The Ten Commandments of Brief Writing

Tales from the Appellate Bench

September 26, 2008

State Bar Convention

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THE TEN COMMANDMENTS
OF BRIEF WRITING

“The secret ambition of every brief should be
to spare the judge the necessity of engaging
in any work, mental or physical.”

1. This is the first, and the greatest commandment: Be **scrupulously honest** in
describing both the law and the facts. You are not only representing your client;
you are building your own reputation with the court and with opposing counsel.
In our profession, credibility is the coin of the realm.

2. Know your judge(s). “The effective production of a brief depends, not only
on a knowledge of the law and facts involved, but also on familiarity with the
background, disposition, and intellectual endowments of the judge. . . . [A] brief
to be effective must be written with the reader in mind. A short story intended
for readers of *True Confessions* must be written differently from one intended for
readers of *Harper’s Magazine*. In briefing . . . effectiveness depends upon
pleasing or impressing the selected audience.”

3. Never use ridicule or sarcasm. “Regardless of provocation or opportunity,
ridicule [and sarcasm] should invariably be eliminated before the brief is submitted
to the judge. In ridiculing an opponent’s argument a lawyer may be ridiculing
one of the pet notions of the judge—and judges resent ridicule. Who doesn’t?”
No matter how ill-treated you may feel, refer to opposing counsel and to the trial
court in respectful terms.

4. Avoid attempts at humor. “[T]he danger [of humor] lies in the unfortunate fact
that its success depends upon the receiver as well as the sender. Ascension to the

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1 These commandments address appellate brief-writing; however, you will find that most apply as
well to writing memoranda of points and authorities in the trial court.
2 Levitan, Mortimer, “Confidential Chat on the Craft of Briefing,” Reprinted in *The Journal of
3 Levitan, at p. 306.
4 Levitan, at p. 313.
bench frequently atrophies a normal, robust sense of humor, and after a period of service—say, two or three days—a juridical sense of humor begins to show: a mysterious, inscrutable, capricious variety which turns into wrath too easily for comfort.”

5. Be a good storyteller. We cannot all be Mark Twain or Ernest Hemingway. Nor is the general subject matter of an appeal—say, the granting of a motion for summary judgment in a breach of contract case—usually the stuff of which riveting tales are made. Nonetheless, the facts of any case can—and should—be related concisely, chronologically and with enough human interest to hold the judge’s attention at least until [she] he gets to your arguments.

6. Use two kinds of arguments: those that persuade and those that support. “Persuasive arguments are those which seek to induce a judge to decide a controversy in a certain way; supportive arguments are those furnished as a courtesy to the judge for use in the opinion filed in justification of his decision. Persuasive arguments must be sound in order to be effective . . . . Supportive arguments really supply the décor for the opinion, which usually is a skillful interplay between intellect and unconscious motivation.” In other words, give the judge a very good reason to rule in your client’s favor and then give her something to “hang her hat on.”

7. Base your persuasive arguments in the facts. “If facts can be clarified to the degree that the barber, the grocer, and the shoemaker would consider that a certain result should follow as a matter of common sense, the probabilities are that the judge will arrive at the same conclusion. True, the judge will listen attentively to protracted oral arguments, will diligently read monumental briefs, will spend precious hours in making personal investigations of the evidence and the law—and notwithstanding all that, his carefully considered judgment will concur with that pronounced by the barber, the grocer, and the shoemaker.”

5 Levitan, at p. 313.
6 Levitan, at p. 314.
8. Embrace—do not duck—the weaknesses in your case. “If there is a single ‘fatal flaw’ that afflicted most lawyers on appeal, it is that they fail to meet the tough argument that is made (or could be made) against their position. By ignoring it, they hope the court won’t see it or be affected by it. Almost invariably, the court sees that this is the turning point in the case. It often decides the case on this issue with no input on it from the losing attorney.”

9. Write from an outline. “The lawyer who writes a brief without a preliminary outline would if he were a carpenter, build an edifice without a plan. True, by persistently pounding away eventually a written argument might emerge, and a shelter might evolve, but the finished product would probably be bizarre rather than artistic. . . . . While time spent in briefing may be wasted, time spent in outlining a brief is never wasted, for a skillfully prepared outline invariably engenders a shorter, clearer brief.”

