



TO: Hon. Louis R. Mauro, Chair
Appellate Advisory Committee

CC: Christy Simons, Judicial Council of California

FROM: Committee on Appellate Courts, Litigation Section

DATE: May 27, 2021

RE: Appellate Procedure: Appeal After Plea of Guilty or Nolo
Contendere or Admission of Probation Violation - SPR21-02

The Committee on Appellate Courts of the Litigation Section of the California Lawyers Association submits the following response to a proposal to amend Rule of Court, rule 8.304. The Committee broadly supports this proposed amendment, but suggests that one point of ambiguity be addressed before adoption.

Criminal defendants who enter a no-contest or guilty plea must generally request a certificate of probable cause prior to filing an appeal that challenges the validity of the plea. However, issues that do not challenge the validity of a plea (or that challenge the denial of a suppression motion) may be raised on appeal even without the certificate of probable cause.

The determination of whether an issue challenges the validity of a plea may ultimately be litigated by the parties, and certainly involves legal decision-making. Nevertheless, current rule 8.304 requires the superior court clerk to decide whether a certificate is required at the outset of an appeal—i.e., the clerk must determine whether an appeal will challenge the validity of a plea at the time a notice of appeal is initially filed. If the clerk determines that an appeal will present a certificate issue, and no certificate has been obtained, the rule requires the clerk to mark that notice of appeal as “inoperative.”

The Committee agrees with the Invitation to Comment that this current procedure “inappropriately requires clerks to make legal decisions.” The Committee also notes that the current rule frequently leads to unnecessary delays: when clerks inaccurately deem an appeal to be “inoperative,” the process of preparing an appellate record is deferred, leading to subsequent delays in resolution of the appeal.

The Committee therefore generally supports the proposed amendment to eliminate the clerk's role in determining whether appeals should be operative. The current proposal appropriately removes legal decision-making from the court clerk, while still limiting post-plea appeals in general to "issues that do not require a certificate of probable cause." The change properly vests this determination entirely with the court, rather than the clerk.

However, the Committee offers the following minor suggestion for the proposed amendment. The current proposal would amend rule 8.304 (b)(2)(B) as follows: "~~Grounds that arose after entry of the plea or admission and do not affect the plea's validity, as a substantive matter, challenge the validity of the plea or admission.~~" But the qualifier "as a substantive matter" appears to be unnecessary, and may open the door to confusion about the appealability of issues that only secondarily or incidentally "affect the plea's validity." The Committee therefore recommends either omitting the qualifier or retaining the prior language. Retaining the prior language would also ensure consistency with the existing body of case law—where the term "affect the plea's validity" has already been well-defined by California courts.

The Committee also notes that clerk's and reporter's transcripts must be prepared by the superior court once an operative notice of appeal has been filed. The amendment may therefore result in appellate records being prepared for some cases even when they do *not* present appealable issues. Since notices of appeals in felony matters are generally filed by attorneys rather than the litigants themselves, these will hopefully be uncommon. However, a review of internal court statistics involving inoperative appeals—comparing the number that are subsequently deemed operative with the number that receive no further action—would help reveal the scope of this potential hurdle. Superior court clerks and staff may have additional insight, assuming adoption of the proposed amendment, on whether the amended rule has required the use of additional resources.

CONTACTS:

Committee on Appellate Courts
Erin Smith, Chair
(510) 858-7358
esmith@fvaplaw.org

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