Basic Civil Appellate Practice in the California Court of Appeal for the Second Appellate District

Prepared by the Appellate Courts Section of the
Los Angeles County Bar Association

This pamphlet is not an official reference source, and you should not cite it as authority. You must evaluate your own case and conduct your own research. Although this pamphlet provides some legal authorities for your convenience, you are responsible for making sure that they apply to your case and that they have not been superseded.

Neither the Court of Appeal nor the Los Angeles County Bar Association is allowed to give you legal advice**.**

This Guide was prepared by members of the Appellate Courts Section of the Los Angeles County Bar Association.

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I. INTRODUCTION

This guide provides a simplified outline of the basic procedures that govern appeals in civil cases in the Second Appellate District of the California Court of Appeal. It does not address appeals in criminal matters, writ petitions, or any aspect of appellate practice in the federal courts.

You can find suggestions for further reading at the end of this guide. You may also wish to consult an appellate specialist.

II. AT THE OUTSET: SHOULD YOU CONSIDER SETTLEMENT?

Appeals can be time-consuming and expensive. They usually require considerable effort in obtaining and reviewing the record of the trial court proceedings, researching legal issues, and preparing briefs that meet the criteria for appellate review. The process may take many months or even years, and the outcome is never certain.

In order to help parties avoid the delay and expense of appeals, the Second Appellate District conducts a voluntary mediation and settlement conference program for civil cases. The program has been instrumental in the early resolution of many appeals.

After the appeal is filed, if all parties agree, the Court of Appeal appoints a volunteer settlement officer, either an appellate specialist or an experienced mediator with training in appellate issues. The conference usually takes place before the record on appeal is prepared and before any briefing. If the case does not settle, it proceeds along its normal course.

Settlement conferences are conducted entirely through the Clerk's Office, which provides no information to the justices about individual settlement conferences.

Settlement conferences require a substantial investment of time by the Court's staff and volunteer settlement officers. Parties should not participate unless they are genuinely interested in settlement. **If your case settles while the appeal is pending, you must notify the Court immediately.**

III. GENERAL CONSIDERATIONS

A. The Second Appellate District of the California Court of Appeal

The Second Appellate District of the California Court of Appeal consists of eight divisions with four justices each. Division Six handles appeals from the superior courts of Ventura, Santa Barbara and San Luis Obispo counties. Appeals from the Los Angeles County Superior Court are randomly assigned to one of the remaining divisions (and on occasion to Division Six). Once a case is assigned to a division, it is heard by three of the justices within that division, or sometimes by two of the division's justices and a "pro tem" judge of the superior court sitting on the Court of Appeal by assignment. You can learn more about the Court and each division by visiting the Court's website at: http://www.courts.ca.gov/2dca.htm.

B. The limited function of appellate review

An appeal is not a retrial. Trial courts resolve both legal and factual disputes, but appellate courts consider only legal questions. They do not reweigh the evidence, and they do not reassess witness credibility. With very narrow exceptions, appellate courts usually reject arguments that a judge or jury reached the wrong factual conclusion.

An appellate court is also limited by the "standard of review." This is the set of rules that govern how the court determines whether an error occurred. The standard of review varies depending on the type of issue and the procedural context, but it usually includes a presumption that the trial court's decisions were correct. In addition, even if the appellate court finds error, it cannot reverse the judgment unless it also finds that the error was prejudicial. In civil cases, this means the court cannot reverse unless it concludes it is reasonably probable that, without the error, the result would have been more favorable to the appellant. See below for more detail.

C. Threshold questions

In evaluating whether to appeal or how to respond to an opponent's appeal, consider the following.

1. Appealability

Is the order or judgment appealable? With some important exceptions, only final judgments are appealable. For example, an order sustaining a demurrer without leave to amend or granting a summary judgment motion is not appealable; you can appeal only from the judgment entered pursuant to one of those orders.

Code of Civil Procedure sections 904.1 and 904.2 list many types of appealable orders, but there are others. You should therefore consult practice guides and any special statutes that govern your case.

2. Standing

Does the prospective appellant have standing to appeal? To have standing, the appellant must be "aggrieved" by the judgment or order. In general, this means that the appellant must be a party to the case and must be "injuriously affected" in an "immediate, pecuniary, and substantial" way.

3. Enforcement of judgment

Does the appellant have the resources to see the appellate process through? Where a judgment requires the payment of money, the judgment creditor (the party who won in the trial court) can usually enforce it immediately. Can the appellant withstand this enforcement? If not, an appellant can stop enforcement by obtaining a bond from a surety company. In most cases, (1) the appeal bond must be for at least 1½ times the amount of the judgment, (2) most judgment debtors will have to give the surety company security equal to the amount of the bond, and (3) the annual bond premium can be 1-2% of the amount of the bond. There are a few other ways to stop enforcement of a judgment, but they are beyond the scope of this pamphlet. The appellant should consult practice guides or an appellate specialist.

4. Appellate fees

The appellant generally must pay a filing fee of $775 and a Clerk's Transcript deposit of $100. (Note: these are the current fee and deposit amounts. They may change in the future.) The appellant also must pay the costs of preparing the record on appeal. The record on appeal includes the written portion of the appellate record, typically contained in a Clerk's Transcript (Rule 8.122, Cal. Rules of Court) or an Appendix (Rule 8.124, Cal. Rules of Court). This cost may be several hundred dollars, depending on the size of the Clerk's Transcript or Appendix.