10. Take the time to read good writing (not just “good books”). You will find that your own writing improves noticeably after you have read excellent writing. Some suggested authors: J.D. Salinger; Ivan Doig; Margaret Atwood; Thomas Keneally; Anne Lamott.

**Bonus Commandment:** Pick the most brilliant line you have written; the most startling riposte; the most telling argument embellished by your style and soul. Then, cross it out.

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8 Levitan, at p. 306.
9 Moskovitz, at p. 7.
THE NUTS AND BOLTS OF BRIEFS AND TRANSCRIPTS ON APPEAL
or
“Restating the Obvious and Pet Peeves”

The following list of items was created after talking with appellate judges and their research attorneys who, combined, have about 250 years of appellate experience.

1. Identify and apply the standard of review.
2. Limit your recitation of contextual facts.
3. Use precise record cites (CT: 24, 35, 67, 88; not CT: 24-88)
4. Include record cites in your Summary of the Case.
5. Cite-check your brief. Twice.
6. Check all transcripts and appendices after copying for legibility.
7. Bind the record so that it does not fall apart after two uses.
8. Include an index in each volume of your transcript or other record.
9. When you cite to a multi-volume index, include the volume number.
10. Footnotes have their place in a brief, but do not overuse them.
11. Spelling and grammar count; misspellings and bad grammar are distracting.
12. Avoid string cites.
13. Use short words and short sentences.
14. Use the active voice.
15. Your section Headings (which become your Table of Contents) should tell the whole story. If they cannot tell everything, they should, at least, be informative.
ANNOTTATIONS TO NUTS AND BOLTS

“What briefs need most in this world is readability.”10

1. The standard of review will often determine whether you win or lose an appeal. This will be the judge’s first question, because it provides the analytical context for evaluating the arguments. It tells the judge “how to think about” the case. Sometimes it is not clear what standard applies. Sometimes there is a “mixed” standard—one for reviewing the factual findings and one for reviewing the related legal decisions. Both appellant and respondent need to focus on this issue with great clarity, before the brief is drafted, because it will also tell the writer “how to think about” the case. If there is a dispute about which standards apply, be sure to argue your case under both.

2. Lawyers have a bad habit of simply regurgitating all of the information they have when writing the statement of facts. To be effective, the writer should first take some time to think about what the issues are on appeal, and which facts are relevant to these issues. The recitation of facts should be limited to only those facts that (1) are directly relevant, or (2) help to persuade the judge to reach a certain result. Blatant appeals to prejudice are unhelpful, but important facts such as the youth of an injured plaintiff, the particular vulnerability of a victim, or the historical context showing a pattern of behaviour should be included.

3. Using “global” record cites forces the reader to work far too hard in order to verify the factual assertions made in the brief. Precision in record citation saves the judge an enormous amount of time, and inures to your benefit in building your credibility and reputation. This means citing not only to the appropriate page in the record, but also to the specific lines.

4. The section of your brief entitled “Summary of the Case” will, of necessity, contain only the core facts and arguments. Because these are the key facts and arguments you are asking the court to focus upon, they should be tied to the record, even though the record cites are repeated in the more detailed Statement of Facts. The Summary of the Case is the court’s “quick reference” section. If

10 Levitan, p. 305, fn omitted.
there are no record cites you have lost an opportunity to refer the judge immediately to your strongest evidence.

5. (Almost) nothing is more annoying than going pulling a book from the shelf to find a cited case, turning to the cited page, and finding an entirely different case. Not only does this cause you to lose the reader/researcher’s momentum in the middle of your argument, but it also forces the reader to spend extra time tracking down the correct case cite—which [s]he usually finds in your opponent’s brief.

6. You would be surprised to learn how many pages of unreadable record are filed with the court. Check legibility both before and after the record has been copied. (This means you need to copy the record more than one day before it is due to be filed.)

7. Judges and their research attorneys do read the record, and often look at key pages in the record several times. If, during that process, the transcript starts to fall apart, the frustration level of the reader increases geometrically in proportion to the number of additional uses. Keep in mind also that the readers of the record would appreciate being able to open the volume and have it lie flat enough so that it does not roll closed while in use.

