTS:

Committee on Appellate Courts
Leah Spero, Chair
Spero Law Office
(415) 565-9600
leah@sperolegal.com

California Lawyers Association
Saul Bercovitch
Director of Governmental Affairs
California Lawyers Association
(916) 516-1704
saul.bercovitch@calawyers.org