In addition, the record on appeal often includes the record of the oral proceedings in the trial court, such as a hearing or trial. If a court reporter was present at the hearing or trial, you may include the Reporter's Transcript of the oral proceedings in the record on appeal (Rule 8.130, Cal. Rules of Court). You can contact the court reporter to obtain the estimated cost of preparing the Reporter's Transcript. If no court reporter was present at the hearing or trial, or if you cannot afford to pay for the Reporter's Transcript, you can file a motion to use a "settled statement" as the record of the oral proceeding (Rule 8.137, Cal. Rules of Court).

If the appellant is indigent and obtains a fee waiver from the Superior Court or the Court of Appeal, the appellant will not need to pay the $775 filing fee. Similarly, if an indigent appellant obtains a fee waiver from the Superior Court, the appellant will not be required to pay for the Clerk's Transcript. Instead, the Superior Court will prepare the Clerk's Transcript without cost to the appellant. If the appellant chooses to proceed with a Rule 8.124 Appendix rather than a Clerk's Transcript, however, the appellant will bear the cost of preparing the Appendix even if the appellant has a fee waiver.

Keep in mind that **fee waivers do not apply to Reporter's Transcripts**. Although the Transcript Reimbursement Fund (TRF) operated by the Court Reporter's Board of California has a program to help indigent litigants obtain free Reporter's Transcripts, the TRF has limited funds and an application for assistance may significantly slow down your appeal.

The respondent generally must pay a filing fee of $390, due when the respondent first files a document in the Court of Appeal. (Note: this is the current fee amount. It may change in the future.) The respondent also must pay for its copy of the Clerk's Transcript and the Reporter's Transcript (unless the respondent makes a timely request to borrow the record under Rule 8.153). If the respondent is indigent and obtains a fee waiver from the Superior Court or the Court of Appeal, the appellant will not need to pay the $390 filing fee. Similarly, if an indigent respondent obtains a fee waiver from the Superior Court, the respondent will not be required to pay for its copy of the Clerk's Transcript.

5. Length of the appellate process

Will the appellant have the necessary financial and emotional endurance? The time from notice of appeal to the conclusion of an appeal can be more than a year or even two, depending on how long it takes for the Superior Court to prepare the appellate record, for the parties to prepare their briefs, and for the Court of Appeal to hear argument and issue an opinion. During this time, most unpaid money judgments earn interest at 10%. And in some cases, the prevailing party will also recover attorneys' fees.

6. Timeliness of appeal

Is there time to appeal? The deadline for filing a notice of appeal is jurisdictional, and it cannot be extended by any agreement, conduct of the parties, or court order. The Court of Appeal must dismiss a late-filed appeal.

In most cases, the earliest of these two deadlines applies: (1) 60 days after a party or the Clerk of the Superior Court serves either a document entitled "Notice of

Entry" of the appealable judgment or order or a file-stamped copy of the appealable judgment or order, showing the date either was served; or (2) 180 days after entry of the appealable judgment or order. (The filing of a judgment or order constitutes "entry.") (Rule 8.104, Cal. Rules of Court.)

Rule 8.108 extends the 60-day period when there was a timely motion for new trial, to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration under Code of Civil Procedure section 1008. A cross-appeal must be filed within 20 days after the superior court clerk serves notification of the first appeal. (Rule 8.108(g), Cal. Rules of Court.)

The five-day extension under Code of Civil Procedure section 1013 for service by mail does not apply to notices of appeal and does not extend the time to file them.

Because the right to appeal can be lost forever if the appellant fails to file the notice of appeal on time, a prospective appellant should carefully study the applicable rules and practice guides, consider consulting an appellate specialist, and begin doing these things as early as possible.

7. Standard of review

What is the standard of review? Standards of review are rules that guide the appellate court's decision about whether the trial court decision should be reversed. The appellant's opening brief must state which standard applies to each issue.

Generally, there are three standards of review:

a. "Substantial evidence": This standard usually governs appellate review of factual findings made by a jury or trial judge. When the appellant claims that a factual finding is not supported by the evidence, the Court of Appeal examines the entire record to determine whether there is sufficient evidence to support the finding. If there is, the Court must accept the finding as correct, even if a great deal of evidence contradicts it.

b. "Abuse of discretion": This standard usually governs appellate review of the trial court's rulings on procedural questions. The appellate court considers whether the trial court's ruling was within the bounds of reason, in light of all of the circumstances before it.

c. "De novo": This standard is usually limited to the appellate court's review of the trial court's decision of pure questions of law. The reviewing court independently examines the trial court record, applies the same standard for decision as the trial court, and decides the issue anew.

For example, if the appellant's only complaint about the trial is that the jury believed Witness A instead of Witness B, the substantial evidence standard will apply. That means the appellate court must accept Witness A's testimony and will affirm as long as that testimony supports the judgment, regardless of what Witness B said. But if the appellant claims that Witness A's testimony was inadmissible (and if the appellant made a proper and timely objection at trial), the Court of Appeal will probably review that claim under the de novo or abuse of discretion standards, or under some combination of the two. (For example, the de novo standard might govern whether a particular rule of evidence applies to the situation, and the abuse of discretion standard might govern whether the trial court acted within the range of options permitted by that rule.)