8. In multi-volume records, it is just plain cruel to place the index or table of contents in only the first volume. Forcing the judge to look at two volumes of record every time [s]he wants to find a single document is not a good idea.

9. Ditto for citing to the record. If you cite to “CT 459” the reader has to look at least one or two volumes in order to find page 459 of the record. Remember, one of your guiding principles is to make it easy on the reader, so provide the volume number too: “CT: IV-459.”

10. “Footnotes can be very useful to help make the text of your brief concise. Your main arguments should flow smoothly through the text of your brief, so the reader can easily follow your chain of analysis. Interruptions to discuss incidental points [such as distinguishing out of state cases cited by your opponent, or adding citations that give historical context to your argument] should be kept to a minimum. . . . None of these incidental items may be important enough to insert in the middle of your text . . . [but] omission of this discussion might also cost you something. The answer to this dilemma is the footnote. . . . Some people say that they dislike footnotes. ‘Too distracting’ is one criticism. Footnotes can be distracting, but they are not nearly so distracting as including the same information in the text of your brief, where it intrudes directly into your main argument. Others say ‘If it is important enough to appear in your brief, it is
important enough to put in the text.’ This is true in some situations, but not all. Some topics are important enough to warrant discussion but not important enough to warrant interrupting your main argument.” (Moskovitz at pp. 65-66)

11. “The effectiveness of an argument can be accentuated or dissipated by the mode of presentation. An unshaved, dirty-collared, baggy-suited salesman handicaps himself in selling, no matter how superior the merchandise. A carelessly typed, poorly arranged page does the same thing, no matter how excellent the argument. A small gob of jam on a single page can destroy completely the effectiveness of the brief—even if the gob is genuine [Smuckers]! Misspelled, misplaced, and misused words create almost as much havoc with the selling of the argument as the gob of jam. True, a word is a word even when slightly misspelled; the difficulty is that the reader’s attention lingers on the mangled word rather than on the thought intended to be conveyed. Misplaced and misused words distract attention and may suggest vagrant ideas far removed from the argument intended.” (Levitan, p. 308.)

12. “Never cite a case without a purpose and make that purpose clear in the text surrounding the citation. . . . . Similarly, do not string-cite without a purpose, and that purpose should be apparent from the brief. A brief which cites ten cases for an undisputed point of law simply looks cluttered, not impressive, and this clutter tends to interfere with the chain of thought you are trying to get the reader to follow. If the point of law you are stating is not disputed, it is enough to cite one or two cases, preferably from the highest court in your jurisdiction [or from the panel of judges who has the case]. Where, however, the point of law is not clearly established, or the point is disputed by your opponent, a string-cite may help persuade the court that there is substantial authority in support of your position.” (Moskovitz at pp 44-45.)

13. “Minimize jargon and technical terms. This doesn’t mean that you should adopt a Dick-and-Jane style, but merely a straightforward style that [readers] can understand. . . . . Strive for an average sentence length of 20-30 words. Doing this involves following a maxim that, unfortunately, makes some legal drafters nervous but needn’t do so: ‘if you want to make a statement with a great many qualifications, put some of the qualifications in separate sentences.’ [citing Bertrand Russell]” (Garner, Bryan, Advanced Legal Drafting, LawProse, Inc. 1997, p. 6 [Garner].)

14. You already know this, but it bears repeating: The active voice is more powerful and clear. “The contract was breached” compares poorly to “Defendant
breached the contract” because the former does not tell the reader who breached the contract. “The contract was breached by the defendant” uses twice as many words than are needed. (Ibid.) Sometimes the passive voice must be used to avoid an unsupported factual inference; however, try to minimize its use.

15. “[G]uiding signs placed at strategic spots throughout the brief . . . facilitate reading and comprehension . . . . Not exactly the same kind of signs used on highways, . . . although some of those signs have possibilities of adaptation, viz., “Winding Argument Ahead” or “Muddy When Wet or Dry” or “Unreadable Until Repaired.” Much more dignified, and probably better, than the highway type of signs are synopsis-of-synopsis headings—headings that trenchantly state the essentials of the argument, both factual and legal. Headings that simply enumerate, or vaguely refer to some fact or argument, or just mumble in type, should be eschewed; the headings should actually tell something to the judge.” (Levitan, at p. 317.)
Ten Tips For Success On Appeal

1. Research And Assess Your Case, Appellate Procedures And The Cost Of Appeal

First and foremost, make sure you have a final judgment or appealable order. (See, e.g., Code Civ. Proc., §§ 904.1, 1294; Prob. Code, § 1300 et seq.) For instance, an order sustaining a demurrer without leave to amend, or an order granting a motion for summary judgment, is not an appealable order. However, an order dismissing an action is an appealable order. (See Code Civ. Proc., § 581d.)

