California Court of Appeal

Second Appellate District

Civil Appellate Practices and Procedures for the Self-Represented

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NOTICE REGARDING ELECTRONIC FILING FOR SELF-REPRESENTED LITIGANTS

California Rules of Court, rule 8.71 requires that for parties with attorneys, *all* filings in civil cases be made through the Court's electronic filing system (TrueFiling).

Self-represented litigants, however, are exempt from the requirement to file documents electronically. (CRC, rule 8.71(b). However, if a self-represented litigant chooses to file documents electronically, he or she is bound by the rules of electronic filing laid out in California Rules of Court, Article 5. Represented parties are *required* to file electronically.

When electronically filing, you must comply with the requirements of TrueFiling and California Rules of Court, rule 8.74. By electronically filing any document with the court, you agree to file *all* documents electronically. You also agree to receive service of documents electronically unless you notify the court and all parties that you do not accept electronic service and choose to be served paper copies at an address you provide. (CRC, rules 8.71(b)(2) and 8.78(a)(2).)

For electronic filing support, registration and training, please review the following resources at courts.ca.gov/2dca:

- Register for TrueFiling
- TrueFiling Quick Start Guide
- TrueFiling Support and Training
- Guide to Creating Electronic Appellate Documents
- How to Prepare Electronic Filings
- Frequently asked questions regarding electronic filing

Please note: any references contained within this self-help manual regarding document formatting (for example, color covers), apply only to paper filings.

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DISCLAIMER

The materials included here are not legal advice and may not be used as legal authority. The primary legal authority for the practices described in this manual is the California Rules of Court.[1] This manual does not replace or supersede the California Rules of Court. It is merely a general summary of the applicable rules. The rules themselves are subject to change, and you should consult them directly.

In the event the information here differs from the California Rules of Court, you must follow the California Rules of Court. The California Rules of Court are referred to throughout this manual as "CRC" (for example, "CRC, rule 8.108").

The California Rules of Court are available at any law library, on the Internet at www.courts.ca.gov/rules, or can be ordered for a fee by calling (800) 328-9352.

[1] See CRC, rules 8.100-8.278 if you are appealing from the unlimited jurisdiction of the superior court to the Court of Appeal. Appeals from the limited jurisdiction of the superior court to the appellate division of the superior court are covered by CRC, rules 8.800-8.891; transfer from the Appellate Division of Superior Court to the Court of Appeal is covered by CRC rules 8.1000-8.1018. This manual discusses only appeals to the Second Appellate District Court of Appeal, not to the Appellate Division.

INTRODUCTION

This manual describes, in simple terms, what you must do when you lose in the trial court and decide to appeal. It also covers the related California Rules of Court. The manual is intended for persons who represent themselves (also called "self-represented litigant," "pro per" or "pro se") in the California Court of Appeal, Second Appellate District. The Second Appellate District hears all appeals from Los Angeles, Ventura, Santa Barbara and San Luis Obispo Counties. This manual only covers civil appeals. It does not discuss criminal or juvenile dependency appeals nor does it cover writs or any kind of original proceeding.

You should seriously consider hiring an attorney if you can afford to do so. Bringing a case to the Court of Appeal without an attorney is hard work, extremely complicated, and takes a good deal of time. If you choose to be self-represented, even though you do not need to pay attorney's fees, there is still an expense associated with bringing an appeal, including filing and transcript fees. You also are held to the same standard and expectations as if you were an attorney. In most cases, you have only one chance to have the court hear your case. **You must follow all of the court's rules and procedures, or your case may be dismissed.** An attorney who is familiar with appeals and knows how to handle them will know how to guide your case through the appeal process. You can proceed with your appeal on your own, but given the particular nature of your case, you may want to consult a lawyer.

You must complete many steps when appealing a civil case. The steps are presented in this manual in the order in which they must be completed. Make sure to read each chapter in its entirety before attempting to complete the steps. Ideally, you should read through the entire manual before beginning the appeal process. Questions you may have often will be answered later in the text.

The appendices to this manual include a timeline to assist you in computing and meeting applicable deadlines for an appeal (Appendix 1) and a glossary defining important terms used in the manual (Appendix 4).

All of the forms referred to in this manual are included in the final section entitled "Sample Forms and Instructions," along with detailed instructions for filling them out.

If you are reading a hard copy of this manual, for the electronic version is available at the Second Appellate District website: www.courts.ca.gov/2dca, under Self Help Resources. There you will find the entire manual online and can print the sample forms. Just click on "Civil Appellate Practices and Procedures for the Self-Represented" to access the manual. Other useful

information is available on this website, such as, directions to the court, parking information, frequently asked questions ("FAQs"), local rules and Practices & Procedures of the court. You may also find online information about your own case by clicking on "Search Case Information." (See **Chapter 5**.)

Many of the sample forms in this manual are also available online in Adobe Acrobat PDF format and can be filled out electronically for free at www.courts.ca.gov/2dca/forms. A shorter description of the civil appeal process (form APP-001) is also available.

It is extremely important to understand that the Court of Appeal does not retry the case, take new evidence, or decide which witnesses were telling the truth. Rather, it reviews the superior court trial or hearing for errors of law. The Court of Appeal presumes the superior court judgment is correct, and the appealing party must overcome this presumption to win the appeal. The Court of Appeal can only reverse a case if it finds an error of law that was so important to the trial court proceedings that it changed at least part (or all) of the outcome of the case. Because of this heavy burden of proof, it is quite difficult to win an appeal.

You may not visit or talk about your case with a justice or a member of his or her staff. The staff in the Court of Appeal clerk's office will help you as much as they can, but they **cannot give you legal advice or tell you what to put in your papers**.

If you have any questions about the steps outlined in this guide, call the clerk's office at (213) 830-7000. The staff at the court would be happy to help you in any way they can.

CHAPTER 1
FILING THE NOTICE OF APPEAL

The filing of the *Notice of Appeal* is the event that begins the entire appeals process. It notifies the superior court, the Court of Appeal, and the opposing parties involved with the case of a person's intentions to have the Court of Appeal reexamine all or part of the superior court trial for errors of law. The *Notice of Appeal* must meet strict content and time requirements set out in California Rules of Court (CRC). Additionally, the payment of certain fees must accompany the *Notice of Appeal*. The following chapter describes those requirements and instructions for preparing your own *Notice of Appeal*. This chapter also discusses the topic of appealability, which determines if a person has the legal right to appeal a decision in a superior court case. The *Notice of Appeal* MUST be filed at the superior court.

The Designation of the Record is discussed at length in **Chapter 2**. Frequently, however, appellants file their *Notice Designating the Record on Appeal* at the same time that they file their *Notice of Appeal*. If you would like to do so, make sure that you thoroughly read **Chapter 2** along with **Chapter 1**. Like the *Notice of Appeal* the *Notice Designating the Record on Appeal* MUST be filed at the superior court.

Deciding If You Can Appeal What the Trial Court Did (Appealability)

Appealability, meaning a person's legal right to have the Court of Appeal review a decision that was made in the superior court, can be a tricky issue.

(1) In order to appeal, you must be aggrieved[2] by a decision at the superior court. Generally, you would have been considered to have "lost" at the

[2] Aggrieved means the superior court or an administrative agency denied your claim or ruled against you in a way that causes you some type of harm or injury (for example, it upheld your being fired by your employer), or cost you money (for example, ordering you to pay doctor bills for someone you hurt in a car accident that you caused).

superior court. You also must have been a party in the case in the superior court. You may not appeal for a spouse, a child (unless you are the child's guardian) or a friend.

(2) Even if you were aggrieved, not every court ruling is appealable. While there are numerous exceptions, in most cases you can appeal only a **final judgment**. The final judgment tells what the final result of the case is – who has "won," who has "lost," and what actions must take place (i.e., the payment of money). The court usually issues a final judgment at the end of the case and that judgment says what one or more parties must do (such as pay money to the other party). This judgment may have been made by the superior court judge or a jury. All final judgments are appealable.

You can also appeal most **orders** the trial court makes after final judgment. After the judge or jury has issued a final judgment, the judge may order further instructions to one of the parties. For example, after a trial, sometimes the side that won may make a motion for attorney's fees, which the judge may grant with an order to pay attorney's fees. Such orders after final judgment are also appealable.

Many cases end without a trial because the judge decides the plaintiff doesn't have a case even if everything in the complaint is true. (This is called a demurrer.) Other cases don't get to trial because the judge decides the plaintiff doesn't have enough evidence to have a chance of winning at trial, even looking at that evidence most favorably to the plaintiff's position. (This is called a summary judgment.) When a trial court grants a demurrer, the defendant is entitled to a dismissal of the case. Such a dismissal is appealable. After granting a summary judgment motion, the court will enter a judgment in favor of the prevailing party. This judgment is a final judgment and is appealable. However, until the court issues an order dismissing the case, or a judgment after the granting of a summary judgment motion, the demurrer or summary judgment cannot be appealed. Furthermore, if a trial court denies a demurrer or summary judgment, that denial is not appealable and can only be challenged through a petition for writ.

Special considerations are discussed at length in Appendix 5. For a list of less typical decisions that can be appealed or for more information about what constitutes an appealable judgment or order, refer to the California Code of Civil Procedure, section 904.1.

How to Find the Appealable Decision in the Record

When filing your Notice of Appeal, you must attach the file- stamped, signed document with the superior court's ruling. The file stamp on the document shows the date the superior court filed it and verifies that the document is official. **Without this file-stamped, signed document, your appeal will be rejected.**

The file-stamped, signed judgment or order can be found in the superior court file and could be in the form of piece of paper labeled 'Judgment,' 'Order,' or 'Order after Judgment,' or it could be in the form of a minute order (explained below). If the superior court file contains a formal judgment or order, signed by the judge and file-stamped, you can use a photocopy of it as the basis for your appeal.

If the superior court file does not contain a formal judgment, the appealable order might appear in the minutes of the case. The minutes are the official court record of what happened during the case and are written down by the clerk of the superior court. You can identify the minutes by looking for the word 'Minutes' at the bottom of the page as it appears in the superior court file. If the minutes are signed by the judge and file-stamped, they become a minute order and can be used as the basis for your appeal.

Sometimes, the superior court file contains neither a formal judgment nor a signed minute order. The minutes might show that the judge ordered one of the parties to prepare a separate document titled 'Judgment,' 'Order,' or 'Order after Judgment." If this is the case, you may **not** use the minute order as the basis of the appeal.