Many trial court rulings are governed solely by the abuse of discretion standard. For example, the trial court has substantial leeway in such areas as pre-trial discovery rulings, continuances, and managing trials. The Court of Appeal will rarely second-guess a trial court's rulings in these areas.

IV. MECHANICS OF THE APPELLATE PROCESS

A. The notice of appeal

The deadlines for filing a Notice of Appeal are mandatory and jurisdictional. Do not wait until the last minute to file a Notice of Appeal.

The Notice of Appeal or cross-appeal must describe the order or judgment being appealed and must be signed by the appellant or the appellant's lawyer. The filing fees for a Notice of Appeal or cross-appeal are set forth in Government Code section 68926, et seq. and Rule 8.100(b). You can use the Notice of Appeal form found on the Second District's website: http://www.courts.ca.gov/documents/app002.pdf. You must file the Notice of Appeal and fees with the Superior Court. (Instead of the filing fees, you may submit a fee waiver application.) You must arrange to have the Notice of Appeal served on the opposing party's lawyer (or the opposing party if he or she is unrepresented). The person who serves the Notice of Appeal must sign and date the proof of service on the Notice of Appeal before you file it. If you are appealing a decision in a case

heard in Los Angeles County, you should file the Notice of Appeal (including the signed and dated proof of service) and the filing fee (or fee waiver application) in Room 111 of the Stanley Mosk Courthouse in downtown Los Angeles, 111 N. Hill Street, Los Angeles, CA 90012.

B. The record on appeal

The appellant must designate the record on appeal within 10 days after filing the Notice of Appeal. (Rule 8.121.) You can use the record designation form found on the Second District's website: http://www.courts.ca.gov/documents/2dca03/pdf. If the appellant fails to file a record designation, the superior court clerk will send out a notice of default. If the appellant fails to cure the default by filing the record designation within the time stated in the default notice, the appeal can be dismissed. (Rule 8.140.) To avoid dismissal for failing to timely and properly designate the record on appeal, the appellant should study the applicable rules and practice guides before filing the notice of appeal.

If the appellant cannot designate the record on appeal within 10 days after filing the notice of appeal, the appellant should file an application for an extension of time to designate the record on appeal. You can use the extension application form found on the Second District's website: http://courts.ca.gov/documents/2DCA-02/pdf. The appellant should file the application in the Court of Appeal.

Generally, there are three elements to the record on appeal: (1) oral proceedings, presented in a Reporter's Transcript (Rule 8.130) or a settled statement (Rule 8.137); (2) documents filed or lodged in the trial court, presented in either a Clerk's Transcript prepared by the superior court (Rule 8.122) or an Appendix prepared by one or both of the parties (Rule 8.124); and (3) exhibits, which may be copied in the Clerk's Transcript or Appendix and/or transmitted to the Court of Appeal (Rule 8.224). In cases that involve administrative proceedings, the record also may include an administrative record (Rule 8.123).

The designation of the Reporter's Transcript must comply with the Second District's Local Rule 3, which requires the designation to identify the date, the department number, the name of the reporter or electronic recording monitor, and the nature of the proceeding. The designation of the Clerk's Transcript must state the title and the filing date of each paper or record the appellant wants to have included in the record, and for each exhibit must state the exhibit number, a brief description, and the admission status. Alternatively, the appellant may elect to file an Appendix under Rule 8.124, which requires only a notice stating the election.

Rules 8.122 and 8.130 allow the respondent to designate materials the appellant did not designate. In addition, under Rule 8.124(a)(1)(B), the respondent

may require the case to proceed with an Appendix by filing a notice to that effect within 10 days after the filing of the notice of appeal, except when the appellant has a fee waiver for the Clerk's Transcript or the superior court orders otherwise.

The parties should cooperate in preparing the record on appeal, particularly when they are using a Rule 8.124 Appendix. Their mutual goal should be to submit a record that has everything the Court needs to decide the case, assembled in an organized and easily-read way, without burdening the Court with irrelevant material.

C. The Civil Case Information Statement and the Certificate of Interested Entities or Persons

Under Rule 8.100(g), the Clerk of the Court of Appeal will notify the appellant of the deadline to file a Civil Case Information Statement. The appellant must file the completed Civil Case Information Statement, including an attached copy of the judgment or order being appealed (showing the date of entry of the judgment/order) and a proof of service on all parties to the appeal, by the deadline stated in the notice. If the appellant cannot file the Civil Case Information Statement by this deadline, the appellant can apply to the Court of Appeal for an extension of time to file the form.

In addition, in most civil cases the appellant must file a Certificate of Interested Entities or Persons along with the Civil Case Information Statement. (Rule 8.208.) An "entity" party's certificate must list any other entity or person that the party knows has an ownership interest of 10% or more in the party. (Rule 8.208(e).) If a party knows of any person or entity, other than the parties themselves, that has a financial or other interest in the outcome of the proceeding that the party reasonably believes the justices should consider in deciding whether to disqualify themselves, the party's certificate must list that entity or person and identify the nature of the interest of the entity or person. (Rule 8.208(e).) If the party knows of no entity or person that must be listed under these rules, the party's certificate must so state. (Rule 8.208(e).) If the appellant cannot file a Certificate of Interested Entities or Persons by the deadline, the appellant can apply to the Court of Appeal for an extension of time to file the form.