The time limit to file the notice of appeal in superior court is generally 60 days from the date of notice of entry of the judgment or appealable order. (See Cal. Rules of Court, rules 8.104, 8.108 (hereafter all further rule references are to the California Rules of Court).) The notice of appeal must be accompanied by the $655 filing fee (except in criminal, juvenile, and conservatorship cases), and a separate $100 deposit for preparation of the record on appeal (unless you expect to proceed by appendix in lieu of clerk’s transcript). (See rule 8.100.)

Within 10 days of the filing of the notice of appeal, appellant must also file a designation of the record on appeal. The required deposit for preparation of the transcript, or a waiver, must accompany a designation of reporter’s transcript. (See rule 8.130.) When there is a designation to proceed by clerk’s transcript, appellant will be notified of the cost to prepare the transcript and will need to deposit the required fees within 10 days of the date of notice. (See rule 8.120.)

2. Study And Understand The Standards Of Appellate Review

"[A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (Davey v. Southern Pacific Co. (1897) 116 Cal. 325, 329.)

"No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; see also Code Civ. Proc., § 475.)
Ten Tips For Success On Appeal

"'A judgment or order of the lower court is presumed correct. All inteniments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (Denham v. Superior Court (1970) 2 Cal.3d 557, 564.)

**Harmless Error:** Generally speaking, to the extent that fundamental, constitutional rights are at issue, we examine the record to determine whether any error was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 23-24.) To the extent that the appeal rests on other grounds, reversal is warranted only where it is reasonably probable that a more favorable result would have been reached in the absence of the error. (People v. Watson (1956) 46 Cal.2d 818, 836-838.)

**Substantial Evidence Rule:** "[E]ven if the judgment of the trial court is against the weight of the evidence, we are bound to uphold it so long as the record is free from prejudicial error and the judgment is supported by evidence which is 'substantial,' that is, of 'ponderable legal significance,' " "reasonable in nature, credible, and of solid value."" (Howard v. Owens Corning (1999) 72 Cal.App.4th 621, 631.)

**Abuse Of Discretion:** "A decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' . . . In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not be set aside on review." (People v. Preyer (1985) 164 Cal.App.3d 568, 573-574.)

**De Novo Review:** The construction and interpretation of a statute are a question of law, which this court considers de novo. (Dowden v. Superior Court (1999) 73 Cal.App.4th 126, 128.) The interpretation of a written instrument is subject to independent review where the interpretation does not turn on the credibility of conflicting extrinsic evidence. However, the underlying findings of fact are still subject to substantial evidence review. (WYDA Associates v. Merner (1996) 42 Cal.App.4th 1702, 1710.)

**Doctrine Of Waiver And Invited Error:** Generally, errors not raised or argued in the trial court are deemed waived on appeal. (See, e.g., Evid. Code, §§ 353, 354.) "A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (People v. Vera (1997) 15 Cal.4th 269, 276.) A claim of excessive or inadequate damages must be raised in the trial court on a motion for new trial. (Schroeder v. Auto Driveaway Co. (1974) 11 Cal.3d 908, 918.) An appellant may not change his or her theory of recovery or relief on appeal. (Cinnamon Square Shopping Center v. Meadowlark Enterprises (1994) 24 Cal.App.4th 1837, 1844.) Also, the party who induces the commission of error is estopped from asserting it as a ground for reversal. (Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 403.)
Stare Decisis: “Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction.” (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.)

