CHAPTER 5
Briefing the Case

An appellate brief is a written argument by the appellant or respondent that explains why the superior court acted correctly or incorrectly. Once the record is prepared, it is time to prepare a brief.

There are three briefs: (1) the appellant's opening brief, (2) the respondent's brief and (3) the appellant's reply brief.

- The appellant's opening brief tells the Court of Appeal what judgments or orders the appellant is appealing, why the appellant thinks the superior court acted incorrectly in making those judgments or orders, how the court's actions hurt the appellant, and what the appellant wants the Court of Appeal to do about it if it finds the superior court acted incorrectly.

- The respondent's brief responds to each of the issues raised by the appellant, showing why the appellant's arguments are not correct and expressing support for the trial court's decision.

- The appellant's reply brief addresses the arguments made by the respondent 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.

  NOTE: If filing in paper form, you must serve four paper copies of your brief on the California Supreme Court (CRC rule 8.212(2)(C).)

We will discuss each of the briefs separately and then the items needed in all the briefs.

Step 8. Preparing your brief

Appellant's Opening Brief

When is the appellant's opening brief due? The appellant's opening brief is due 40 days after the Court of Appeal notifies the appellant that the record or reporter's transcript is filed. If the appellant prepared his or her own appendix and did not request a reporter's transcript, 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).) In either case the Court of Appeal sends a notice to appellant that says when the appellant's opening brief is due.

How does the appellant prepare the opening brief? A short example of an appellant's brief is included in Sample Form K. The appellant uses the facts in the case as determined by the jury or the court at the trial or hearing in superior court. 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. Hopefully 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 the sample brief as you read about the various parts of a brief in the sections that follow.

The appellant's opening brief is a single unbound document that includes a 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, and proof of service. (For a discussion of attachments to the brief, see the heading "Considerations that Apply to All Briefs" later in this chapter.)

The brief starts with a **cover** that includes identifying information about the case. (See Sample Form K.) If filed in paper form, the cover must be white and be unbound. (See **What about format?** later in this chapter.)

The cover is followed by the **table of contents**, which lists the sections of the brief by page number. Then there is a **table of authorities**, which lists the cases (in alphabetical order), the statutes and other authorities used in the brief, and the number of the page on which each can be found in the brief. These items cannot be completed until the brief is completed, for only then will the page numbers be known.

The next item is a **statement of the case.** This tells the Court of Appeal the procedural history of the case. You should explain what happened in the trial court, in chronological order from 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 of the case, including the date on which the complaint was filed and the date on which the *Notice of Appeal* was filed. (See "Statement of the Case" in appellant's opening brief, Sample Form K.) The appellant must show where this information can be found in the record by referencing the volume and page number(s) of the clerk's or reporter's transcript that has this information. (CRC rule 8.204(a)(1)(C).) The reference is set out in parentheses as **CT** (clerk's transcript) or **RT** (reporter's transcript). 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 with the date the complaint was filed on it) on page 1 of the first volume of the clerk's transcript.[1]

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[1] 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

Next comes the **statement of appealability**, where the appellant tells the court why this case is now appealable. This may already be clear to the appellant, but for the person reading the brief for the first time, the statement sets the stage. 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 nonfinal judgment. If you are appealing an order or a nonfinal ruling, 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 "Statement of Appealability" in appellant's opening brief, Sample Form K.)

Then the appellant should set out the **statement of facts** of his or her case. 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). The appellant may use only the information in the transcripts to prepare the statement of facts, because they are the only items the court and/or jury could use to determine the case in the superior court.

Your statement of facts will depend on the nature of the proceedings in the trial court. If there was a trial, you must remember that the Court of Appeal will not retry the case. As noted earlier, the Court of Appeal does not change the facts that were found by the superior court judge or the jury in a trial, as long as 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. So, 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 you contested the factual findings made by the jury or the trial court. Of course, you 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 "Statement of Facts" in Sample Form K.) For every statement of fact you make in the brief, there should be a **citation** showing 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 be different if the case was dismissed without a trial. Demurrers and summary judgments are two types of pretrial motions that may cause a case to be dismissed without a full trial. Because cases are commonly dismissed

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Respondent's appendix—RA Respondent's brief—RB
Appellant's reply brief—ARB Superior court file—SC file

on demurrer or summary judgment, we will explain a little about how to write the statement of facts when appealing from such a dismissal.