A Certificate of Interested Entities or Persons is not required, however, in family, juvenile, guardianship, and conservatorship cases. (Rule 8.208(b).)

When required, the respondent also must file a Certificate of Interested Entities or Persons along with the first document the respondent files in the Court of Appeal. (Rule 8.208.)

The failure to timely file a Civil Case Information Statement or a Certificate of Interested Entities or Persons may result in the dismissal of the appeal.

D. Briefing

1. The basic timetable

Rule 8.212(a) states the deadlines for filing briefs:

(1) An appellant must serve and file its opening brief within:
  (A) 40 days after the record—or the reporter's transcript, after a rule 8.124 election—is filed in the reviewing court; or
  (B) 70 days after the filing of a rule 8.124 election, if the appeal proceeds without a reporter's transcript.
(2) A respondent must serve and file its brief within 30 days after the appellant files its opening brief.
(3) An appellant must serve and file its reply brief, if any, within 20 days after the respondent files its brief

If a party fails to timely file an appellant's opening brief or a respondent's brief, the Clerk of the Court of Appeal will notify the party by mail that the brief must be filed within 15 days after the notice is mailed and that, if the party fails to comply, the Court may impose one of the following sanctions:

(1) If the brief is an appellant's opening brief, the court may dismiss the appeal;
(2) If the brief is a respondent's brief, the court may decide the appeal on the record, the opening brief, and any oral argument by the appellant.

The Court may reject a late reply and proceed to oral argument and decision without considering it.

Cross-appeals are governed by Rule 8.216, which dictates the briefing schedule and contents of the briefs.

These deadlines all run from the date the record and briefs are filed, with no extension for service by mail.

2. Extensions of time

The parties can agree ("stipulate") to limited extensions of time for filing their briefs, and the Court can grant extensions on application. (Rule 8.212(b).) The Court prefers that parties stipulate to extensions if they are needed and justified under the factors set forth in Rule 8.63.

The maximum extension by stipulation is 60 days for each brief, and the parties must file the stipulation before the brief is due. (Rule 8.212(b)(1).) If there is no stipulation, or if the parties have already stipulated to the full 60-day period, the party seeking an extension must apply to the Court.

Applications for extensions should be served on all parties and must include a declaration stating that the party was unable to obtain—or that it would have been futile to seek—a stipulation, or that the parties have already stipulated to the maximum 60-day period. (Rules 8.60(c), 8.212(b)(3).) The application must also provide good reasons for the extension; Rule 8.63 lists relevant factors. A form application for an extension of time is available in the "Forms" section of the Court's website at: http://www.courts.ca.gov/documents/2DCA-04.pdf

If you use this form, you may wish to provide an attachment that details the reasons for the extension.

In the Second Appellate District, you need to file only the original application for an extension of time (and serve copies on the other parties). (See Local Rule 5; keep in mind that other districts may have different filing requirements for extension applications.) The Clerk will mail notice of ruling to all parties.

Counsel must notify their clients of all stipulations and applications for extensions, and must provide the Court with evidence that they have done so. (Rule 8.60(f).)

3. Technical requirements

(a) Content. The appellant's opening brief must state the nature of the action; state the relief sought in the trial court; identify the judgment or order appealed from; demonstrate that the judgment or order is appealable; and provide a summary of the significant facts and procedure limited to matters in the record. (Rule 8.204(a).)

(b) Citing the record. The statement of any factual or procedural matter in any brief must be followed by a reference to the pages of the record that support the statement. For example:

> Jones left his house "early in the morning" (Reporter's Transcript ("RT") 485) and followed his usual route to work (RT 490). Although he testified that he looked both ways when he reached Fifth Street (RT 495), in a pretrial declaration received in evidence he swore that he looked only to the left (Clerk's Transcript ("CT") 150).
>
> or
>
> In a special verdict, the jury found that Brown held an easement (Joint Appendix ("JA") 345), but that she had abandoned it (JA 346). The trial court entered judgment for Green (JA 360), who served notice of entry of judgment on May 10, 2001 (JA 365).

In an appeal from a summary judgment, a brief's statement of facts should cite both the statements of undisputed/disputed facts and the underlying evidence.

Ordinarily, you may not rely on anything that does not appear in the record on appeal.

(c) Citing legal authorities. Each legal proposition in a brief should be supported by an *accurate* citation to a statute, decision, or other legal authority (such as a treatise or law review article). The citation should include the specific pages containing the language or reasoning you rely on. For example:

> As the California Supreme Court has observed, "Standing alone, a conspiracy does no harm and engenders no tort liability." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511.)

You should not rely solely on the research you did before the appeal. There may be new cases, and a fresh look at the applicable authorities is always valuable.

Briefs should be concise but comprehensive. You must cover all relevant points, because the failure to raise a particular contention waives it (meaning you cannot raise it later). However, you should remember that not every possible issue has merit and that some issues should be discarded, such as those that plainly will not affect the outcome of the appeal. Careful issue selection is an important part of skillful appellate advocacy.