3. Consider Whether An Appellate Specialist Should Be Consulted
If you are not familiar with appellate practice, you may want to have an appellate specialist review the case to assess your probability of success on appeal. In any case, recommended practice guides are:
  - Eisenberg et al., California Practice Guide: Civil Appeals and Writs (The Rutter Group 2007)

4. Consult, Understand And Comply With The California Rules Of Court
All appellants in civil appeals are required to file a Civil Case Information Statement form pursuant to rule 8.100(g). The court will send appellant the form upon receiving the notice of appeal from the trial court. Failure to timely file the statement with an attached copy of the judgment or appealable order can result in monetary sanctions or dismissal of the appeal. (See rule 8.100(g)(3).)

Exhibits are deemed part of the clerk’s transcript, but they are not automatically included or copied. (See rule 8.122(a)(3).) A party wanting the court to consider exhibits must file a notice designating the exhibits in superior court. (See rule 8.224(a).)

Augmentation and correction of the record is governed by rule 8.155. A motion for augmentation of the record should be accompanied, whenever possible, by a copy of the document(s) or transcript(s) at issue.

Sealed records are governed by rules 8.160 and 2.550. Any part of a record sealed by the trial court must be filed under seal in the appellate court, unless and until ordered unsealed by the appellate court. Any part of a record not ordered sealed by the trial court may be sealed in the appellate court only upon order of the appellate court.

Motions are generally governed by rules 8.54 and 8.57, and Code of Civil Procedure section 1013. The court holds all motions in civil cases, except stipulations and those with time limitations, for 15 days in order to allow for consideration of any opposition. The court generally rules on motions without placing them on calendar for a hearing. (See rule 8.54(b).)

Time limits for briefs: After the filing of the record, appellant has 30 days in a civil case to file the opening brief. Respondent has 30 days from the date the opening brief is filed to file a response brief. Appellant has 20 days from the date respondent’s response brief is filed to file a reply brief, if desired. (Rule 8.212; but see rule 8.216, which governs whenever a party is both an appellant and a respondent.) Parties may stipulate to up to a 60-day extension to each of these time periods in civil appeals. (See rule 8.212(b).)
Ten Tips For Success On Appeal

The length, cover color, number of copies, proof of service, etc., are governed by rules 8.25, 8.44, 8.200-8.216 and 8.268 [rehearing]. A certificate stating the number of words in the brief, which may not exceed 14,000 words, including footnotes, must accompany all computer-produced briefs in civil cases not governed by rule 8.216. (See rule 8.204(c)(1).) Combined briefs governed by rule 8.216 must not exceed double the limits. (See rule 8.204(c)(4).) The court may decline to file any brief not complying with any of the rules of court.

There are separate rules governing records and brief in appeals in criminal and juvenile proceedings. (See, e.g., rules 8.320, 8.340, 8.360, 8.404, 8.408, 8.412.)

5. Tips For Brief Writing

Always include a brief introduction to the case, setting forth the nature of the action in the trial court, the order or judgment appealed from and the relief requested on appeal. Always include specific citations to the record in the statement of facts, procedural history, and in support of the arguments. (See rule 8.204(a).) Do not include any matters outside the record. If an issue is one of first impression, say so.

Set forth the standard of review on each issue, and keep it in mind when arguing. Appellants should indicate how each alleged error prejudiced them in order to address whether the error may be harmless. Unless the case is one of first impression, or is governed by the United States Constitution or federal or uniform laws, parties should generally limit citations of case authority to published decisions in California. Decisions from other state courts and federal appellate courts other than the United States Supreme Court are not binding on the appellate courts of this state, but may be persuasive when interpreting a similar statute or written instrument.

Always include a concluding paragraph that states the relief requested on appeal and why the relief should be granted.

Points raised for the first time in the appellant’s reply brief will not be considered, in the absence of a showing of good cause, because the respondent has not been given a chance to respond.

Always use a respectful tone, and avoid the use of clichés.

Limit the use of footnotes.

Edit, edit, edit.

6. Supplemental Briefs

When, upon completion of the briefing, a new opinion is published that is relevant to the issues raised on appeal:

- If the new opinion warrants an extended discussion, serve and file a request to file a supplemental brief as soon as possible, with the proposed supplemental brief attached. The court's order granting the request will allow opposing counsel to file a supplemental brief responding to the discussion.
- If the new opinion does not warrant an extended discussion, simply serve and file a letter brief containing any additional citations. The letter brief should be submitted before, or when responding to, this court's notice to the parties that the case is ready to be placed on calendar.