If a signed order or judgment has not been prepared as ordered by the judge in the court's minutes, you, as appellant, will need to prepare and have it entered before you can proceed with your appeal. If you prepare a proposed

order of judgment, you must first serve it (see Proof of Service) on opposing counsel and the superior court. Prior to service, ask for opposing counsels' approval within a certain number of days. If opposing counsel approves, take or mail the approval along with the proposed judgment or order to the superior court department where your case was heard. Ask for the order to be signed by the judge and file-stamped by the clerk.

If opposing counsel does not respond to your request for approval within five days, the order is considered approved, and you can submit the proposed order to the trial judge with explanation of why opposing counsels approval is absent. The trial court will hold the proposed order for **20 days** from the date of service. At the end of the twenty days, the court may sign the order or judgment, hold a hearing, and/or make changes to the proposed judgment or order. In any case, the court will mail you a signed, file-stamped copy that may be used as the basis for your appeal.

If you have questions about whether you have an appealable judgment or order, refer to the California Code of Civil Procedure, section 904.1, consult with an attorney, or contact the Clerk's Office at the Court of Appeal.

Preparing the Notice of Appeal

The Notice of Appeal is a relatively straightforward document. However, if you have questions about the document, refer to CRC, rule 8.100(a) or contact the Clerk's Office at the Court of Appeal.

The *Notice of Appeal* must be filed at the superior court. Once the appellant has completed the *Notice of Appeal*, a copy must be served on all parties and the original must be filed, along with appropriate filing fees (discussed below), at any filing window of any branch of the superior court in the county in which your superior court case took place. (CRC, rule 8.100(a).) A *Notice of Appeal* may also be filed by the respondent in the same case, in which case the respondent is filing a *Notice of Cross-Appeal*. (CRC, rule 8.100(f).)

Do not file the *Notice of Appeal* or *Notice of Cross-Appeal* at the Court of Appeal. If you are filing your *Notice of Appeal* in Los Angeles County, it is highly recommended that you file the documents directly with the appeals section, located at 111 North Hill Street, Room #111A, Los Angeles, CA

90012. For information on the locations of superior courts in the Second District, see Appendix 2.

Service of documents means that you let the other parties and the court know what you are doing by having copies of the documents you plan to file with the court—in this case, the *Notice of Appeal*— mailed or hand-delivered to them. Copies of all of the documents you prepare to file should be served on all counsel and self-represented parties, and the original should be filed with the court. **Failure to properly serve a document on all appropriate parties will result in that document being rejected for filing by the superior court or the Court of Appeal.**

A document may be hand-delivered or mailed only by someone who is over the age of 18 and is not a party in the lawsuit. For example, if you are self-represented in an appeal, you cannot hand-deliver or mail your *Notice of Appeal* to the parties. Someone else, an adult who is not a party, must do it for you. A *Proof of Service* must be filled out and attached to each document you file. This proof of service says who was served and how they were served. (See Proof of Service.) Depending on whether you are having service done by mail or in person, the person doing the service needs to fill out the Proof of Service properly.

Filing Fees

At the time that the appellant files the *Notice of Appeal*, unless the appellant has a **fee waiver**, he or she must pay two separate fees. (CRC, rule 8.100(b).)

1. A $775 filing fee payable to "Clerk, Court of Appeal," and
2. A $100 deposit, made payable to "Clerk of the Superior Court."

If you, as appellant, have received a fee waiver from the superior court for the case number(s) you are appealing, include a copy of the fee waiver with the *Notice of Appeal*. This fee waiver may apply to the Court of Appeal filing fee if the box for 'Court of Appeal' is checked; otherwise, you must apply for a fee waiver. If you, as appellant, did not get a fee waiver in superior court, you may apply to the Court of Appeal for a waiver under CRC, rules 3.50-3.58. (See also CRC, rules 8.100(b)(1) and 8.26.) A fee waiver allows persons below a certain income level to file their appeal without paying the

filing fee. (See Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division) APP-015/FW-015-INFO.)

If you are the responding party (not the appellant), there are also fees you must pay. Pursuant to the California Government Code, section 68926(b), any party other than the appellant must pay $390 when filing their first document with the Court of Appeal. See CRC, rule 8.25(c)(2)(D), for a list of documents that are considered initial filings by a respondent and where a filing fee may be required. However, the respondent does NOT have to make a $100 deposit to the clerk of the Superior Court.

Defaults

If your *Notice of Appeal* is missing something (proof of service, appropriate fees, etc.), the Superior Court or the Court of Appeal will issue a *Notice of Default* to you. The *Notice of Default* formally informs you that you have not complied with the Rules of Court pertaining to the *Notice of Appeal* and, if you do not fix the problem(s) within **15 days** (e.g., by providing a properly completed *Proof of Service*, paying the fees, or achieving a fee waiver), the Court will dismiss the appeal.

Throughout the appeal process, the Court of Appeal uses the *Notice of Default* to notify a party that they have failed to properly comply with the rules. *Notices of Default* are a warning; a *Notice of Default* always allows some period of time (usually 15 days) for the party to fix the problem(s) with their appeal. If the party fails to fix the problem(s) set out in the *Notice of Default* within the time allowed, the Court may dismiss the appeal. If you receive a *Notice of Default* and do not understand the problem with your filing, refer to the rule of court specified in the Notice or call or visit the Clerk's Office at the Court of Appeal.

Time Limits for Filing a Notice of Appeal

In the same way that deciding whether you have an appealable order or judgment can be difficult, figuring out the time limits for filing a *Notice of Appeal* can also be confusing. But, the time limits are extremely

important. **If the *Notice of Appeal* is late in a civil case, the appeal must be dismissed. (CRC, rule 8.104(b).) There are no exceptions to this rule.** You can file a *Notice of Appeal* as soon as the order or judgment is signed by the superior court judge and file- stamped by the court clerk. However, there are three different situations that put different time limits on the filing of the *Notice of Appeal*. You should identify which of these applies to you and proceed accordingly.

1. If a *Notice of Entry of Judgment* has been served on the parties. The judgment in the case is "entered" when it is file-stamped; this is also called the entry of judgment. The parties may not know the exact date when this was done. The court clerk or any party may provide notice that the judgment was entered. The clerk may do so by mailing a *Notice of Entry of Judgment* or a copy of the judgment or order to the parties in the case. If this happens, the *Notice of Appeal* must be filed within **60 days** of the date that the clerk mailed the *Notice of Entry of Judgment or (Order).* (CRC, rule 8.104(a)(1).) Any party in the case may provide *Notice of Entry of Judgment* by serving each of the other parties with either (1) a *Notice of Entry of Judgment* (see Notice of Entry of Judgment) or (2) a file-stamped copy of the judgment. A *Proof of Service* (see Proof of Service) must be attached to either document. If this happens, the *Notice of Appeal* must be filed within **60 days** of the date of the party's serving a copy of the judgment, minutes, or *Notice of Entry of Judgment*. (CRC, rule 8.104(a)(1).) If the clerk mails the *Notice of Entry of Judgment* and a party serves the *Notice of Entry of Judgment*, the 60-day time limit starts on the earlier of the two.
2. If there is a *Notice of Entry of Judgment*, the time to file a *Notice of Appeal* can be extended if there is a timely motion:
    - Motion for new trial (Civil Code of Procedure section 663(a) and CRC, rule 8.108(b)).
    - Motion to vacate (or set aside) the judgment (Civil Code of Procedure section 629 and CRC, rule 8.108(c)).

- Motion for judgment notwithstanding the verdict (Civil Code of Procedure section 659 and CRC, rule 8.108(d)). Or,
- Motion to reconsider an appealable order. (Civil Code of Procedure section 1008(a) and CRC, rule 8.108(e)).

A party filing a cross-appeal should carefully review CRC, rule 8.108(g) to ensure compliance with the rule governing filing a cross-appeal when the time to file an appeal has been extended by CRC, rule 8.108(e).

3. If there is no *Notice of Entry of Judgment*; the appellant has **180 days** after entry of the order or judgment, to file the *Notice of Appeal*. (CRC, rule 8.104(a)(1)(C).) Even if there are extensions, the *Notice of Appeal* may not be filed if 180 days have passed since the entry of the order or judgment (recall that this is the file-stamped in the upper right-hand corner of the judgment or order).

CHAPTER 2
DESIGNATING THE RECORD

After filing the *Notice of Appeal*, the appellant needs to designate the record. That means picking out which documents in the trial court record you want the justices to see when they are reviewing your case and deciding your appeal. The **record** in an appeal is the official account of what went on at the hearing or trial that is being appealed.

A party designates the record by listing what items to include in a *Notice Designating Record on Appeal.* (See Notice Designating Record on Appeal.) This notice must be served and filed at the superior court within **10 days** of the filing of the *Notice of Appeal.* (CRC, rule 8.121(a).) A record is required in every case. Because the short time period between the filing of the *Notice of Appeal* and the *Notice Designating Record on Appeal*, **appellants often file both documents at the same time**. However, the Court does not require that they be filed simultaneously.

The record may consist of two parts:

1. A clerk's transcript (CRC, rule 8.122), and
2. A reporter's transcript (CRC, rule 8.130).

The **clerk's transcript** can include anything that is in the superior court file—the papers that were filed, the orders that were made, the things that were done. A clerk's transcript is prepared by the superior court based on what you listed in the *Notice Designating the Record on Appeal*. Or instead of having the superior court prepare a clerk's transcript, you individually or with the opposing party may prepare and file a rule 8.124 appendix (see CRC, rule 8.124 (discussed later)). Either a clerk's transcript or a rule 8.124 appendix is required in all cases.

The **reporter's transcript** is a word-for-word record of everything that was said in court during the hearings or trial. Notes taken down by a certified court reporter are transcribed for the appeal.

With very few exceptions, the appellant must pay the fees for the preparation of both the clerk's transcript (unless they elect to produce an 8.124 appendix) and the reporter's transcript.

When you file the *Notice Designating Record on Appeal*, you will need to make a decision about what type of record you would like. There are four options on the first page of the designation form. You must choose one:

1. Appendix only; no Reporter's Transcript,
2. Appendix and Reporter's Transcript,
3. Appendix and Agreed or Settled Statement,
4. Clerk's Transcript only; no Reporter's Transcript,
5. Clerk's Transcript and Reporter's Transcript, and
6. Clerk's Transcript and Agreed or Settled Statement.

The record is an extremely important part of an appeal. Think of the record as a package that contains all of the information that the justices might need to know about what happened in the trial court in order to review the case. You can only put into the package those items (filings, transcripts, orders, motions, minutes, etc.) that were part of the trial court proceedings. Furthermore, when writing your brief and conducting oral argument, you can only refer to parts of the trial court proceedings that are included in the package. The contents of the record limit the scope of issues and information that the parties can use in their arguments and that the Court of Appeal will consider as it reviews the case. Anything in the record can be examined and considered. For the purpose of appellate review, any parts of the superior court trial that are not included in the record *do not exist*, and therefore will not be examined or considered by the Court and cannot be used by either party to support their case.