Demurrer. If a plaintiff files a case in superior court and the facts in the complaint do not state a cause of action (that is, they give no legal basis for the defendant to be held responsible), the defendant may bring a **demurrer** asking that the case be dismissed. If a cause of action *has been* stated, the superior court overrules the demurrer and the case continues on. If no cause of action has been stated but the court believes there may be more facts that will enable the plaintiff to state a cause of action, the court sustains the demurrer "with leave to amend," in which case the plaintiff can restate his or her case. If the court believes there is no cause of action, the court sustains the demurrer without leave to amend, and the case is dismissed. This ruling is an order but, by statute, may be appealed. (Code of Civil Procedure, section 581d.) The order must say the case is dismissed. On appeal, the Court of Appeal looks only at the complaint and assumes all of the factual allegations are true in order to rule on whether the complaint states a cause of action. Thus, the Statement of Facts in the opening brief should be based on the facts as alleged in the complaint.

Summary judgment. In a **summary judgment**, one party may contend there are no facts that need to be decided, *or* the parties may agree on what the facts are. Either side (and sometimes both sides) may bring a motion for summary judgment arguing that they are entitled to a judgment in their favor without a trial. Unless the parties agree that there is no genuine dispute about material facts in the case, the court must determine whether there are any such disputed facts. Unlike a demurrer, the court is not limited to the allegations of the complaint, and it will review sworn statements or other evidence submitted by the parties in writing. The court will then decide if there is conflicting evidence in the record as to the material facts. If so, the summary judgment motion should be denied because the evidentiary conflict must be resolved in a trial. If not, the court can grant summary judgment in favor of either of the parties. For example, if all the evidence shows that the light was green, the court does not need to hold a trial to determine whether the light was red or green.

A trial court's ruling granting summary judgment is an order. A party seeking to appeal the ruling must first get a *judgment* based on that ruling. In looking at the facts on appeal, the question is exactly the same as the issue before the trial court: Is there a genuine dispute as to material facts that must be resolved at a trial? If there is such a factual dispute, summary judgment should not have been granted, the judgment should be reversed, and the case should go back to the trial court for a trial. Thus, if you are the appealing party, your Statement of Facts should emphasize the evidence in the record that you believe conflicts with the trial court's ruling. With appropriate page number citations to the record, you should point out the evidence which demonstrates there is a factual conflict that must be resolved in a

trial. If there are no factual disputes, you should argue that the trial court incorrectly applied the law in granting summary judgment to the opposing side.

The next section of the brief after the statement of facts is the **argument** section. This is the part of the brief in which you discuss each of the errors you believe the superior court made. You should discuss each issue separately in light of the facts and the laws. The appellant has the burden of showing that there was an error 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 may need to read some legal materials on the subject. If so, go to a public law library. (See Appendix 3 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 cases previously decided in the area of contracts. You may want to read those cases. 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 the court will apply to each issue.

What is the standard of review? 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**. 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.

When is the "abuse of discretion" standard used? 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.

When do you use the "substantial evidence" standard? 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, 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.

What is the de novo standard? *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 and looks at the issue 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.

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 a case, statute, rule, or legal treatise that sets out that proposition. Citations usually appear at the end of the sentence in parentheses. For more information on legal citations, see Appendix 4.

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).) (See "Argument" section of Sample Form K.)

After you have discussed each issue, you should briefly restate your position in a c**onclusion** and tell the court what you want it to do. (See "Conclusion" section of Sample Form K.) If the opening brief is produced on a computer, it must also include a **certificate of compliance** with the length limitations discussed below (see Certificate of Compliance attached to Sample Form K) and a **proof of service** (Sample Form C).

Respondent's Brief

When is the respondent's brief due? The respondent's brief is due 30 days after the appellant's opening brief is filed. (CRC rule 8.212(a).) There is no five-day extension if the appellant's opening brief was filed by mail. (Code of Civil Procedure, section 1013(a).)

How do you prepare the respondent's brief? If you are the respondent, you will need to address the facts and legal issues raised in the appellant's opening brief. First of all, 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's brief should follow the same general format as the opening brief, with a cover, table of contents, table of authorities, statement of the case, statement of facts, argument, conclusion, certificate of compliance, and proof of service. (A short example of a respondent's brief is in Sample Form K.) For a discussion of attachments to the brief, see the heading "Considerations that Apply to All Briefs" later in this chapter.

Does there need to be a facts section? 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 with a shorter version of the facts. 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).)

What about the issues the appellant has raised? 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 it was not correct 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 may need to do some reading on the subject. Go to the county public law library (see Appendix 3) 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 error may have been waived, or given up. 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.

There may be additional issues—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.

Appellant's Reply Brief

When is the appellant's reply brief due? The reply brief is due 20 days after the respondent's brief is filed. (CRC rule 8.212(a).) There is no five-day extension if respondent's brief was served by mail. (Code of Civil Procedure, section 1013(a).)