You should try to get your points across without being verbose or redundant, and you should always remember that appellate practice is fundamentally different from trial practice. Your audience is the Court, not a jury charged with weighing the evidence. The sole concern of the appellate justices is to identify error and determine whether there was prejudice. **The most effective briefs are those that present their arguments concisely.**

(d) Format. Except in family, juvenile, guardianship, and conservatorship cases, the appellant's opening brief and the respondent's brief must include a Certificate of Interested Entities or Persons that appears immediately after the front cover of the brief. (Rule 8.208(b), (d)(1).) (The appellant has already filed a Certificate of Interested Entities or Persons along with the Civil Case Information Statement, and the respondent may have filed one as well, but the rules require another one at the beginning of the appellant's opening brief and the respondent's brief.)

Following the party's Certificate of Interested Entities or Persons, the appellant's opening brief and the respondent's brief must contain a table of contents and a table of authorities. (Rule 8.204(a).) An appellant's reply brief, which does not require a Certificate of Interested Entities or Persons, begins with the table of contents and the table of authorities. (Rule 8.204(a).)

After the tables, appellant's opening briefs and respondent's briefs customarily contain a short introduction; a statement of facts and procedural history; a discussion of the applicable law as it relates to the pertinent facts; and a conclusion. Each topic must appear under "a separate heading or subheading summarizing the point." (Rule 8.204(a)(1).) The format of the appellant's reply brief is similar, but the reply brief generally does not require another statement of facts and procedural history. If there is a cross-appeal, the parties must propose, and the Court will order, a briefing sequence. (Rule 8.216(a).)

Although no rule requires a particular citation style, it is useful to follow the California Style Manual (4th ed. 2000). California state courts generally follow this manual.

Briefs must have the colored covers specified by the rules—green for the appellant's opening brief, yellow for the respondent's brief, and tan for the appellant's reply brief. (Rule 8.40(b).) Plastic covers are not allowed.

Generally, the cover must include the name, mailing address, telephone number, fax number (if available), e-mail address (if available), and California State Bar number of each attorney filing or joining in the document, or of the party if he or she is unrepresented. However, if more than one attorney from a law firm, corporation, or public law office is representing one party and is joining in the document, the name and State Bar number of each attorney joining in the document must be provided on the cover. The law firm, corporation, or public law office representing each party must designate one attorney to receive notices and other communication from the Court by placing an asterisk before that attorney's name on the cover and must provide the contact information specified above for that attorney. Contact information for the other attorneys from the same law firm, corporation, or public law office is not required but may be provided. (Rule 8.40(c).)

The cover must also include the title of the brief (for example, Appellant's Opening Brief); the title, trial court number and Court of Appeal number of the case; the name of the party that each attorney on the brief represents; and the name of the trial court and of each participating trial judge. (Rule 8.204(b)(10).)

Briefs that are produced on a computer may not, without Court permission, exceed 14,000 words, including footnotes. The brief must include a certificate stating the number of words used in the brief. You can rely on your computer's word-count program in preparing the certificate, but make sure that the program counts footnotes. (Rule 8.204(c).) The type size, including footnotes, must not be smaller than 13-point with a conventional font (e.g., Times New Roman, Arial). Briefs must be prepared on plain white 8½ x 11 paper. (Rule 8.204(b).) There are special requirements for typewritten briefs. (Rule 8.204(b)(11).)

(e) Attachments. A party filing a brief may attach copies of exhibits or other materials **in the appellate record** or copies of relevant local, state, or federal regulations or rules, out-of-state statutes, or other similar citable materials that are not readily accessible. These attachments must not exceed a combined total of 10 pages, but on application the presiding justice may permit additional pages of attachments for good cause. (Rule 8.204(d).) If there is a particularly important exhibit in the appellate record—for instance, a contract, a photograph, or a property plot plan—you should consider attaching it to your brief.

(f) **Filing and service.** You must file the original brief plus four copies in the Court of Appeal – unless, under the Second District's Local Rule 7, you submit an electronic copy of the brief to the Court of Appeal. Under Local Rule 7, a

party submitting an electronic copy of a brief is required to file an original and only three paper copies. A party that does not submit an electronic copy of its brief (and therefore must file four paper copies) is required to submit one of the four copies **scan-ready** at the time of filing. "Scan-ready" means the document is unbound.

You must file a proof of service showing service of your brief on opposing counsel and the trial court. The proof of service must also show service on the California Supreme Court of either one electronic copy (as specified in Rule 8.212(c)) or four paper copies. Submission of an electronic copy of the brief will satisfy the requirement of serving the California Supreme Court. When a copy of a civil brief is submitted electronically to the Court of Appeal, a copy is automatically sent to the California Supreme Court and there is no need to submit a separate e-copy to the Supreme Court.

4. Common pitfalls

- **Failing to cite the record or relying on material that is not part of the record.** As noted above, you must support all statements of factual or procedural matters with citations to the record. You may, however, ask the Court to take **judicial notice** of legislative history and a few other types of information. This requires a formal motion to the Court, which must include a copy of the material of which you request judicial notice. (See Rule 8.252(a).)