What you choose to include will depend on the issues that you are appealing. The appellant needs to think about the trial, what rulings may have been legally wrong, and what part of the record will best tell the Court of Appeal why these rulings were legally wrong. These are the items the appellant should put into the package and designate for the record.

The following section will tell you how to designate the record.

Preparing the Clerk's Transcript/CRC, Rule 8.124 Appendix

In all appeals, the Court requires either a clerk's transcript or a rule 8.124 appendix. These contain the same material and serve the same purpose: to provide the court with the procedural history of the hearing or trial that is being appealed. Both are "books" that contain the papers that were filed in the trial court in chronological order. The difference between the two is that the clerk's transcript is prepared by the superior court while the 8.124 appendix is either prepared jointly by the appellant and respondent or by either of the parties individually. Additionally, the appellant must pay for the preparation of the clerk's transcript; the only cost associated with preparing an 8.124 appendix is the expense of photocopying and binding the relevant documents. With these differences in mind, the clerk's transcript and 8.124 appendix will be discussed separately.

Clerk's Transcript

In order to have the clerk's transcript prepared, the appellant must properly complete pages 1 and 2 of the *Notice Designating Record on Appeal*. This involves checking a box on page 1 indicating that the appellant would like to proceed with a clerk's transcript, and then, on page 2, listing all of the documents that the appellant would like included in the clerk's transcript (Notice Designating Record on Appeal). Within **10 days** of the filing of the *Notice of Appeal*, the appellant must serve and file the completed *Notice Designating Record on Appeal* at the superior court. The superior court, not the Court of Appeal, prepares the record.

The clerk's transcript automatically includes (CRC, rule 8.122(b)):

- The *Notice of Appeal*,
- The judgment or order being appealed and any notice of entry,
- Any notice of intention to move for new trial, to vacate the judgment, for judgment notwithstanding the verdict, or for motion for reconsideration,

- Any notices or stipulations to prepare the clerk's or reporter's transcripts or to proceed by agreed or settled statement, and
- The register of actions, if any.

You must specifically designate any other document you want included. Ordinarily, this means you should go to the clerk's office at the superior court to look at the entire file for your case. That's the only way you will be able to pick the documents you want to include in the clerk's transcript and know the names of those documents, the dates they were filed, etc. To designate a document, list the date of the filing or lodging of a document and its exact title. If the date on which the document was filed is unknown, use the date the document was signed. The appellant does not have to individually designate each jury instruction or minute order. You can list "all" jury instructions and "all" minutes.

All exhibits, whether admitted into evidence or refused, are considered part of the clerk's transcript. If some or all of the exhibits are needed in the appeal, the ones to be used are designated, and most often transmitted to the court under CRC, rule 8.224, after the respondent's brief is filed. However, if a party wants one or more of the exhibits copied and put in the clerk's transcript to be available while the briefs are being written, the exhibits to be included must be noted by number or letter in the *Notice Designating Record on Appeal*.

Within **10 days** after service of appellant's designation, the respondent may provide a list of additional items to be included in the clerk's transcript. (CRC, rule 8.122(a)(2).) This list must also be specific as to the title of each document and the date it was filed.

Clerk's Fees

After the respondent's designation is filed, or the time to file has passed, the superior court appeals clerk locates the documents that have been designated and determines the cost of preparing the clerk's transcript. The cost of a clerk's transcript depends on how many pages there are. The superior court charges a copying fee based on the number of pages designated, and a volume fee based on the number of volumes in the clerk's transcript. The superior court appeals clerk then notifies the parties of the estimated cost of the clerk's transcript and, upon payment by the

appellant, begins to prepare it. Unless the court waives appellant's $100 deposit (which was paid at the time of the filing of the *Notice of Appeal*), that money is put toward the cost of the clerk's transcript. If the total cost is more than $100, the superior court sends a notice of the remaining amount that is due. A person who is unable to pay for the clerk's transcript can file with the superior court an application for a waiver of the clerk's transcript fees. (CRC, rule 8.122(c)(3); Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division) APP-015/FW-015-INFO.) **The appellant pays the entire cost for preparation of the original clerk's transcript and one copy, even when the respondent has designated items to be included.**

The respondent does not automatically get a copy of the record. If he or she wants a copy of the clerk's and/or reporter's transcript, the request must be made promptly. The superior court appeals clerk will provide the respondent with an estimate of the cost to prepare the clerk's transcript. (CRC, rule 8.122(c).) The respondent has **10 days** to pay the estimated cost or submit an application to waive costs. (CRC, rule 8.122(c)(3), Form FW-001 and APP-016/FW-016).

If the respondent does not wish to have to pay for his or her own copy, he or she may borrow the appellant's copy after notifying the appellant no more than **20 days** after the record is filed in the Court of Appeal. The record is lent to the respondent when the appellant's opening brief is served, and returned to appellant when the respondent's brief is served. (CRC, rule 8.153.)

If fees are not paid, the superior court sends a *Notice of Default* telling the appellant to pay within **15 days** or the appeal may be dismissed. (CRC, rule 8.140(a).) If the fees are not paid within **15 days** after that *Notice of Default* is sent, the superior court sends a *Notice of Failure to Clear Default* to all parties and to the Court of Appeal. The Court of Appeal then dismisses the appeal.

Once the designation has been made and the fees paid, the appeals division of the superior court will prepare the clerk's transcript. The papers you designated on your *Notice Designating Record on Appeal* are arranged chronologically in the order in which they were filed in the superior court, beginning with the first papers filed in the case and ending with the last

papers filed in the case. After the papers are arranged in order, they are numbered in sequence. The clerk prepares two indexes and inserts them at the beginning of the transcript. One index lists the papers in the order they were filed, and the second index lists the papers in alphabetical order by the first letter of the first word in the title of the document. Each index includes the page numbers and, if there is more than one volume, the volume number where the papers can be found in the transcript. A cover is prepared, and everything is then bound in book form.

8.124 Appendix

Any party may elect to proceed by an 8.124 appendix. Within **10 days** of filing the *Notice of Appeal*, the appellant must serve and file his or her intention to proceed under CRC, rule 8.124, along with a Proof of Service on all parties. The appellant gives notice of his or her intention by checking a box on the first page of the Notice Designating Record on Appeal form.

For detailed directions on how to construct an 8.124 appendix, see Guide to Creating Electronic Appellate Documents.

If the appellant opts for a clerk's transcript, but the respondent would prefer an 8.124 appendix, the respondent may file an election to proceed with an appendix within **10 days** of the filing of the notice of appeal and, if timely, this election will govern the record preparation, and the parties must proceed with an appendix. However, if the appellant would prefer a clerk's transcript, the appellant must challenge the election of an 8.124 appendix by filing a written motion in superior court. The motion must be filed within **10 days** after the *Notice Designating Record on Appeal* is served and filed. (CRC, rule 8.124(a)(1).)

If the parties ultimately decide to proceed by appendix, there are two options: a joint appendix or a separate appendix from each party.

A **joint appendix** is the simplest of the two. A joint appendix is prepared by both parties and contains all the documents needed by both the appellant and respondent. (CRC, rule 8.124(b). The Court prefers this type of appendix.

If the parties cannot cooperate to create a joint appendix, each side must prepare their own appendix, meaning the appellant files an **appellant's appendix**, the respondent files a **respondent's appendix**, and

if necessary, the appellant files an **appellant's supplemental appendix**. In either case, the joint or appellant's appendix must be served on the respondent(s) and filed with the court at the same time as the appellant's opening brief. A respondent's appendix, if any, must be served on the appellants and filed with the court at the same time as the respondent's brief. An appellant's supplemental appendix, if any, must be served on the respondent and filed with the court at the same time as the appellant's reply brief. For information on the timing for the filing of the briefs, see **Chapter 4**.

In filing an appendix, you are certifying that the papers included are true and that correct copies of the documents are filed or lodged with the superior court. (CRC, rules 8.124(d), (g).) The documents must be identical to the originals in the superior court file.

All exhibits admitted in evidence or rejected are considered as part of the appendix even if they are not physically included in the bound volumes. (CRC, rule 8.124(b)(4).) They can later be lodged with the Court of Appeal by transmitting them under CRC, rule 8.224.

From a financial perspective, the advantage of an appendix is that it only costs the appellant or both parties the expense and time of photocopying the relevant documents and binding.

Reporter's Transcript

The reporter's transcript is a word-for-word, typewritten record of everything that was said in court during the trial or hearing. It is an optional part of the record on appeal. The appellant should consider requesting a reporter's transcript if what was said at the trial or hearing relates to the issues the appellant wants to talk about on appeal. If what was said at the trial or hearing has nothing to do with the issues for the appeal and the appellant does not want it typed up, the appellant does not need to request a reporter's transcript. If you choose to go without a reporter's transcript, be sure that you will not need any part of it to make your case. **Without the reporter's transcript, you will not be able to refer to it or use anything that was said during the trial to support your argument.**

As discussed in the section on the clerk's transcript, within **10 days** of the filing of the *Notice of Appeal*, you must serve and file a *Notice Designating Record on Appeal* with the appeals section of the superior court. On page 1, the appellant must indicate whether he or she wants a reporter's transcript by checking the proper box. *If the appellant does not ask for a reporter's transcript, the respondent may not ask for one either*. (CRC, rule 8.130(a)(4).)

If you choose to proceed without a reporter's transcript, you can skip the rest of this section.

If you do elect to have a reporter's transcript prepared, you must make a list of each day that is to be typed up (transcribed). The list must include the date, the reporter's name, department (that the trial or hearing was in that day), and the nature of the proceedings. This information can be found in the minutes located in the superior court file. Page 3 of the form, *Notice Designating Record on Appeal* may be used for this purpose. This list must be filed with the superior court. If only a portion of a witness's testimony is needed, the respondent(s) must agree to that, and a stipulation must be filed with the superior court.[3] If you choose to include this limited part of a witness's testimony, you must set out the issues that you intend to raise on appeal. (CRC, rule 8.130(a)(2).)

If you already have a copy of the reporter's transcript, and you want it to be part of the record on appeal, include the date(s) in your designation with a notation that the date has been prepared and you will lodge it directly with the Court of Appeal. (CRC, rule 8.130(b)(3)(C).) The transcript that you lodge with the Court of Appeal must be free of any alterations, modifications, deletions or insertions. If the transcript has been altered in any fashion, it cannot be used as part of the record on appeal.

