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California Court of Appeal, First Appellate District: New Mandatory Procedures for E-Filing and E-Submission

By: Tary Socha, Esq. | Sr. Appellate Counsel | Counsel Press
tsocha@counselpress.com

There have recently been many changes in the appellate rules regarding electronic filings and electronic submissions, and many courts have made these mandatory. The California Court of Appeal, First Appellate District is among the most recent adopters.

Effective May 1, 2013, the California Court of Appeal, First Appellate District has new rules regarding mandatory electronic submission of briefs, motions, appendices, reporter's transcripts and administrative records. The First Appellate District now mandates electronic submission of a text-searchable PDF copy of all briefs, motions and writ petitions. The Court will also require parties to submit a text-searchable PDF copy of all appendices, administrative records, reporter's transcripts and exhibits to writ petitions. Also, certain preliminary certificates, notices and extension requests must now be filed electronically. It is imperative to note that the electronic filing of preliminary certificates, notices and extension requests are in lieu of the paper copies in this Court. However, printed briefs still must

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be filed with the Court when the briefs are submitted to the Court electronically. The number of printed briefs required changes from court to court.

Although not an early adopter of the mandatory electronic submission, the First Appellate District is the first Court to require appellant's counsel to provide electronic submission of the reporter's transcripts and administrative records and the first to require electronic submission of motions.

There are a couple of exceptions to the new rules. These include self-represented parties, who may comply with the rules but are not required to do so. Any other party seeking exemption must lodge the paper copies along with a declaration of hardship to support the request to be excluded from these requirements.

(Please note that the electronic filing and electronic submission requirements differ for each of the California Court of Appeal districts. We recommend checking the local rules prior to filing, as the rules are often updated and the requirements may change.)

15 Critical Steps To Effective Brief Writing

By: Cameron W. Gilbert, Esq. | Group Director | CP Legal Research Group | cgilbert@counselpress.com
Vincent J. Wiscovitch, Esq. | Appellate Counsel | Counsel Press | vwiscovitch@counselpress.com

The appellate brief is unquestionably the most important element in an appeal – presuming the record has been properly preserved and prepared. Nothing will be more persuasive than a cogent, well-written legal argument applying precedents to the facts before the court. In fact, at a symposium on appellate business, one of the judges from the New York Court of Appeals stated: "I think briefs are 95-percent of all cases. The brief is the deal." Judges read the briefs. But, they may not grant you oral argument or give you much time to speak even if you do argue. Thus, your written advocacy skills are of paramount importance to victory.

Through its award-winning CP Legal Research Group, Counsel Press, the largest and most experienced appellate services company in the United States, has assisted thousands of attorneys with their briefs, including brief review, brief re-crafting and brief writing. The purpose of this article is to share our extensive knowledge in this field and to provide appellate practitioners with guidelines for effective brief writing.

Step #1 – Prepare to Write.

Before you even start to write, you must do a few things to prepare. Master the facts and know your record, both your client's version of the events and your adversary's. Identify the strengths and weaknesses of each. Answer these questions to know that you are prepared to write: (1) Why did the litigation arise in the first place? (2) Upon what facts was the judgment or order appealed from apparently based? (3) If

stated, what was the reason for the lower court's decision? and, if you are the appellant, (4) What are the errors that warrant reversal? Know the standard of review applicable to each issue to strategically present the facts in the best light possible.

Step #2 – Keep it Simple.

This doesn't mean that your writing should be unsophisticated, nor that the issues and facts presented cannot be complex. Rather, it means that the brief should read like it was *not* written by a lawyer. Be concise and avoid repetition whenever possible. Focus on the points that need to be addressed and don't add "fluff." Appellate judges dislike unnecessarily long briefs!

Step #3 – Use Short Descriptive Sentences.

The optimum length of a sentence is 20 words or less. It is not always practical in legal writing, but the goal is: short words, sentences and paragraphs. Short sentences aid in comprehension, increase clarity and give your words weight. Streamlined, efficient sentences allow a clear picture of what is being conveyed. Sharp, bright sentences decrease confusion and possible misinterpretation. Think of famous quotations throughout history. How many are long-winded, lengthy sentences? (Note – not one sentence you've read in these steps so far exceeds 20 words.)

Step #4 – Use Proper or Descriptive Names, Not Designations.