The court retains discretion to consider issues raised for the first time in a post-briefing supplemental brief and to request a supplemental response brief.
7. Requests For Costs And Sanctions
The prevailing party in a civil case is generally entitled to costs on appeal. However, an appellate court has discretion to make an award of costs that departs from this rule. (See rule 8.278(a)(5).) Thus, a party seeking exercise of this discretion should make a request for the court to do so in its brief.

Although a party may request an award of attorney fees on appeal in its brief, a request for sanctions for a frivolous appeal requires a separate noticed motion filed no later than 10 days from the date appellant's reply brief is due. (See rule 8.276(b).) Generally, the court will not consider a request for sanctions raised only in a brief.

8. Oral Argument
Once the court notifies the parties that the case is ready to be placed on calendar, oral argument will be deemed waived if a request for oral argument is not timely filed. The court may, on its own motion, place a case on calendar even though the parties have waived oral argument. Personal appearances by both counsel are preferred if oral argument is requested, but argument by teleconference is offered as an alternative. Notice of the date and time of oral argument will be mailed at least 20 days before the argument date, but the court may shorten the notice period for good cause. (Rule 8.256(b).)

Remember: At the time of oral argument, the panel hearing oral argument will have read the briefs and will be familiar with the facts and procedural history of the case. Thus, oral argument should be limited to the relevant authorities governing key issues raised in the briefs. Parties should be prepared to answer questions from the panel on any issue raised by either party.

In most cases, the matter will be submitted either at the end of oral argument or when the court has approved the waiver of oral argument. In certain cases, the court will grant the parties time to file supplemental briefs and will submit the matter after the briefs have been served and filed or the time to do so has passed. Submission may be vacated only by an order stating reasons and setting a timetable for resubmission. (Rule 8.256(e)(1).)
9. Decision And Further Review
A decision will be filed within 90 days of the matter's submission, and is generally final as to this court 30 days thereafter. (Cal. Const., art. VI, § 19.) A request for publication of an unpublished decision may be submitted by any person and must be delivered to the court within 20 days after the opinion is filed. (See rule 8.1120(a).) The standards for publication of decisions of the Court of Appeal are listed in rule 8.1105(c). If the court does not grant a request for publication before the decision becomes final, it must transmit the request and its recommendation to the Supreme Court.

A petition for rehearing must be served and filed in this court within 15 days after the decision is filed. (See rule 8.268(b).) Rehearing is mandatory if the decision is based on an unbriefed issue and the court failed to afford the parties an opportunity to file supplemental briefs. (See Gov. Code, § 68081.) A petition for rehearing should also be filed if a party believes that the appellate court made any mistake of law, misstated the facts or issues, or overlooked matters presented at oral argument. A party must not file an answer opposing a petition for rehearing unless the court requests an answer. (Rule 8.268(b)(2).) Generally, rehearing will not be granted on points urged for the first time in the petition for rehearing. If rehearing is not granted before the decision becomes final as to this court, rehearing is deemed denied. (Rule 8.268(c).)

A petition for review must be served and filed in the Supreme Court within 10 days after the decision is final as to this court. (See rule 8.500(e).) The form and contents of the petition, answer, and reply are governed by rule 8.504. Grounds for review are listed in rule 8.500(b).

A request for depublication of a published decision of this court may be submitted by any person and must be delivered to the Supreme Court within 30 days after the decision becomes final as to this court. (See rule 8.1125(a).)

Do you have any questions

10. If You Have Any Questions
You may want to review the court's website at [www.courtnfo.ca.gov](http://www.courtnfo.ca.gov), which provides access to court rules, docket information, opinions and forms. The website also includes a section on frequently asked questions, but do not hesitate to call the court clerk's office if you have any procedural questions. The clerk's office phone number is (408) 277-1004.
Ten Tips For Success In Writ Practice

1. Know The Rules Of Writ Procedure

Review the statutes and court rules pertaining to general writ procedure.

These include Code of Civil Procedure section 1084 et seq. (writ of mandate); Code of Civil Procedure section 1102 et seq. (writ of prohibition); and California Rules of Court, rule 8.490 (hereafter rule 8.490).

Rule 8.490 lists the procedural requirements for filing petitions for writ of mandate, certiorari, or prohibition.