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[3] A stipulation is a written agreement between the parties about something they are going to do. In this context, it is an agreement that only parts of the testimony will be considered in the appeal. It is signed by all counsel and self-represented parties. If you want or need a stipulation, call or write counsel or a self-represented party and ask whether he or she is willing to agree to what you propose. If he or she is agreeable, prepare a written statement that "The parties agree (stipulate) to . . ." setting out what has been agreed to. Add a separate signature line for each counsel or self-represented party to sign, with the person's name typed under the signature line and a place for the date on which the document was signed.

Reporter's Fees

At the same time that the *Notice Designating Record on Appeal* is filed, the appellant must also include a deposit for reporter's fees. (CRC, rule 8.130(b)(1).) The cost of the reporter's transcript depends on how many days or hours the reporter is asked to transcribe. Reporter's transcripts are expensive. You can ask the reporter for an estimate in advance or, you may calculate the deposit yourself. The rate is $650 per day for each day in which there were more than three hours of proceedings, and $325 per day for each day in which there were less than three hours of proceedings.

If the appellant does not have sufficient funds to cover the deposit, there are a few options. First, the appellant can ask for a waiver of deposit from the reporter(s) themselves. Please note that a waiver of deposit is merely that. It waives only the need for the deposit, not the cost of the reporter's transcript. (CRC, rule 8.130(b)(1).) This means the appellant will need to pay the reporter's fees sometime in the future. If the reporter(s) grants the waiver, the appellant must provide a copy of the waiver at the time the appellant files the *Notice Designating Record on Appeal*.

The Court of Appeal has the power to waive only its own filing fee of $775 and cannot waive the reporter's fees. (CRC, rule 8.26(e).) Alternatively, in addition to a notice of designation, a party may serve and file a copy of its application to the Court Reporters Board for payment or reimbursement of monies paid for transcription. (See CRC, rule 8.130(c).)

If the appellant has already had some or all of the proceedings transcribed, a certified copy of that transcript can be substituted for the reporter's transcript and the deposit is not necessary. The transcript(s) must comply with CRC, rule 8.144. The appellant should be sure to keep a copy of this transcript for writing the brief.

The *Notice Designating Record on Appeal* must be filed with either a money deposit for the cost of the transcript, a signed waiver of deposit, or a certified copy of the transcript.

If, after being served with the appellant's *Notice Designating Record on Appeal*, the respondent wishes to designate additional parts of the transcript, a respondent's designation or *Notice Designating Record on Appeal* must be served and filed with the superior court within **10 days** of the service of the appellant's designation. (CRC, rule 8.130(a)(3).)

After the time limit for the respondent to designate additional items has passed, it generally takes 30 to 60 days for the transcript to be completed. The Court of Appeal may grant extensions of time for the reporter if he or she is unable to complete the transcript on time. (CRC, rule 8.130(f)(1).)

Record Problems

If you fail to properly designate the record by not filing a *Notice Designating Record on Appeal* or if you have not paid the costs of the clerk's and/or reporter's transcript, or if you have failed to correct the designation of the record after notice was sent to you by the superior court, you will be sent a *Notice of Default*. (CRC, rule 8.140(a).) A party has **15 days** from the date of the notice to cure the problem. If the problem to be fixed is still not cured after the **15 days**, the superior court sends a *Notice of Failure to Clear Default* to all parties and to the Court of Appeal. If the appellant is the party who has not complied with the rules, the Court of Appeal may dismiss the appeal; if the respondent is the party that has not complied on time, the appeal may go forward on the appellant's record alone. (CRC, rule 8.140(b)(2).)

If either party discovers that something is missing from the record after the record has been filed, there are ways to fix the problem. If the clerk or reporter left out a required or requested item, a *Notice of Correction* must be filed in the superior court and served on all parties. (CRC, rule 8.155(b), Local Rule 2(a).) If the item was not listed in the designation of record, a motion to augment will be needed. (See **Chapter 6**.)

When filing the *Designation of the Record on Appeal* in Los Angeles County, the Court strongly suggests that you make those filings at the appeals section of the Superior Court, Room #111, at 111 North Hill Street, in Los Angeles. However, the court will accept the *Designation of the Record on Appeal* at any superior court clerk's office. Information on the various superior court locations in Second District can be found in Appendix 3.

CHAPTER 3
CIVIL CASE INFORMATION STATEMENT

A Civil Case Information Statement is a questionnaire about the case that appellants and cross-appellants, if any, must fill out and return to the Court of Appeal for all civil cases. The answers on the *Civil Case Information Statement* help the court to know whether the *Notice of Appeal* is on time and whether the order or judgment is appealable.

Once the Superior Court Clerk mails the notification of the filing of the *Notice of* Appeal, the completed *Civil Case Information Statement*, a signed, conformed copy of the final judgment or order being appealed, and a *Proof of Service* on all parties must be filed in the Court of Appeal within **15 days**. (CRC, rule 8.100(g)(1).)

If the *Civil Case Information Statement* is not received within the **15-day** limit, the Court of Appeal clerk will send a *Notice of Default*. If the appellant does not cure the default within **15 days** (presumably by correctly filing the *Civil Case Information Statement*), the Court may dismiss the appeal.

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

CRC, rule 8.208 requires that each party serve and file a Certificate of Interested Entities or Persons **at the time it files its first document in the Court of Appeal** (which is usually the above- referenced *Civil Case Information Statement*). (CRC, rule 8.208(d)(1).) Each party must also include a copy of the certificate in its principal brief. This does not apply to civil appeals arising out of family, guardianship, and conservatorship cases. (CRC, rule 8.208(b).)

The purpose of this rule is to provide justices of the Courts of Appeal with additional information to help them determine whether to disqualify themselves from a proceeding. (See CRC, rule 8.208(a).)

For the purposes of rule 8.208, "Certificate" means a *Certificate of Interested Entities or Persons* signed by appellate counsel or an unrepresented party. "Entity" means a corporation, a partnership, a firm, or any other association, but does not include a government entity or its agencies or a natural person. (See CRC, rule 8.208(c).)

If an entity is a party, that party's certificate must list any other entity or person that the party knows has ownership interest of 10 percent or more in the party. (See CRC, rule 8.208(e)(1).) If a party knows of any other person or entity that has a financial or other interest in the outcome of the proceeding that the party reasonably believes the justices should consider in determining whether to disqualify themselves, the party's certificate must list that entity or person and identify the nature of the interest of the person or entity. (See CRC, rule 8.208(e)(2).) If the party knows of no entity or person that must be listed under these two rules, the party must so state in the certificate. (See CRC, rule 8.208(e)(3).) A party that learns of changed or additional information that must be disclosed under CRC, rule 8.208(e) must promptly serve and file a supplemental certificate in the reviewing court.

Note that while the *Certificate of Interested Entities or Persons* must be filed simultaneously with the party's first document filed in the Court of Appeal, the Certificate must be treated as a **separate filing** and have attached to it **a separate *Proof of Service*** and may not be simply attached to the first document filed and listed on that document's proof of service.

CHAPTER 4
BRIEFING THE CASE

The briefs are written arguments put together by each party. If you are the appellant, your brief will explain why you believe the trial judge was wrong. If you are the respondent, your brief will tell the justices why the trial judge was right.

The briefs are the single most important part of the appellate process. While the record (the clerk's or appendix and reporter's transcripts) provides the court with a picture of what occurred at the lower court; it is the briefs that describe any error in those proceedings and explains whether it changed the outcome of the trial. The best briefs contain your entire argument, guiding the Court through the case and using the record and legal authority to justify your points.

There are three briefs:

1. The Appellant's Opening Brief (AOB) – The AOB tells the Court of Appeal (a) what judgments or orders the appellant is appealing, (b) why the appellant thinks the superior court acted incorrectly in making those judgments or orders, (c) what legal authority supports the appellant's argument, (d) how the court's actions hurt the appellant, and (e) what the appellant wants the Court of Appeal to do if it finds the superior court acted incorrectly.
2. The Respondent's Brief (RB) – The RB responds to each of the issues raised in the appellant's opening brief, explaining both why the appellant's arguments are not correct and expressing support for the trial court's decision.
3. The Appellant's Reply Brief (ARB) – The ARB addresses the arguments made in the respondent's brief and shows how they do not overcome the arguments made in the appellant's opening brief. No new issues may be raised in the reply brief.

Appellant's Opening Brief

The appellant carries the burden of convincing the appellate court that the trial court made a prejudicial error – that is, an error that changed the outcome of the case. If you are an appellant, the AOB provides your first and best chance to prove that error. The rest of this section will provide guidance that may be helpful in preparing that critical brief.

Time Limits (CRC, rule 8.212.)

There are two potential due dates for the AOB depending on whether the case is proceeding with a clerk's transcript or with an 8.124 appendix (for explanation of these components of the record, see **Chapter 2**):

- If the appellant chooses to have a clerk's transcript prepared, once the Court of Appeal receives the record on appeal (the clerk's and reporter's transcripts, or just the clerk's transcript), the clerk sends a notice to all parties that the record has been filed. Then the AOB is due **40 days** from the notice. (CRC, rule 8.212(a)(1)(A).)
- If the appellant or the parties chose to prepare their own 8.124 appendix and did not request a reporter's transcript or chose to lodge the reporter's transcript directly with the Court of Appeal, the clerk's office **will not** send a notice. The appellant's opening brief and appendix are due **70 days** from the date appellant filed the rule 8.124 election in the superior court. (CRC, rule 8.212(a)(B).)

Contents

The appellant's opening brief is a single bound document that contains:

- Cover
- Table of contents
- Table of authorities
- Statement of the case
- Statement of appealability
- Statement of facts

- Argument
- Conclusion
- Certificate of compliance with length limitations
- Proof of service

(For a discussion of attachments to the brief, see "Important Things to Remember When Writing Your Briefs" later in this chapter.) A short example of an appellant's opening brief is included as Sample Brief. In this example, we have used the facts from *Goldilocks and the Three Bears* as our case. There are only one or two items in our statement of authority and only one issue. We hope that this example from a familiar story will be helpful as you prepare your tables of contents and authorities and set out the facts and issues of your case. You may find it useful to follow along in this sample brief as you read about the various parts of a brief in the discussion that follows.

Cover

The cover includes identifying information about the case. (See Sample Brief.) The cover should be made out of stiff paper called "cardstock," and should be green. The back of the brief will be a blank page the same color as the front cover and made out of the same cardstock material. The rest of the brief should be bound within the cardstock covers. (See *General format requirements* later in this chapter.) The cover page should begin with page one of your brief.