- **Ignoring the standard of review.** Identify the correct standard of review for each issue you discuss in your brief, and be sure to apply it correctly. This tells the Court that you understand your case and, more importantly, helps you frame your legal arguments correctly.

- **Waiver**. You must be sure the issues you want to raise were preserved for appeal. For example, the Court of Appeal ordinarily will not consider a challenge to the admission of evidence unless trial counsel or a self-represented litigant made a timely objection. Remember that the failure to address a material issue in a brief may be treated as a waiver.

- **Overlooking prejudice.** No court proceeding is perfect, and errors do not require reversal unless they were prejudicial. An appellant's opening brief therefore must not only identify trial court error but also show prejudice—that is, why it is probable that, without the error, the result would have been different. Conversely, a respondent's brief can acknowledge or assume that error occurred, but argue that the error was not prejudicial.

- **String cites.** One or two cases are usually enough support for a basic legal proposition. String citations—multiple cases with no discussion of their relevance—are rarely useful.

- **Improper citation of unpublished decisions.** Do not cite California opinions that are not certified for publication under Rule 8.1105 or Rule 8.1110. (Rule 8.1115.) If the California Supreme Court grants review of a Court of Appeal opinion, the opinion is automatically vacated and cannot be cited unless the Supreme Court orders otherwise.

- **Improper tone.** Never personally attack an opponent, opposing counsel, or a judge. Name-calling and invective are never appropriate in legal writing, particularly in an appellate brief. They detract from the merits of your appeal, and may well offend the Court.

- **Failure to proofread.** Read, re-read and re-read again to make sure spelling, grammar and citations are correct.

- **Not clearly telling the Court what you want it to do.** As the appellant, do you want the Court of Appeal to order a retrial on all issues, a retrial on only some of the issues, or entry of judgment in your favor with no retrial? Depending on the nature of your case and the issues you raise, you may need to provide legal support for the result you request.

5. What if the Clerk rejects a document?

The Clerk may reject a document for a number of reasons, such as:

- Failing to serve or improperly serving opposing counsel, the Superior Court, or the Supreme Court

- Failing to serve parties with extension stipulations and applications

- Omitting an original signature when one is required

- Presenting a brief that exceeds the word-count limit without an application for permission to file an oversized brief

- Submitting an insufficient number of copies

- Failing to include an attorney's California State Bar number
- Failing to include a proposed order with a motion or application

The Clerk will usually give a reason for the rejection. Fix the problem and file the corrected document within the time allowed. You may have to file a motion for relief from default. Call the Clerk's Office if you have questions.

V. ORAL ARGUMENT AND DECISION

A. Scheduling

The Court of Appeal usually schedules oral argument within a few months after briefing is complete. When the Court notifies the parties, it may ask for a time estimate for the argument. While the rules allow a maximum of 30 minutes per side (Rule 8.256(c)), effective arguments can often be made in a few minutes. Usually only complex cases require lengthy argument. A failure to timely respond to the notice of oral argument may be treated as a waiver of argument.

You should notify the Court immediately of any scheduling conflict.

B. Preparing for argument

Update your legal authorities. If any authorities cited in the briefs are no longer valid or you discover new authorities you wish to rely on, notify the Court and all opponents in writing before the argument. This is particularly important if you want to cite the new authorities at oral argument.

Review the record, the arguments and the key authorities. Since you never know what may interest the Court, you must be conversant with every aspect of the case.

Carefully prepare your key points and anticipate questions from the Court. You should have a clear idea about the points you want to make. You should also try to anticipate questions by the Court and arguments by your opponent, and prepare responses to them. You should not write out a prepared statement.

Organize your materials. It is a good idea to prepare an outline for easy reference to the points you want to make. If there are key authorities or key aspects of the record that are likely to come up, you may find it useful to have copies of relevant pages organized for easy access.

C. Participating in argument

Where to go. For appeals heard in all divisions of the Second Appellate District except for Division Six (which is in Ventura County), the courtroom is on the third floor of the Ronald Reagan State Building, 300 South Spring Street in downtown Los Angeles. The cafeteria on the second floor is open to the public. Restrooms are on the ground floor opposite the public elevators in the north side of the building and outside the cafeteria on the second floor.

Checking in. Arrive before the scheduled time. After passing through a security station, you will find a schedule of the day's arguments, or the "calendar," on a table in the anteroom outside the courtroom. This sometimes identifies the three justices who will hear your case. On the same table, you will also find check-in slips, to be filled out by the person who will argue the case. The clerk inside the courtroom collects these slips.

Electronic devices. Electronic devices such as cell phones, laptops, iPads or other tablets are not permitted in the Court of Appeal's courtrooms, except by prior approval upon written request. Requests to bring an electronic device to the courtroom must be made in writing, show good cause, and be submitted in advance of the calendar date to the Division that will be presiding. Electronic devices (other than assisted listening devices) will be permitted only if the request is granted.

Calling the calendar. Each division calls the calendar a little differently. The Court may simply call the first case the justices wish to hear, or it may "call the calendar"—read the list of cases and ask counsel for appearances and time estimates. If the Court calls the calendar, stand and identify yourself and the party you represent and, if asked, state your time estimate.