2. Use Writ Practice Guides

Most questions asked by practitioners can be answered by consulting the available writ practice guides, which also provide forms for writ petitions. Recommended practice guides include:

- Eisenberg et al., California Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) Chapter 15, Writs
- Sorgen et al., California Civil Writ Practice (Cont.Ed.Bar 3d ed. 2007)
- Bonneau et al., Appeals and Writs in Criminal Cases (Cont.Ed.Bar 3d ed. 2007) Chapters 7-11, State Court Writs
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3. Understand The General Requirements For Extraordinary Relief

Generally, appellate courts grant extraordinary relief from a trial court order only if the writ petition shows that three requirements are met: (1) there is no other adequate remedy at law, such as an appeal or relief from the trial court; (2) petitioner will suffer irreparable injury if the writ is not granted; and (3) petitioner has a beneficial interest in the lawsuit.

These factors are discussed in *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266.

4. Determine Whether You Are Seeking A Common Law Writ Or A Statutory Writ

The difference is crucial because a statutory writ petition usually has a short statutory filing deadline, while a common law writ petition is subject to a discretionary 60-day deadline. (See *Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 499; *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 356.) A petition is “statutory” if the Legislature has expressly authorized writ review of a particular order, such as an order denying a motion for summary judgment or granting or denying a motion for summary adjudication. (Code Civ. Proc. § 437c, subd. (m)(1).)

For some trial court orders, the statutory writ petition may be the exclusive means of appellate review. (See, e.g., Code Civ. Proc. § 170.3, subd. (d) [judicial disqualification].)

5. Comply With The Technical Requirements For The Writ Petition

The successful writ petition consists of a three-part package: (1) the verified petition, which states the facts, the asserted error and the grounds for relief; (2) the memorandum of points and authorities in support of the petition; and (3) the supporting documents.

Keep in mind that the Court of Appeal is unfamiliar with your case and the supporting documents must include a record adequate to permit informed review of the trial court’s ruling. Rule 8.490(c) lists the required supporting documents, and rule 8.490(d) specifies how the documents should be compiled. A request to seal documents must comply with rule 8.160.

Be aware that rule 8.490(c)(5) allows the court to summarily deny a petition if the record is inadequate.
6. Tailor The Memorandum of Points And Authorities For Review By The Court Of Appeal

Instead of duplicating your memorandum of points and authorities filed in the lower court, tailor your points and authorities in support of the writ petition to address the requirements for extraordinary relief and the applicable standard of review for the order you are challenging.

The memorandum of points and authorities need not repeat the facts alleged in your petition. (Rule 8.490(b)(5).)

Tailor your memorandum of points and authorities in support of the writ petition.

7. Write Clearly And Concisely

The Court of Appeal reviews hundreds of writ petitions every year.

Clear, concise, and well-organized writing in the petition, the stay request, and the memorandum of points and authorities helps the Court of Appeal to understand your case and appreciate your arguments in favor of writ relief.
8. Cite Current And Relevant Authorities

Always confirm that the statutory and case authorities you have cited in your memorandum of points and authorities have not been superseded or vacated.

Be sure to address the major and recent decisions on your issue, even if the decisions are not favorable.

The appellate court performs independent research and will not overlook those decisions.

9. Request A Temporary Stay Of Trial Court Proceedings When Appropriate

A temporary stay of lower court proceedings or enforcement of an order may be requested. Rules 8.490(b)(7) and 8.490(c)(4) require the petitioner to explain the urgency in the petition and comply with rule 8.116.

The court is authorized to deny a stay request that fails to comply with rule 8.116, which sets forth the technical requirements for a stay request, such as prominently displaying the notice “STAY REQUESTED” on the cover of the petition and identifying the nature and date of the proceeding or act sought to be stayed. (Rule 8.116(a).)

For example, if the petitioner seeks writ review of a discovery order compelling the disclosure of confidential information, the petition should include a request for an immediate stay of the discovery order and should include the discovery compliance date.

10. File The Writ Petition As Soon As Possible

In the words of one commentator, “Courts are not inclined to look favorably upon petitions alleging the need for a stay and immediate relief if the petition is filed on the day before (or the day of) trial but the challenged order was rendered weeks or months previously.” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) ¶ 15:146.1, p. 15-70.14.)