Table of Contents and Table of Authorities

The **table of contents** lists the sections of the brief by page number (CRC, rule 8.204(a)(1)(A)). The **table of authorities** lists the cases (in alphabetical order), the statutes and other authorities used in the brief, and the number of the page or pages on which each can be found in the brief. (CRC, rule 8.204(a)(1)(A).) Page numbers should not be inserted until the final version of the brief. (See Sample Brief.)

Statement of the Case

The statement of the case tells the Court of Appeal the procedural history of the case. You should explain what happened in the trial court, in chronological order beginning with the filing of the complaint through the final judgment. The statement of the case should tell about the motions, hearings, and orders that are relevant to the issues on appeal, including the date on which the complaint was filed and the date on which the *Notice of Appeal* was filed. The appellant must show where this information can be found in the record by putting in the numbers of the pages in the clerk's or reporter's transcript where this information appears. The reference is set out in parentheses as **CT** (clerk's transcript) or **RT** (reporter's transcript) followed by the page number. For example: "The complaint in this case was filed on December 25, 2000. (CT 1.)" The "(CT 1)" tells the court it can find the first page of the complaint (which will have the file-stamp on it) on page 1 of the clerk's transcript.[4] The "statement of the case" differs from the facts of the case. The statement of the case refers to what happened to the case *within the court*. There will be a time to address the facts of the case later in the brief. (See Sample Brief.)

Statement of Appealability

Here, the appellant tells the court why this case is appealable. This may already be clear to the appellant, but for the person reading the brief for the first time, this is the statement that sets the stage. Remember in **Chapter 1** we discussed the problem of appealability and why it was so important. The case may be appealable because there is a judgment or order of dismissal (after demurrer or other motion) and the case is finished, *or* there may be an order (usually one after the judgment, or after a hearing in a family law or probate case), *or* there may be a non-final judgment. If you are appealing an order or a non- final ruling,

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[4] Other sources that may be referenced are abbreviated as follows:

Appellant's appendix – AA	Appellant's reply appendix – ARA
Joint appendix – JA	Appellant's opening brief – AOB
Respondent's appendix – RA	Respondent's brief – RB
Appellant's reply brief – ARB	Superior Court file – SC file

you need to explain why it is appealable. (CRC, rule 8.204(a)(2)(B); Code of Civil Procedure, section 904.1.) Generally, an appellant states the statute that gives him or her the right to appeal the case. (See Sample Brief.)

Statement of the Facts

Before starting on the facts, the appellant should read through the entire record (the reporter's transcript, clerk's transcript or appendix, and exhibits, if any). In preparing the statement of facts, the appellant may use only the information he or she designated to be included in the record. For every statement of fact you make in the brief, there must be a **citation** showing the page number where that information can be found in the record (the reporter's transcript, clerk's transcript or appendix, or exhibits).

Your statement of facts will depend on the nature of the proceedings in the trial court. If you are appealing after a full trial, you must remember that the Court of Appeal will not retry the case. The Court of Appeal does not change the facts that were found by the superior court judge or the jury in a trial, if there is sufficient evidence to support those findings. If the record includes conflicting facts (for example, one witness said the light was green, and the other said it was red), the Court of Appeal will presume the superior court's or the jury's findings on the facts are correct. The Court of Appeal does not change the judge's or jury's decision about whom to believe if the witnesses disagreed about what happened. This means that if you are appealing after a trial, you should assume that the Court of Appeal will resolve all evidentiary conflicts in favor of the judgment being appealed. In other words, you should state the facts in the way that supports the judgment, even if your witnesses or other evidence gave a different version of what happened. Of course, you also may tell your side of the story as well, but you should base it only on evidence or testimony presented to the judge or jury. (See Sample Brief.)

Your statement of facts will be different if the case was dismissed without a trial. Demurrers and summary judgments are two common types of pretrial motions that may cause a case to be dismissed without a

full trial. Because cases frequently are dismissed on demurrer or summary judgment, you must write the statement of facts differently than if the facts had already been established in the trial court proceedings. These concerns are discussed in Appendix 5 which discusses demurrer and summary judgment.

Argument

This is the part of the brief in which you discuss each of the errors you believe the superior court made. Without question, this is the most important part of the brief, if not of the entire appeal. Within this section, the appellant must show that the trial court committed what is called "prejudicial error." It is not enough to show the trial judge made one or more mistakes. The error must be bad enough there is a very good chance it changed the outcome of the case. In order to show the trial court did something the appellate court will find to be legal error, it is necessary to have knowledge of the relevant legal authorities as they apply to the various decisions the trial judge made. This is the part of the brief that is hardest for self-represented parties.

You should discuss each issue separately in light of the facts and the law. The appellant has the burden of showing that there was an error (or errors) so serious that the court's decision must be reversed. In figuring out the issues, think about what happened at the trial or hearing where the alleged errors were made. Did these errors involve findings of fact, discretionary rulings by the judge, or questions of law? Do you think these rulings were really wrong? What did these rulings do to the outcome of your case? You will need to read some legal materials on the subject. Public law libraries are excellent resources for conducting legal research, and law librarians are trained to help with legal research. See Appendix 2 for information on library locations and hours. Look at books that are written about the area of law that your case involves. For example, if your case involves a possible breach of contract for work that was not done or work that was not done properly look in the area of contract law. Ask the librarian to suggest readings about contracts and breaches of contract. In books written about the law ("secondary sources"), you will find mention of appellate opinions

previously decided in the area of contracts. You may want to read those cases because they may tell you which laws apply to your case. Based on this information and the facts of the case, the appellant should make a list of the issues he or she wants to raise—the issues the appellant thinks hurt his or her case in superior court the most or the ones that would help his or her case the most now.

After making a list of the issues, the appellant then needs to determine what **standard of review**[5] the court will apply to each issue. When the appellant argues that the superior court erred in its ruling, the Court of Appeal looks first at what the standard of review is for that particular issue. The three most common standards of review are (1) abuse of discretion, (2) substantial evidence, and (3) de novo review.

1. *Abuse of Discretion* – If the superior court's decision is one that involved the exercise of its discretion, the "abuse of discretion" standard is used. Any decision for which the judge exercises his or her discretion, such as admissibility of evidence or issuance of restraining orders, comes under this standard. Abuse of discretion occurs when the superior court judge makes a ruling that is arbitrary or absurd—which does not happen very often. The Court of Appeal rarely reverses a superior court judge's ruling using this standard.
2. *Substantial Evidence* – If you are appealing the factual findings of a judge or jury after trial, the "substantial evidence" standard is used. The Court of Appeal reviews the record to make sure there is substantial evidence to support the factual findings made by the court or jury. The Court of Appeal's function is not to decide whether it would have reached the same factual conclusions as the judge or jury. Instead, the Court of Appeal merely decides whether a reasonable fact-finder could have come to this conclusion based on the facts in the record. If there is a conflict in the evidence, and a reasonable fact-finder could have resolved the conflict either way,

[5] When the Court of Appeal reviews an issue, it needs some kind of rules or guidelines to determine whether the superior court made an error in its decision. Different kinds of rulings require different kinds of review guidelines. These guidelines are called standards of review.

the Court of Appeal will affirm the decision. Because the judge or jury at the trial saw the witnesses and heard what the witnesses said, they are in a better position to decide what actually happened and who is telling the truth.

3. *De Novo – De novo* is a Latin phrase meaning "from the beginning." In de novo review, the Court of Appeal does not defer to the decisions made in superior court. Instead it looks at the issues as if the superior court had never ruled on it. This type of review is generally limited to issues involving questions of *law*. If the issues involve questions of law—for example, the interpretation of a contract or a statute—the Court of Appeal does not assume the superior court's ruling is correct but looks at the issue "from the beginning," exercising its independent judgment. A trial court's ruling granting a demurrer or motion for summary judgment is also reviewed under the de novo standard of review. For this reason, reversals happen more often when what is being appealed is a trial court's decision to grant a demurrer or a summary judgment rather than when you are appealing after a full trial of the case.

Once you determine which standard of review applies to the issue, you must point out why you think the court made the wrong decision and why you are entitled to reversal under that standard of review. Explain why this incorrect decision harmed your case so much that the error should cause the superior court's order or judgment to be reversed.

For every statement of law you make in the brief, there must be a citation to an appellate court opinion, a statute, a rule, or legal treatise that sets out that proposition. This is where legal research will be required in the writing of your brief. Citations usually appear at the end of the sentence in parentheses. For more information on legal citations, see Appendix 3.

Think of the argument section of your brief as a book in which each issue is a separate chapter. Set off each issue with a heading similar to a chapter title, and subheadings if needed, describing the arguments that will follow. (CRC, rule 8.204(a)(1)(B) and Sample Brief.)

Conclusion

After you have discussed each issue, you should briefly restate your position in a **conclusion** and tell the court what you want it to do. Be specific in your directions to the court, detailing how you think the court should rule on the matter.

Certificate of Compliance and Proof of Service

If the opening brief is produced on a computer, it must also include a certificate of compliance with the length limitations. The word limit for briefs written on a computer is 14,000 words. (See CRC, rule 8.204(c)(1).) If the brief is produced on a typewriter, it cannot exceed 50 pages in length. In all cases, the brief must include a Proof of Service.

Respondent's Brief

The respondent's brief gives the respondent an opportunity to reply to the arguments that the appellant makes in the appellant's opening brief and to explain why the Court of Appeal should *not* reverse the trial court.

Time Limits

The respondent's brief is due 30 days after the appellant's opening brief is filed. (CRC, rule 8.212(a)(2).)

Contents

The respondent's brief should follow the same general format as the appellant's opening brief, with a cover (for a respondent's brief the cover is yellow), table of contents, table of authorities, statement of the case, statement of facts, argument, conclusion, certificate of compliance, and proof of service. (For a discussion of attachments to the brief, see *Attachments to briefs* later in this chapter.)

The facts are already set out in the appellant's opening brief. However, remember the decision is in the respondent's favor and the facts must be set out to support the winning side of the case. Make sure the facts, as stated by the appellant, are accurate and any conflicts in

the facts have been resolved to support the decision. You may end up including a shorter version of the facts. Or, if you totally agree with the way the appellant has set out the facts, you can ask to adopt those facts as yours. As with the appellant's opening brief, you need to make a reference to the record for every fact and for every legal statement, and provide headings and subheadings for each point. (CRC, rule 8.204(a).)