Typically, the cases with the shortest time estimates will be heard first. In those divisions that ask for time estimates on the argument request form, the calendar will usually list the cases in the order in which they will be called.

Presenting argument. When the Court calls a case for argument, the appellant's counsel (or self-represented appellant) should go directly to the lectern, and the respondent's counsel (or self-represented respondent) should take a seat at the counsel table to the right of the lectern. Clients must remain in the audience. If there are more than three justices on the bench, the Presiding Justice will usually

identify the three hearing the case. The appellant should then state his or her appearance and proceed. If as the appellant you want to reserve time for rebuttal, you should advise the Court; failing to do so may deprive you of an opportunity for rebuttal.

The justices will have reviewed the parties' briefs, and you should assume that they are familiar with the case. You should highlight the pivotal issues in a conversational manner, and you should not read a prepared statement. Maintain eye contact. Avoid excessive rhetoric. If a Justice asks a question, stop your presentation and answer as directly as possible. If you do not know the answer, say so. If the question seems significant, ask for permission to address it in a letter brief to be filed shortly after argument.

The respondent should address the appellant's key points, and may want to address questions that the Court posed to the appellant.

The appellant's rebuttal is limited to replying to the respondent's arguments; this is not an opportunity to present new arguments.

If the Presiding Justice says that your time has expired, stop speaking. However, if you are the middle of making a point, you may ask for permission to complete it.

D. Decision

At the conclusion of oral argument, the Court will take the case under submission, and it will ordinarily file its decision within three months. The Clerk will mail a copy to counsel and to self-represented parties. You can request email notification of the filing of the decision through the Court's website. The decision will be stamped with its filing date, and it will say whether the Court has certified it for publication under Rule 8.1105. Both published and unpublished decisions are available on the Court's website. The decision ordinarily becomes final as to the Court of Appeal 30 days after filing, which means that the Court of Appeal loses jurisdiction to modify the decision or certify it for publication.

The filing date of the Court's decision is important because several deadlines run from it.

VI. PETITIONS FOR REHEARING

A. Should you seek rehearing in the Court of Appeal?

In most cases, probably not. The grounds for rehearing are extremely limited, such as where there is an omission or misstatement of a material issue or a material fact (it is not enough that a decision does not address every point a party raised, or makes a minor mistake of fact), or where the directions to the trial court are unclear, incomplete, or impractical. In addition, Government Code section 68081 requires a rehearing when the decision is "based upon an issue which was not proposed or briefed by any party to the proceeding."

You should consult practice guides to evaluate whether a rehearing petition is appropriate or necessary to preserve issues for possible Supreme Court review.

B. Deadlines

A petition for rehearing in the Court of Appeal must be filed and served within 15 days after the date the decision is filed. (Rule 8.268(b).) An answer to the petition may be filed only if the Court requests one. (Rule 8.268(b).) The answer, if any, must be filed and served within 8 days after the filing of the Court's order requesting an answer (unless the Court orders otherwise). (Rule 8.268(b).) Since the Court of Appeal cannot extend the 30-day period during which it retains jurisdiction, it can grant only very short extensions of time to file a petition for rehearing or an answer to a petition. These deadlines run from the filing date of the opinion; there is no extension for mailing.

C. Considerations in preparing the petition and answer

Petition. A rehearing petition is not an opportunity to reargue the entire case, nor is it an opportunity to raise new issues (other than a recent change in the law). Focus on the specific, narrow ground for rehearing and explain why rehearing is necessary.

A respectful tone is essential. You must identify the Court's mistake and explain why it is important without berating or insulting the Court. Keep the petition short. The Court is familiar with the case and does not need a lengthy reiteration of the facts or the law.

Answer. If the Court requests an answer, keep it as short as possible. Respond to the points raised in the petition and avoid rearguing your briefs.

Format. Use the same format as any other appellate brief. The cover of the petition should be orange; the cover of the answer, blue. (Rule 8.40(b).)

Filing and service. You must file the original petition for rehearing (or answer to petition for rehearing) plus four copies in the Court of Appeal – unless, under the Second District's Local Rule 7, you submit an electronic copy of a petition for rehearing (or answer to petition for rehearing) to the Court of Appeal. Under Local Rule 7, a party submitting an electronic copy of a petition for rehearing (or answer to petition for rehearing) is required to file an original and only three paper copies. A party that does not submit an electronic copy of its petition (or answer) (and therefore must file four paper copies) is required to submit one of the four copies **scan-ready** at the time of filing. "Scan-ready" means the document is unbound.

You must file a proof of service showing service of your petition for rehearing (or answer to petition for rehearing) on opposing counsel and the trial court. The proof of service must also show service on the California Supreme Court of either one electronic copy (as specified in Rule 8.212(c)) or four paper copies. Submission of an electronic copy of the petition (or answer) to the Court of Appeal will satisfy the requirement of serving the California Supreme Court. When a copy of a petition (or answer) is submitted electronically to the Court of Appeal, a copy is automatically sent to the California Supreme Court and there is no need to submit a separate e-copy to the Supreme Court.

D. Ruling.

If the Court of Appeal does not rule on a petition for rehearing before the decision becomes final (30 days after filing in most cases), the petition is deemed denied. If the Court does rule, it can deny the petition, deny it with a modification of the decision, or grant it. If the Court grants the petition, ordinarily there will be no further briefing or oral argument; the Court will issue a new decision in due course.