Why an appellant's reply brief? Why no response to the reply? Because the appellant has the burden of showing the Court of Appeal that the trial court erred, the appellant is given the opportunity to respond to the respondent's brief. The appellant's reply brief is optional. No new issues may be raised in the reply, since the respondent would have no opportunity to rebut them. 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 new issues raised by the respondent in its brief. There is no response to the reply brief. Briefing has to stop somewhere, and this is where it stops! A short example of an appellant's reply brief is in Sample Form K.

Considerations that Apply to All Briefs

Table of contents and table of authority. When you have finished your brief, copy each heading and subheading into a **table of contents** (which will be page i of your brief). 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 used, 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 each item is found. This is the **table of authorities**. (CRC rule 8.204(a).) The table of contents and table of authorities should be separately paginated from the rest of the brief using small Roman numbers. For example, the tables could be pages i-iv, and then you would start with page 1 for the *text* of your brief.

Certificate of compliance with length limitations. 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, table of authorities, the cover information, the *Certificate of Interested Entities or Persons*, any

signature block, and attachments are not counted in computing the number of pages or words. (CRC rule 8.204(c).) Every brief produced on a computer must include a certificate of compliance stating the number of words in the brief. You may rely on the word count of the computer program used to prepare the brief. (See Certificate of Compliance attached to Sample Form K.)

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).)

You may attach to your brief copies of exhibits or other materials already contained in the existing record on appeal or relevant local, state or federal rules or regulations. The attachments must not exceed a combined total of 10 pages, unless you get permission from the court. (CRC rule 8.204(d).) Before including attachments, you should carefully consult CRC rule 8.204(d).

What about format? CRC rule 8.204 specifies the format requirements for briefs filed in paper form. Briefs should be:

- Typed or prepared on a word processor or computer;
- On 8-1/2-by-11 inch white or unbleached 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 prepared with a typewriter;
- Unbound
- The pages must be consecutively numbered. The page numbering must begin with the cover page as page 1 and use only Arabic numerals (e.g., 1, 2, 3). The page number on the cover page may be hidden and need not appear. Printed with a font size no smaller than 13 points (including footnotes); and
- Given side margins of 1-1/2 inches, and upper and lower margins of 1 inch.

The cover all briefs filed in paper must be in white and not include cardstock

The pages should be unbound. On the cover should be the title of the case, the superior court and Court of Appeal case numbers, the names 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” (see “Cover” of Sample Form K), and your name,

address, and daytime telephone number. (CRC rule 8.204(b).) The court heading should be centered at the top of the brief cover.

What about service? All civil briefs must be served on all the parties and the clerk of the superior court (for delivery to the judge in the case). If you filed your brief in electronic form, the requirements for service on the California Supreme Court under rule 8.212(c)(2) have been satisfied. If you are filing in paper form, you must serve four paper copies on the California Supreme Court. If you are filing in paper form, the original brief must be filed in the Court of Appeal. The original must be unbound, not contain tabs and be consecutively paginated using Arabic numerals only. For *Proof of Service* (see Sample Form C; for court addresses, see Appendix 3). You must also serve any public officer or agency required to be served by CRC rule 8.29.

What if I need more time to file my brief? If you need more time to file your brief, you and opposing counsel can stipulate (agree, see Chapter 3, footnote 1) to up to a maximum of 60 days in extensions for each type of brief. However, you may not stipulate to extend the time if the court has already granted an application to extend time to file your brief. Stipulations to extend time (see Sample Form Q) 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 Sample Form R.)

What if the brief is late or not filed at all? If the appellant's opening brief or a respondent's brief is late, a notice (under CRC rule 8.220) 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 allowed under the rule, the appeal may be dismissed. If the respondent's brief is not filed within the 15-day rule 8.220 grace period, the court may decide the case on the appellant's opening brief, the record, and any oral argument by the appellant. (CRC rule 8.220.) Within the rule 8.220 grace period, a party may apply for an extension of that time for good cause. If an appellant's brief is not filed during the extension, the court may dismiss the appeal. (CRC rule 8.220(d).)

How are exhibits sent to the Court of Appeal? 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.

This is the way exhibits are handled in San Diego and Imperial Counties. A party wishing to have the Court of Appeal consider an original exhibit that was not copied in the clerk's transcript or appendix 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 and the party requesting that exhibits be lodged with the Court of Appeal must each put the designated exhibits in their possession into numerical or alphabetical order. If the exhibits are not transmitted electronically, the exhibits are sent to the Court of Appeal along with two copies of the list of exhibits being sent. If exhibits are physically lodged with the Court of Appeal, they will be returned at the end of the case.

What if the briefs are not prepared properly? 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, 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).)