As the respondent, you will want to address the facts and legal issues raised in the appellant's opening brief. First, make sure (1) there is a final judgment, if the appeal is from a judgment; or (2) the order is appealable, if the appeal is from an order; and (3) the *Notice of Appeal* was filed on time, or "timely filed." If there is a problem with the appeal, you may file a motion to dismiss the appeal and/or argue in your respondent's brief that the appeal should be dismissed.

The respondent has the burden of responding to the issues raised by the appellant and showing that the ruling of the trial court was correct. If the court's ruling was incorrect, you, as respondent, must show that the mistake the court made was so small that there was no prejudice. You should not rely on the legal references made by the appellant in his or her opening brief. You probably will need to do some reading on the subject and conduct your own legal research. Go to the county public law library (see Appendix 2) and research the case law and statutes that relate to the issues on appeal. Reread the court's statement of decision, if there is one, or the orders and judgment set out in the minutes of the court. Be sure to respond to each and every issue raised in appellant's opening brief. Deal with each issue separately, with headings and subheadings that match the ones used by the appellant.

Check the record and make sure that an objection or motion was made to challenge the ruling in the trial court at the time the ruling was made. If no objection or motion was made, the appellant may have waived (given up) the error. Tell the court in your brief if you believe there was a waiver. If the Court of Appeal believes the appellant has waived the issue, it may decide to not even consider the issue the appellant has raised. (But ordinarily you should also argue why it was not error, even if it looks like the appellant waived it. The Court of Appeal

may decide the issue was not waived, after all.)

There may be additional issues not mentioned in the appellant's brief—for example, concerning the statute of limitations or other defenses—that may result in a decision in your favor. You should discuss these issues in your respondent's brief even though the appellant did not bring them up. If no respondent's brief is filed, the court may decide the appeal based upon the record on appeal, the opening brief, and appellant's oral argument. (CRC, rule 8.220(a)(2).)

Appellant's Reply Brief

Because the appellant has the burden of showing the Court of Appeal that the trial court erred, the appellant is given the opportunity to answer arguments in the respondent's brief. The appellant's reply brief is optional, however, because the reply brief answers issues in the respondent's brief, the appellant cannot file a reply brief if no respondent's brief has been filed.

Time Limits

The reply brief is due 20 days after the respondent's brief is filed. (CRC, rule 8.212(a)(3).) The Court of Appeal does not send out a default notice if no reply brief is filed by the appellant. The Court will merely state that no brief was filed and proceed forward with appeal. Any reply brief that comes in past its due date could require permission to be filed by Court order.

Contents

No new issues may be raised in the reply brief, because the respondent will not have any opportunity to respond to the reply brief. In the reply brief the appellant should:

- show how the respondent has not countered the appellant's claims stated in the opening brief;
- address the cases and the arguments raised in the respondent's brief; and

- respond to any new issues the respondent raises in its brief. The cover for an appellant's reply brief should be tan.

Important Things to Remember When Writing Your Briefs

1. *Table of contents and table of authorities* – When you have finished your brief, copy each heading and subheading into a table of contents. The person reading your brief should be able to get a good overview of the case by skimming the table of contents. Then go through the brief and write down all of the cases you cited, then all the statutes, then all the rules of court, then all the other books and articles. List the cases alphabetically, the statutes alphabetically by code and numerically by section number within each code, and the books and articles alphabetically by author. Type these lists—cases, statutes, and "other authorities"—and note on which page or pages each item is found in the brief. (See Sample Brief and CRC, rule 8.204(a).) The table of contents and table of authorities should not have a different set of numbers from the rest of the brief. (CRC, rule 8.204(b)(7).)
2. *Certificate of compliance with length limitations* – Every brief produced on a computer must include a certificate of compliance stating the number of words in the brief. A brief produced on a computer must not exceed 14,000 words, including footnotes. A brief produced on a typewriter must not exceed 50 pages. The table of contents and table of authorities are not counted in computing the number of pages or words. (CRC, rule 8.204(c).) You may rely on the word count of the computer program used to prepare the brief.
3. *Attachments to briefs* – You should be very careful about including attachments to your brief. Improper attachments can cause your brief not to be filed, or to be stricken or returned to you for corrections. (CRC, rule 8.204(e).) Before including attachments, you should carefully consult CRC, rule 8.204(d).

You may attach to your brief copies of exhibits or other materials already contained in the existing record on appeal. The attachments must not exceed 10 pages, unless you get permission from the court. (CRC, rule 8.204(d).) If you include any attachments to your brief, you must file a declaration stating whether the material is part of the record and, if not, why each attachment is permissible under the rules.

4. *General format requirements* –Whether you file electronically or in paper, CRC, rule 8.204(b) describes the format requirements for briefs. Briefs should be:

- Typed or prepared on a word processor or computer;
- Text searchable in a Portable Document Format (PDF), if filing electronically;
- If filing in paper, paper size must be 8-1/2-by-11 inch recycled, plain white paper of at least 20- pound weight (except for the cardstock front and back covers) -- do not use legal or pleading paper with numbered lines;
- One-and-a-half or double spaced, with single-spaced headings and footnotes. Both sides of paper may be used unless you prepared the brief on a typewriter;
- Bound on the left side of the pages. If stapled, the staples must be covered by tape (most briefs, however, are Velobound);
- Printed with a type size of at least 13 points or prepared on a standard pica typewriter (not elite) with type size no smaller than 10 characters per inch;
- Side margins of 1-1/2 inches, and upper and lower margins of 1 inch; and
- Pages must be consecutively numbered with page one beginning on the cover.

The cover colors are standardized and only required for paper filings, per CRC, rule 8.40(b), and are as follows:

Appellant's opening brief – green
Respondent's brief – yellow
Appellant's reply brief – tan
Appellants Appendix – green
Respondents Appendix – yellow
Joint appendix – cream or white
Petition for rehearing (discussed later) – orange
Answer to Petition for Rehearing – blue
Petition for review (discussed later) – white
Answer to Petition for Review – blue

When you file in paper form, the pages should be bound on the left side. On the cover you should put the title of the case, the superior court and Court of Appeal case numbers, the name of the superior court judge and county, the type of brief (for example, "Appellant's Opening Brief," "Respondent's Brief," or "Appellant's Reply Brief", and your name, address, and daytime telephone number. (CRC, rule 8.204(b)(10).) The court heading should be centered at the top of the brief cover.

5. *Service* – If you are unable to file electronically, then an original and three copies of the brief , one of which is an unbound, scan ready copy, must be filed with the Court of Appeal, showing service on all the parties (CRC, rule 8.25(a)), and the Clerk of the superior court (for delivery to the judge in the case). (CRC, rule 8.212(c)(1)). Filing of an electronic copy with the Court of Appeal satisfies the requirement to serve the California Supreme Court. You must also serve any public officer or agency required to be served by CRC, rule 8.29.

6. *Extensions of time* – If you need more time to file the appellant's opening brief, the respondent's brief or the appellant's reply brief, you and opposing counsel can stipulate (agree in writing to allow extra time, see **Chapter 2**, footnote 4) up to a maximum of 60 days for each brief. Stipulations to extend time (see Stipulation for Extension of Time to File Brief) must be filed in the Court of

Appeal before the date the brief is due. If you need more time and have already stipulated to 60 days or if you are unable to get opposing counsel to agree to a stipulated extension, you must file a motion or application for extension of time with the Court of Appeal. (CRC, rules 8.212(b), 8.50, 8.60, 8.63.) (See Application for Extension of Time.) Do not delay when requesting an extension of time to file a brief. It is wise to do so as early as possible and before any deadlines. For a more detailed description of applications or stipulations for extension of time, see **Chapter 5**.

If the appellant's opening brief is late, a notice (under CRC, rule 8.220(a)) will be sent that gives the party 15 more days to file the brief. If the appellant's opening brief is not filed within the 15-day grace period, the appeal may be dismissed. If the respondent's brief is not filed on time, a notice (CRC, rule 8.220(a)) will be sent. If the brief is not filed within the 15-day grace period, the court will decide the case on the appellant's opening brief, the record, and any oral argument by the appellant. (CRC, rule 8.220(a)(2).) The respondent will not be allowed to make an oral argument to the court. Within the 15-day period, a party may apply for an extension of that time for good cause. If a brief is not filed after the extension is granted, the court may dismiss the appeal. (CRC, rule 8.220(d).)

7. *Exhibits* – In some superior courts, exhibits are lodged with the court. Since they were **lodged**, the superior court returns the exhibits to the parties at the end of the case. A party who wishes to have the Court of Appeal consider an original exhibit must file a notice (which designates the exhibits to be sent) in superior court within 10 days after the respondent's brief is filed. A copy of the notice must be sent to the Court of Appeal. Ten days after the notice is filed in superior court, any other party wishing to have the Court of Appeal consider additional exhibits may also file a notice in the Superior court. Under CRC, rule 8.224(b), the superior court puts the designated exhibits in its possession into numerical or alphabetical order. The exhibits are sent to the Court of Appeal along

with two copies of the list of exhibits being sent. If the trial court has returned the exhibits to the parties who lodged them, a party can transmit exhibits directly to the Court of Appeal. The party prepares a Notice of Lodging of Exhibits. The notice identifies each exhibit being transmitted to the Court of Appeal. The listed exhibits are placed in numerical or alphabetical order. The exhibits are sent to the Court of Appeal with an original and one copy of the Notice of Lodging of Exhibits. Since exhibits are lodged with the Court of Appeal, they will be returned at the end of the case.

8. *Non-compliant briefs* – If the brief is not done properly— for example has no table of authorities or no citations to the record— the Court may decline to file it. Or at the request of the opposing party or on its own motion, the court may strike the brief and return it to the party for corrections and changes. In making these corrections, generally it is necessary to prepare a new document, which must be served on all the parties and filed with the court. If the incorrect or omitted items have been redone properly, the court files the corrected document. If the items have not been redone properly, the court may dismiss the case if it is an appellant's opening brief, or let the appeal proceed on the record and the appellant's opening brief if it is the respondent's brief. (CRC, rule 8.204(e).)

CHAPTER 5
MOTIONS, APPLICATIONS, STIPULATIONS, ABANDONMENT, AND ONLINE CASE INFORMATION

There are a few other types of actions that might take place during the course of an appeal. At some point during your case, you may need to request something from the Court. Typically, these requests take one of three forms:

1. a motion
2. an application
3. a stipulation

This chapter introduces you to motions, applications and stipulations and guides you through when and how to use them. Additionally, this chapter describes how to properly abandon, settle or dismiss an appeal, as well as how to receive the most current information about the status of your appeal.