If the Court modifies the decision, it will state whether the modification effects a change in the judgment. If there is a change in the judgment, the 30-day finality period restarts as of the date of the modification.

VII. POST-DECISION PROCEEDINGS

A. Review by the California Supreme Court

Supreme Court review is beyond the scope of this pamphlet. Keep in mind, however, that if the Court of Appeal's decision presents a proper ground for review (see Rule 8.500(b)), you must file a petition for review in the Supreme Court within 10 days after the Court of Appeal's decision becomes final—that is, within 40 days after the Court of Appeal filed its decision, unless there has been a rehearing or a modification of the judgment that restarted the 30-day finality

period. (However, when the Court of Appeal's decision is final immediately, you have only 10 days to file a petition for review.)

B. Remittitur

Once all proceedings in the Court of Appeal and Supreme Court have concluded, the Clerk issues a remittitur. This is a document the Court of Appeal sends to the trial court, notifying it that the Court of Appeal's decision is final. The remittitur reiterates the disposition and specifies which party, if any, is entitled to recover its costs on appeal. Ordinarily, the remittitur is issued after expiration of the time within which the Supreme Court can grant review. If the Supreme Court grants review, the remittitur will issue after the Supreme Court's decision becomes final. Once the remittitur is issued, the trial court reacquires jurisdiction of the case.

C. Recovering costs on appeal

The Court of Appeal usually requires the losing party to pay the prevailing party's costs on appeal, but it has discretion to make any (or no) award, to apportion the costs, or to defer the award for decision by the trial court at the conclusion of the case. The Court of Appeal's determination is binding on the trial court.

Rule 8.278(d) describes the few items recoverable as costs. They include the cost of preparing an appendix or purchasing a clerk's transcript; the cost of the reporter's transcript; the cost of obtaining an appeal bond; and filing and service costs.

The party entitled to costs must file and serve a verified cost memorandum in the trial court within 40 days after the Clerk mails a notice of issuance of the remittitur. The party liable for costs may challenge specific items (but not the entitlement to costs) by making a motion to tax costs within 15 days after service of the cost memorandum.

VIII. REPRESENTING YOURSELF

A. General considerations

If you represent yourself, you must comply with all of the rules discussed above. You are held to the same standards as parties represented by counsel, and should not expect to be treated differently.

For example, your briefs must follow the format discussed above. You must support all of your factual statements with citations to the record, and you must

support your legal arguments with citations to case law, statutes, or other legal authority (such as a treatise or law review article).

Although staff in the Clerk's Office of the Court of Appeal can answer some basic questions about the status of the appeal, they cannot practice law or give legal advice. Self-represented litigants should consider retaining counsel and possibly consulting an appellate specialist.

B. The Public Counsel Appellate Self-Help Clinic

A free self-help clinic operated by a non-profit legal services organization provides information about the many procedures, filings, and deadlines that unrepresented civil litigants in the Second Appellate District will encounter throughout the appeals process. Public Counsel, the public interest law office of the Los Angeles County and Beverly Hills Bar Associations, provides this walk-in clinic in the Settlement and Mediation Center of the Court of Appeal, located on the second floor of the Ronald Reagan State Building at 300 South Spring Street in downtown Los Angeles.

The clinic assists only unrepresented litigants in civil cases whose cases are on appeal or who want to appeal. Qualifying litigants are seen on a first-come, first-served basis during clinic hours and are welcome to seek assistance at any stage of their appeal.

The clinic is normally open on Wednesdays and Fridays from 9:00 a.m. to 12:00 noon and 1:00 to 3:00 p.m. If you want to make sure the clinic will be open on the day you wish to attend, call Lisa Jaskol at (213) 830-7234 (the clinic number) or at (213) 385-2977 ext. 151 or email her at ljaskol@publiccounsel.org.

The attorneys at this clinic will not be your lawyers. They cannot give legal advice and they cannot represent you in court.

IX. ADDITIONAL INFORMATION AND RESOURCES

For more in-depth analysis and discussion of appellate issues and strategy, several outstanding resources are available at your local law library. They include Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group); California Civil Appellate Practice (Cont.Ed.Bar); Kline & Richland, West's California Litigation Forms—Civil Appeals and Writs; 9 Witkin, Cal. Procedure: Appeal; California Appellate Practice Handbook, published by the San Diego County Bar Association.

You can find general information, local rules and forms at the Second District's website: http://www.courts.ca.gov/2dca.htm. This website also contains a "Self-Help Resources" page, including a manual titled Civil Appellate Practices and Procedures for the Self-Represented. This manual contains chapters explaining the major procedural steps in the appellate process.

In addition, the Second District's website allows you to check the status of your appeal. By clicking on "Search Case Information" and typing in your case number or name, you can see the online docket, a list of parties and lawyers, and other information. You can also sign up here for email notification about important events in your appeal.

You may call the Clerk's Office (213/830-7000) if you have a question. However, you should think through the question, know what information you need, and have your case number available (preferably the Court of Appeal number, but at least the superior court number). Remember that the Clerk's Office staff are not allowed to give legal advice.

The Appellate Courts Section
of the
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