Using legal designations to identify parties is the surest way to stop readers in their tracks. The most abused example of this principle is the use of appellant/appellee or respondent. Despite the fact that most courts specifically request descriptive references or names, authors often insist on using these designations. Worse yet, they frequently mix designations throughout their briefs. For example, referring to the same party as "plaintiff" in some places and "appellant" in others. The reader must then figure out who exactly is being talked about. The last thing you want is a confused, frustrated reader determining your appeal. So, use specific terms or names, such as "the contractor," "the driver," "the passenger," "the doctor," "Smith," "Jones," "the Port Authority," *etc*. Real people or entities are involved in the appeal, so treat them as such in your brief.

Step #5 – Avoid Writing in a Passive Voice.

Many writers use it unconsciously and incorrectly. Not only will using a passive voice increase document length, overuse may detract from your desired perception. To many readers, a non-judicious use of a passive voice signals a less-than-proficient author. If you are up against a word count, you can often save several hundred words by eliminating the passive voice. An active voice is easier to read and more forceful, authoritative and persuasive. (Note - this paragraph was written in an active voice.) Consider these two examples: "The car the plaintiff was driving in, which was red, was traveling at a rate of 45 miles per hour when it was struck by the defendant." (Passive). "Mr. Jones was driving his red car 45 miles per hour when Mr. Smith hit it." (Active).

Focus on the points that need to be addressed and don't add "fluff." Appellate judges dislike unnecessarily long briefs!

Step #6 – Avoid "Lawyerisms."

Choose concrete or familiar words over legal terms of art or "lawyerisms." Among familiar words, choose the simpler term, such as "explain" over "elucidate," "show" over "evince" or "guess" over "hypothesize." Among Latin words, consider choosing a more accessible English phrase unless the term of art is important. A good example is choosing "among other things" over "*inter alia*." There is no real difference between the meanings other than one is in Latin. Your brief is not the place to show off your extensive vocabulary. Your reader won't be happy if he/she has to stop reading to look up definitions.

Step #7 – Write Your Questions/ Issues Presented Persuasively and in a Way That Leads the Reader to Draw Your Desired Conclusion.

Framing the issue is likely the most critical part of the brief. The party that convinces the court to frame the issue the way it wants the issue framed is more likely to prevail. Framing the issue can also have significant impact on the applicable standard of review. Present the question in a way that makes the answer obvious ***and*** is the answer you want. Compare the following issues presented from an appeal granting summary judgment: A) "Whether the lower court erred in granting summary judgment where material issues of fact exist" and B) "Whether the lower court erred in granting summary judgment where there was no definitive determination as to: (i) how long a food spill was present in the aisle at ACME's supermarket, (ii) whether any ACME employee had actual notice of the spill and (iii) if the spill actually caused Ms. Smith's injury."

Step #8 – Present the Facts Accurately, But Persuasively, and Don't Hide From Negative Facts.

The statement of facts section of your brief must be accurate and should not contain argument. That does not mean, however, you cannot legitimately shade the facts to favor your client through word choice. Your client and your client's witnesses and experts "testify," "state," "confirm," "demonstrate," "establish," "conclude," "corroborate," "opine" or "estimate." The opposing party and its witnesses and experts "claim," "speculate," "guess," "contend," "purport" or "allege." Similarly, the words used to identify the persons involved are important. Examples: "victim" vs. "complainant"; "infant" vs. "toddler," *etc*. This holds true with using designations in lieu of names, as well. Because accuracy is important, you should not hide from negative facts or omit them from your recitation. You can, however, minimize bad facts by bracketing or coupling them with favorable facts, using transitions like "although" or "while."

Step #9 – Avoid Dates Unless They Are Critical.

Courts review thousands of documents a year. There are few things more mind-numbing than reading a list of dates and what occurred on those dates. Also, depending on your desired presentation, a chronology may not present the facts in the best light for your client. Unless dates or particular times of actions are significant (*i.e.*, statute of limitations or default) or are integral to your theory of liability or defense, consider simply using words or phrases that orient

the reader to the chronology. Examples: "after," "afterward," "after that," "at first," "at this time," "before," "beginning with," "beyond," "during," "earlier," "ending with," "eventually," "finally," "following," "from then on," "in the meantime," "last," "later," "meanwhile," "next," "now," "prior to," "since," "soon," "subsequently," "then," "until" or "while." If the dates are significant, consider creating a table, list, bullet points or timeline, if permitted by the court, of the milestone dates. Include a concise statement of the relevant occurrences on each significant date.