Motions

In all instances, except those outlined in CRC, rule 8.50, requests to the Court of Appeal are made by motion.[6] CRC, rule 8.54 covers "motions in the reviewing court." Motions are the formal means for asking the court to cure a problem or take some sort of action in a case.

If there are problems with the record, a desire for preference or priority in getting the court to handle the case or any problem, you can file a motion or application asking the court to take care of the problem. (See CRC, rules 8.240, 8.50 and 8.54.) A motion can also be used to vacate a dismissal that has been entered against you, to consolidate two cases, and so forth.

A motion should be typewritten, with *Proof of Service* on all counsel and self-represented parties, and an original and one copy must be filed with the Court of Appeal. (CRC, rules 8.44(b)(4) and 8.54(a).)

[6] CRC, rule 8.50 discusses applications to the Court for routine matters, namely extensions of time to file briefs.

You need to tell the Court of Appeal why you are making the request (show "good cause"), provide additional information that might be relevant, and let the Court of Appeal know what it is you want it to do (such as grant preference in the processing of your case based on a terminal illness, add to the record, take judicial notice of some fact, etc.).

Along with the motion you should provide points and authorities to justify the request and documentary evidence (declarations and exhibits) if it is needed to support your request. Points and authorities are just that: the points set out the argument you wish to make, and the authorities give the legal reasons that the motion should be granted or denied.

At least one declaration should, under penalty of perjury, give the facts surrounding the request, what you have done or attempted to do to take care of the problem, what you want the court to do, and why it is necessary. If your motion is incomplete, the court may deny the motion "without prejudice," which means you may correct whatever problems there are and re-file the motion.

Any opposition to the motion should be filed within 15 days from the date of service. (CRC, rule 8.54(a)(3).) Most motions are not ruled on until the time to file the opposition has passed. If no opposition is filed, the motion is usually granted. Generally, there are no hearings on a motion, but on very rare occasions there may be. (CRC, rule 8.54(b).)

Motion to Augment the Record

A motion to augment the record is used to add new items to the record on appeal (the clerk's or reporter's transcript). If a party wishes to have the Court of Appeal review anything that supports their position, but was not a part of the record, they can serve and file a request for judicial notice. The request should state why the material to be added is relevant; whether the material was presented to the superior court; and whether the new material is relevant to any proceedings after the judgment. (CRC, rule 8.155.)

If the superior court clerk or reporter failed to include something that was designated in your designation of record, you do not need to file a motion to augment. Instead, serve and file a notice to correct the record in the superior court. (See **Chapter 2**.) However, **if you already have a copy**

of the document that the superior court clerk omitted, it may be faster and cheaper to file a motion to augment to which you just attach the document instead of filing a notice to correct the record. (See Motion to Augment Record on Appeal (Documents Attached).)

If new documents need to be added to the record, a motion to augment must be filed with the Court of Appeal. Each item requested must be a part of the superior court file, such as a document that was filed in the superior court, received in evidence, or lodged with the court or is a transcript of oral proceedings. An item that was "lodged" with the court (rather than being filed) is returned to the parties and thus is not physically in the superior court file or in the custody of the court. Any document or transcript that you want to add to the record should be attached to the motion. If the court grants the motion, it then augments the record with the documents or transcripts included with the motion.

If you do not have copies of the documents to be added, the items must be identified as they are in a designation of record so that, if the motion is granted, the superior court can prepare a **"supplemental" clerk's and/or reporter's transcripts**. (CRC, rule 8.155, see Motion to Augment Record on Appeal (Documents Requested).) All motions to augment must be accompanied by a proposed order that identifies clearly each item that is to be added to the record. (Local Rule 2 (g).)

If the motion for a supplemental clerk's and/or reporter's transcript is granted (see Motion to Augment Record with Reporter's Transcript), the superior court will prepare an estimate of the cost of preparing the supplements. After the estimate is paid, the superior court is usually given 30 days to prepare the materials. If your brief is due within this time, your motion to augment should include a request to extend the deadline for filing the brief to 30 days after the supplemental transcript is filed (see applications for extension of time later in this chapter.) The title of your document should be "Motion to Augment the Record and Application to Extend Time to File [Appellant's Opening, or Respondent's or Appellant's Reply] Brief."

Applications and Stipulations

For more routine matters, mainly the extension of time to file briefs, the parties can request permission from the court using an application. An application is less formal than a motion. Generally, the Court of Appeal does not hold an application for opposition and rules on it immediately. The rules for applications are defined in CRC, rule 8.50.

In addition to motions and applications, the two parties in a case can stipulate that an action take place or a problem be remedied. Stipulations can be used in place of any action for which a single party might otherwise use a motion or an application.

Applications/Stipulations for Extension of Time to File Brief

The parties may stipulate to extend the briefing time up to **60 days** for each type of brief by filing one or more stipulations in the Court of Appeal before the brief is due. (CRC, rule 8.212(b)(1).) The stipulation must be signed by and served on all parties. (See Stipulation for Extension of Time to File Brief.)

If a party needs more than the 60 days already stipulated to, or if the opposing party refuses to stipulate to an extension, the party needing the extension must file an application for extension of time. (See Application for Extension of Time.) The party seeking additional time must give reasons, also known as "**good cause**," why that extension is needed. In addition, the party applying for an extension of time should explain either that (1) the applicant was unable to get the agreement of the other party to a stipulated extension or (2) the parties have already stipulated to the maximum **60 days** and the applicant now is seeking permission of the court for a further extension. (CRC, rule 8.212(b)(3)(B).)

An Application for Extension of Time to File Brief should include the current deadline for the brief or item, the length of the requested extension, any previous applications that have been granted or denied, and any notices that have been issued under CRC, rule 8.220, in addition to a statement of good cause (the reason). (CRC rules 8.50, 8.60(c), 8.63.)

You need to file with the court a proof of service of the application on all parties (see Proof of Service). A request for an extension of time must be served on the party represented by the attorney requesting the extension. Evidence of this need not include the client's address. (CRC, rule 8.60(f).)

Most often, applications for extension of time are ruled on without waiting for opposition. Thus, if you wish to oppose an application for extension of time, you must file the opposition (or call the clerk's office and let them know you will be filing an opposition) right away.

Abandonment, Settlement, and Dismissal

At some point in the appellate process, the appellant may decide to abandon the appeal. If this happens before the record has been filed, the appellant should file and serve a written abandonment or stipulation for abandonment at the appeals section of the superior court. The filing effects a dismissal of the appeal. (See Abandonment of Appeal and CRC, rule 8.244(b).) If the clerk's transcript has not been completed, the portion of the deposit that has not been used should be refunded. (CRC, rule 8.122(d)(2).) If the record has been filed, the appellant should file and serve a written request or stipulation to dismiss in the Court of Appeal. (See Request for Dismissal of Appeal.) At this stage, the court has the discretion to accept or deny the request. (CRC, rule 8.244(c).)

If the parties are able to agree on a settlement of their differences, the appellant should immediately notify the court in writing that the matter has settled and file an abandonment of the appeal or request a dismissal of the appeal. (CRC, rule 8.244(a)-(c).)

If at any time the respondent believes the appeal should be dismissed, the respondent should serve and file a motion to dismiss. If the Notice of Appeal is late, or "untimely," the court has no power to hear the appeal, and the case will be dismissed. If the ruling is not appealable, the court may dismiss or it may elect to hear the case as a writ. The court will exercise its discretion in considering other dismissal motions and may deny such motions if the issues raised in the appeal involve the public interest and not just the parties to the appeal.

Online Case Information and E-mail Notification

You may view online information about your individual case at www.courts.ca.gov/2dca. On the website, click the "Search Case Information" button. Case information can be searched by one of the following:

- Court of Appeal case number
- trial court case number
- party name
- attorney name
- case caption

The best method is to use the Court of Appeal case number. Once you get to the case information summary screen for your case, you may get additional information by clicking on one of the choices in the table. You may view all of the:

- docket entries for your case
- a summary of future scheduled actions
- a briefing summary
- the disposition (if the opinion has been issued)
- party and attorney information (including attorney addresses)
- and trial court information (including name of trial judge and date of judgment)

You may also request automatic e-mail notifications about future actions taken in your case by clicking on "Click here" at the bottom of the page. If you provide your e-mail address, you can ask to be automatically notified of certain events that occur in the case. You may choose to be notified when the record on appeal is filed, when a brief is filed, when the court sends a calendar (oral argument) notice, when the court finally disposes of the appeal, and when the remittitur is issued.[7] Whether or not you sign up for e-mail notification, you will still be notified of all of these events by mail from the court.

[7] The remittitur is the final document the Court of Appeal files. It returns the case to the trial court and tells that court what to do as a result of what the Court of Appeal decided. (See Chapter 7, for a further discussion of remittiturs.)

CHAPTER 6
ORAL ARGUMENT

Oral argument is an opportunity for one or both of the parties to appear before the Court of Appeal and argue the merits of their case. At oral argument, each party has the opportunity to clarify the points made in their brief, re-emphasize what they think is most important about their arguments, and answer questions from the panel of three justices who ultimately decide the case. Oral argument is not a time to restate the facts of the case or repeat parts of the brief. The justices know what you said in your brief. They frown on arguments that merely repeat what they read in the briefs. Oral argument is the time to make sure that the Court understands the key issues of the case.

Requesting oral argument

Once the briefing process is complete, the Court begins reading the briefs and considering the issues on appeal. When the Court feels that it understands those issues, it sets a case for oral argument. The court notifies the parties that their case has been placed on an oral argument calendar for a specific date and asks the parties if they wish to argue the case orally. Unless directed to do so by the court, oral argument is optional. On this calendar notice, some divisions in the Second District may ask for an initial estimate of the time you need for argument. (CRC, rule 8.256(b).) Others wait until you are in the courtroom to ask for your time estimate. You should let the court know right away if you cannot attend court on the assigned date. In order to formally request oral argument, you must return this calendar notice promptly to the Court of Appeal by mail, in person, or electronically. However, the Court prefers to receive calendar notices electronically. Some Divisions in the Second District require proof of son the other parties in the case when you return the calendar notice. Read the notice carefully to determine if you must serve the calendar notice, indicating whether you want oral argument.

Preparing for oral argument

The best way to prepare for oral argument is to review your case as thoroughly as possible. You should look at the record again and the arguments in the briefs so that you are very familiar with your case in the event one or more of the justices asks you questions about the facts or the legal argument. Make an outline of the points you wish to emphasize and the responses you would make to possible questions the court might raise or arguments that opposing counsel might raise. Review your opponents brief and prepare responses to the strongest points in their argument. Be prepared to be flexible.