Step #10 – Avoid Emotional Appeals, But Humanize Your Story.

Emotional appeals are improper, disfavored and should be avoided. Reason is paramount, and appellate courts generally resent overt emotional appeals. However, you should humanize your facts and tell a story. This is another reason why names or descriptive adjectives are preferred over designations, when identifying the parties. You can legitimately and properly generate sympathy for your client or outrage against the opposing party's conduct without resorting to emotional appeals.

Step #11 – Your Argument Should Be in Outline Form.

You should have a point heading for each individual issue which stands alone, meaning that if you prevail on that issue, then you should win the appeal, regardless of the results on the remaining issues. Your situation may not always be this neat and clean, but you should strive for it in your argument. If it does not stand alone, then it should probably be a subheading under one of your main headings.

Less is more on the main issues. Try to keep the number down, if possible. But, remember the rules of outlining – if you have a "Point I," you must also have at least a "Point II." If your sub-points have an "A," they must also at least have a "B." If you are a bit rusty on the "formal rules of outlining," plug the preceding quote into your favorite Internet search engine and you are sure to get results that will help you.

Step #12 – Your Point Headings Should Be Mini-Summaries of the Argument That Is About to Follow.

The point headings and subheadings should be succinct, argumentative statements applying a specific legal principle to the facts of the case. Uninformative headings, while brief, are generally disfavored. Each heading and subheading should have a "because" in it. "THE SEARCH WAS UNLAWFUL." This tells the court nothing. Compare it to "THE SEARCH WAS UNLAWFUL BECAUSE THE POLICE OFFICERS RANSACKED THE HOUSE AND RUMMAGED THROUGH THE DEFENDANT'S PERSONAL BELONGINGS WITHOUT A WARRANT."

Step #13 – Avoid Repetition, Platitudes, Clichés, Long Quotes and Personal Attacks.

Avoid repetition, although you should frequently restate the desired conclusion without browbeating the court. Avoid platitudes and clichés – think of what you really want to say and say it. Don't rely on trite or overused expressions. Avoid lengthy quotations, unless they're particularly relevant. Quotations cannot replace explanation of the law or application of the law to the facts. Avoid personal attacks on the opposing party, opposing counsel and the lower court judge. There is no quicker way to antagonize the appellate court than to personally attack or disparage the lower court judge. Remember, these judges often sat in lower courts. If you impugn the integrity of their brethren,

they may subconsciously (or consciously) become defensive. Even where the appeal raises bias, conflicts of interest or improper conduct, make your point without attacking a judge personally.

Step #14 – Write Conclusions That Ask for Something Specific.

The conclusion of a document is often overlooked or given little attention. Make a concise statement of the relief sought from the appellate court. Tell the court exactly what you want it to do. The most common oversight is to ask the court to reverse the judgment or order appealed from, but not specify what you want done with the case after reversal. Consider seeking relief in the alternative, where appropriate. Example: Reverse the order granting the motion to dismiss and reinstate complaint. In the alternative, grant leave to amend any perceived defects.

Step # 15 – Edit, Edit, Edit.

The importance of editing cannot be overstated! You need to edit your brief before submitting it. If you edit your own work soon after completion, however, inevitably you will "read" what is in your mind, not what is on the paper. You need to set aside your work for a sufficient amount of time or have a second set of eyes review it. Some suggestions for effective editing include: setting the document aside, at least overnight, before editing, having an editing service review the brief, having a colleague, who is unfamiliar with the case, read it, reading it out loud or reading it backward.

Conclusion

Brief writing is a combination of art and science. There are rules of grammar and outlines that need to be followed. The above guidelines provide room for the artist in all attorneys to produce a written masterpiece, and we hope you find these useful. Should you require assistance with the editing stage, proofreading or writing of your brief, Counsel Press' Legal Research Group is here to help.

Maximizing Your Electronic Documents in the California Court of Appeal

By: John Y. Hur, Esq. | Director, West Coast Operations | Counsel Press | jhur@counselpress.com
Tary Socha, Esq. | Sr. Appellate Counsel | Counsel Press | tsocha@counselpress.com

Electronic filing has been in existence in the federal courts and in many state general jurisdiction courts for years. In this digital age, it is sometimes surprising that, until a few years ago, many appellate courts were still holding back on establishing their electronic filing systems. And, often, even when adopted, the electronic filing and electronic submission would not be mandatory – it would remain at the option of the filer.