You need to review all of the items you have cited in your brief to make sure nothing has been overruled by the California Supreme Court and that there are no new court decisions or new statutes that might affect your case. If you do have new authority, you should let the court and opposing counsel know what it is in writing before the argument. This is most important if you intend to mention the new material in your oral argument. If you learn of the new case or other authority well in advance of oral argument, you may wish to ask the court for leave so that you and opposing counsel can file supplemental letter briefs concerning the new authorities before the matter is heard. You may make such a request with an informal letter to the court as long as you send a copy to opposing counsel. (CRC, rule 8.254.)

If at all possible, you should take the time before your argument date to come to the court and observe oral argument. Oral argument is held most weekdays, but you can check the oral argument calendar online. If you cannot access the internet or need more information, you should call the clerk's office to confirm the date you wish to come since you may have selected a morning or afternoon when calendar is not scheduled. Argument is open to the public so you don't need special permission to attend.

Oral argument

Argument is held before a panel of three justices. Oral argument in Divisions 1-5 and 7-8 is held at the Court of Appeal, 300 South Spring Street, Los Angeles, CA 90013. The courtroom is located on the third floor. Oral argument before Division 6 is held at 200 East Santa Clara Street, Ventura, CA 93001. When you arrive for oral argument you will go through security, enter the courtroom, and check in with the court clerk, giving your name and a time estimate. The maximum time for argument in the Court of Appeal is 30 minutes for each side (CRC, rule 8.256(c)(2), although in complex cases it may be longer.

Once in the courtroom, sit in the audience until your case is called. When the justices enter the courtroom all persons rise. The presiding justice or the most senior justice sits in the middle and calls the calendar. Generally, but not always, the cases are heard in order with the cases taking the shortest time going first.

The Second District sits on the bench in Divisions that are comprised of four justices. Of the four, however, only three sit on the panel for any one case. Those three justices write the opinion that decides the outcome of the appeal. The names of the three justices on the panel for your case are available in the printed court calendar that is distributed at the Court on the day of oral argument. You can see the names of all the justices on nameplates that sit on the front of the bench.

When your case is called, walk to the podium area. The appellant sits at the table to the left of the podium and the respondent sits at the table to the right of the podium. The appellant argues first. If you are the appellant and wish to save part of your argument time to answer the respondent's argument, tell the justices that before you start your argument and tell them how long you want for that purpose. Be aware the justices generally will stop you when you have used up the time you told them you wanted for argument. When that occurs you should do no more than complete the sentence you are speaking. If you are the appellant and have requested time for rebuttal you are limited in the rebuttal to talking about only those arguments that the respondent has used. You may not present any new arguments at that time.

Often counsel will begin with the words "may it please the court." Whether you start with that or not, you should identify yourself saying that you are self-represented. By the time of oral argument, the three justices on the panel who hear your case are familiar with the facts of your case, the arguments you have raised and the law involved. Thus, there is no need for you to repeat anything that you have already told the court in your briefs. If you do not have anything to present other than what is in your briefs you should waive oral argument.

If, however, you have decided to argue orally, you should proceed in a conversational tone, limit your comments to things which happened during the trial that you believe were in error and are part of your appeal. You may not bring up any brand new argument or fact that was not included in the record or in your brief. But you can attempt to clarify any points that might have been unclear in your brief or so complicated that they might be difficult to understand. As in the briefs, your oral argument should refer back to legal authority for justification. Be as clear and to the point as possible. During your remarks one or more of the justices may ask you questions. If so, stop what you are saying and answer the question. If you do not know the answer to the question, just say so.

Refer to the justices as "Justice [Last Name]" if you feel comfortable identifying them by name, or simply as "Your honor." Be respectful to the justices; do not raise your voice, pound on the lectern, or use inappropriate language. Being respectful of the Court can only help your case.

After all the briefs have been filed and oral argument, if requested, has been held, the case is "submitted." If you do not request oral argument, your case will be submitted at the same time as the cases that were argued on the same oral argument calendar. After the case is submitted, the court does not accept any further information about the case. (CRC, rule 8.256(d).) The justices on the panel discuss the case, and decide what they think is the correct disposition. A decision is then filed within 90 days after the end of the month in which the case is submitted.

CHAPTER 7
WHAT YOU CAN DO AFTER THE COURT FILES ITS OPINION

After an opinion has been issued, there are a number of steps you can take asking the Court of Appeal and/or the Supreme Court to reexamine the case. This chapter discusses some of those options, including, how to file a *Petition for Rehearing* at the Court of Appeal and a *Petition for Review* in the Supreme Court of California. In addition, this chapter explains how the issuance of a remittitur marks the end of an appeal.

Petition for Rehearing

After the opinion in the appeal is filed, a party may file a *Petition for Rehearing* in the Court of Appeal. (CRC, rule 8.268.) The petition for rehearing provides the party that has "lost" at the Court of Appeal with an opportunity to point out any factual errors, misstatements, or omissions that the Court of Appeal may have made in their opinion. There is an automatic right to rehearing if the Court of Appeal makes a decision based on an issue that was not proposed or briefed by any party. (California Government Code section 68081.) One does not need to petition for rehearing in the Court of Appeal before seeking review in the Supreme Court. However, as a policy, the Supreme Court accepts the statement of facts and issues as set out in the Court of Appeal opinion unless any alleged omission or misstatement of fact was brought to the Court of Appeal's attention by a petition for rehearing. (CRC, rule 8.500(c)(2).)

The *Petition for Rehearing* must be served and filed within **15 days** of the filing of the opinion, the order for publication or the modification of the opinion if it changes the judgment. No opposition to the petition may be filed unless requested by the court. If the Court does not rule on a petition for rehearing it will be deemed denied "by operation of law" (that is, automatically without any order of any kind from the court). (CRC, rule 8.268(b) and (c).)

The petition should not merely repeat information and argument that was covered by the appeal. Instead, it should focus on specific errors or contradictions in the opinion.

Normally the court does not consider points or issues being raised for the first time on rehearing, with two exceptions: when you are arguing the superior court or the Court of Appeal did not have the power (jurisdiction) to handle the case, or when the Court of Appeal, in an exercise of its discretion, agrees to consider new materials (such as a new case) that were not included earlier.

Generally, the petition for rehearing should be directed at errors in the opinion: a major misstatement of fact, an error of law, major law or facts that were left out, and/or an important argument that was not included.

If not filed electronically, the petition for rehearing must be bound with orange covers. The original and four copies should be filed with the Court of Appeal (CRC, rule 8.44(b)) along with Proof of Service on all parties (CRC, rule 8.25(a)).)

The Court of Appeal has jurisdiction (power to make rulings in the case) for 30 days from the date the opinion was filed or a request for publication was granted or an opinion was modified that changed the judgment. (CRC, rules 8.264(b) and 8.268(b).)

Review in the California Supreme Court

The Court of Appeal's decision becomes final 30 days after the filing of its opinion or the grant of publication or modification of the opinion with a change in judgment. A modification stating it does not change the judgment does not add time to the usual 30 days from filing of the opinion. (CRC, rule 8.264(c)(2).) A petition for review in the California Supreme Court must be filed within **10 days** after the decision becomes final. The first day starts with the 31st day. Thus, if the Court of Appeal's decision becomes final on a Friday, then Saturday and Sunday are days 1 and 2 of this 10-day period during which the petition for review must be filed. (CRC, rule 8.500(e).)

At the beginning of the petition you should start with a brief statement of the issues to be presented, with an explanation why this case is one the Supreme Court should take for review. (CRC, rule 8.504(b).) If produced on a computer, the petition may not exceed 8,400 words or 30 pages if typewritten and must contain a certificate of compliance. The maximum length does not include exhibits and the copy of the Court of Appeal opinion that must be included. (CRC, rule 8.504(b)-(e).) If filed in paper form, Petitions for Review should have white covers, while Answer to Petitions for Review should have blue covers. An original and 13 paper copies or 8 paper copies and one electronic copy must be filed in the Supreme Court. (CRC, rules 8.40(b)(1) and 8.44(a).) A proof of service must be attached to the original and all copies showing service on the division of the Court of Appeal which decided the case, all parties, and the trial judge.

An answer is not required unless the party opposing review wants to add an issue. An answer should be filed within **20 days** after the petition is filed. (CRC, rules 8.500(a)(2), (e)(4) and (f).)

If the Supreme Court grants review, it may put off action while awaiting disposition of another case, or specify issues that are to be briefed. (CRC, rules 8.512(d)(2) and 8.516(a).) Within **30 days** the petitioner must file an opening brief or the same brief it filed in the Court of Appeal. The opposing party then has **30 days** to file an answer or a copy of the brief filed in the Court of Appeal. A reply brief, if filed, is due within **20 days**. (CRC, rule 8.520.)

The Second District Court of Appeal does not accept Supreme Court filings. Filings must be made directly with the California Supreme Court at 350 McAllister St., San Francisco, CA, 94102. For further information concerning the California Supreme Court, call (415) 865-7000 or go to their website at www.courts.ca.gov/supremecourt.

Review by the California Supreme Court is extremely rare. Unlike the Court of Appeal, the Supreme Court is not required to hear all cases filed before it. The review process allows the Supreme Court to choose the cases it wants to hear. Generally, the granting of review is limited to cases that present issues that have never come before the courts before (issues of first impression), or that have an effect on large portion of the California population, or that have conflicting opinions in the various Courts of Appeal

throughout the state. While it is possible that the Supreme Court will choose to review your case if you apply for review, you should not expect that they will hear it. Only about 5% or fewer of petitions for review are granted each year.[8]

The Remittitur

The remittitur signals the end of the case. It is a document that says the review of the case is final and transfers the power of the reviewing courts (Court of Appeal and Supreme Court) back to the superior court so the superior court can follow up on what, if anything, still needs to be done to carry out the decision made by the reviewing courts. (CRC, rule 8.272.)

If no petition for review is filed in the Supreme Court, the remittitur is issued **61 days** after the filing of the opinion in the Court of Appeal (unless a request for publication was granted or there was a modification of the opinion resulting in a change in the judgment, in which cases the time is more than 61 days). At that time, the case becomes "final" in the reviewing courts. (CRC, rules 8.264(b) and 8.272(b).)

If the opinion said you were entitled to costs on appeal, you must file a memorandum of costs in the superior court within 40 days of the mailing of a copy of the remittitur. (CRC, rule 8.278(c).) Among other things, this memorandum lists all the costs you are asking the court reimburse.

[8] The Supreme Court of California, "Internal Operating Practices and Procedures of the California Supreme Court," 2007.