The California Court of Appeal recently changed its rules regarding electronic submissions and filings and is rapidly moving towards greater acceptance of electronic documents. With the exception of the Second District, which last updated its rules on electronic documents late last

year, all of the Courts of Appeal have updated their rules at some point in 2013. The California Supreme Court does not, yet, accept electronic submissions of Petitions for Review or Briefs on the Merits. However, service copies of Court of Appeal briefs, submitted through the Court of Appeal's website, are deemed served on the Supreme Court and replace the four printed service copies previously required.

All of the districts now accept electronic submissions of briefs and some of the courts require electronic submission of additional documents. Motions to Augment the Record and Requests for Judicial Notice with exhibits must now be electronically submitted to the court in the First and Sixth Appellate Districts. Although the courts vary from district-to-district as to what must be electronically submitted, the trend is moving towards requiring more electronic submissions through all California courts.

Compliance with the Court Requirements

The typical limitation is that the PDF be a text-searchable document which is less than 5MB in size. (The Fifth and Sixth Appellate Districts have increased the file size limit to 25MB. These courts appear to be the first to increase the file size for submissions.) For documents or filings, which are larger than 5MB, they must be divided into parts. Some may find the size limit to be restrictive, especially when color photos are included, but most briefs should fall within this limit. For those briefs, which are larger, the first step is to compress the file. There are various ways to compress your PDF document, but the most common ways are through Adobe Acrobat. By using the "reduce file size" or "optimize PDF" features, you may remove unnecessary or duplicative coding in your file and, thereby, reduce the file size. Additionally, there are a variety of online tools from third-party providers, such as smallpdf.com or primopdf.com.

Enhanced PDFs and eBriefs

Once your brief has been optimized, you may want to consider enhancing your brief. Adding thumbnails, bookmarks and hyperlinks within your PDF may greatly aid the reader by allowing for easier navigation of the brief. Thumbnails show the pages of your PDF as individual icons so the reader may view multiple pages at once. Bookmarked pages create a table of your brief in outline form and hyperlinking connects different parts of your brief to one another through highlighted text, which redirect you when you click on the text. All of these features enhance the reader's ability to navigate and comprehend your brief.

These features are limited by the requirement that PDFs be self-contained files – meaning you cannot link references to other briefs, statutes and caselaw or to the appendix unless these were in the same PDF. To harness those features, you must elect to file an eBrief with the Court of Appeal. An eBrief is different from an electronic submission in several ways:

1. An eBrief is not required, although some districts, such as the Second Appellate District, actively encourage them; and
2. An eBrief is submitted on a CD or DVD disc and not

through the court's website. The advantage is that the 5MB limit no longer applies and you are not limited to a single self-contained PDF file.

The practical implications of these differences are vast. Your brief may now contain links which redirect the reader to specific references in any other brief filed with the Court of Appeal, pinpoint cites to caselaw and statutory authority, and to appellant's and respondent's appendices. Furthermore, without the 5MB limitation, you may imbed color photos, audio, video and slideshows in your brief. The advantages of these multimedia functions are great, especially when dealing with a technical or complicated topic.

Counsel Press is now enhancing federal appellate CM/ECF e-filings with powerful hyperlinks directly to the underlying record or appendix contained within the PACER system. Our eBrief team has been working with hyperlink technology before e-filing was even an option and now offers a powerful new way to present a legal argument and control costs. While an eBrief is still the most complete and effective way to present every bit of briefing and relevant material to the court, this new option can be used in every case being filed in the federal appellate courts. (To read more about this new option, visit Counsel Press' Blog (Electronic Briefs section.))

Benefits of the Electronic Process

From the courts' perspective, the electronic process allows justices to freely access appellate briefs, record documents and Petitions for Review and responses, among other items, from the convenience of their desktops. eBriefs simplify the navigation process of the documents – it is much easier for the justices to review the briefs and record when citations to the record and legal authorities are hyperlinked. Litigants, on the other hand, understand that this technology improves the chances of having their full legal argument reviewed and more easily understood by the court. More understanding offers more opportunity to advance a winning argument.

Given that there has been a heightened interest in the topic of electronic filing and electronic submission, Counsel Press recently published a number of related articles on this subject. To read these articles, visit Counsel Press' Blog (Electronic Briefs section).