Timely filing also gives the Court of Appeal more time to consider your writ petition.
BONUS TIPS: Call The Clerk's Office If You Have Procedural Questions And Check Out The Court's Web Site

The clerk's office at the Court of Appeal, Sixth Appellate District, can answer many procedural "how to" questions about filing writ petitions in our court. However, the clerk's office cannot respond to substantive legal questions. The clerk's office phone number is (408) 277-1004.

Reply Briefs — Really Necessary?

The Recorder

By Mike McKee

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California Supreme Court Justice Kathryn Mickle Werdegar finds them "very useful." Fourth District Court of Appeal Justice Barton Gaut thinks they're mostly a waste of paper. And several other appellate justices believe they'd be a lot better if lawyers put more effort into them.

What's everyone talking about? Reply briefs.

Those often innocuous documents — which give appellants their likely last chance of getting a lower court's jury verdict or judicial finding overturned — are actually rather controversial. (Who knew?)

There has long been debate in appellate circles whether reply briefs serve a worthwhile purpose. Some wonder whether justices even read them. After all, the briefs are optional at the San Francisco-based Ninth Circuit U.S. Court of Appeals.

So to get to the bottom of this divisive issue, The Recorder recently e-mailed all 103 justices on the California appellate bench, including the seven on the Supreme Court, asking for their thoughts about reply briefs. Twenty-five justices responded, including Werdegar and Chief Justice Ronald George from the Supreme Court.

By and large, the responding justices felt that reply briefs — called ARBs in court lingo (for appellant's reply briefs) — are an integral and indispensable part of the courts' record.

Werdegar said appellants often have to use the reply brief to "confront the true strength" of an opponent's response brief. "Thus we sometimes see a petitioner in a reply brief abandoning weak arguments," she said, "or attempting to answer, for the first time, the most difficult arguments against her position."
But then there was Riverside's Gaut, who said attorneys "could save a lot of time and the cost to their clients by not preparing a reply brief." He said a respondent's brief occasionally "requires some minor response, but even that is unusual."

The most common annoyance cited by justices was that too many attorneys commit the sins of either simply regurgitating what they said in an opening brief or attempt to raise new issues for the first time.

"A properly drafted reply brief can offer insight into the issues most in contention between the parties," said Justice James Lambden of San Francisco's First District. "Regrettably, replies are frequently ill-conceived and simply reargue the opening brief."

Justice Arthur Gilbert, of the Second District's Ventura branch, made it clear that repetition isn't welcome.

"Perhaps this is done in the hope that what is read last makes the lasting impression," he said. "These types of reply briefs do make an impression, but an unfavorable one."

Ten other justices complained about getting far too many rehashed reply briefs. And Chief Justice George said he understands why that would be annoying.

"If you just repeat the arguments," he said, "they are worthless."

George, who was so keen on the subject that he called from out of state to talk, said his court often starts working on a case before the reply brief is filed.

"Positions are staked out in the opening and response briefs," he said, "and one would start consideration of the legal issues and modify one's tentative conclusion [based on] the reply brief."

In other words, the Supreme Court reads them.

Reply briefs are limited to 4,200 words in the Supreme Court, but can run up to 14,000 in the lower appeal courts. Appellate specialist Paul Fogel, a partner in Reed Smith's San Francisco office, said the Judicial Council's Appellate Advisory Committee recently proposed that the number of words allowed in Supreme Court reply briefs be doubled.
Currently, if an attorney wants to exceed 4,200 words in the state's high court, he or she has to request the justices' approval.

"My experience is that the Supreme Court is very, very liberal at granting requests for more words," Fogel said. "But one sentiment [among appellate lawyers] is, why should we invite all these requests? Just double the number of words."

U.S. Supreme Court Justice Antonin Scalia heightened reply briefs' profile a couple of months ago when he said that while researching his new book, "Making Your Case: The Art of Persuading Judges," he discovered that "a lot of judges" start with the reply brief. They then read the respondent's brief and finally the appellant's opening brief in a practice called "retro-reading."

One self-confessed reverse reader is Justice William Bedsworth of the Fourth District's Santa Ana branch. But he said he instead begins with the respondent's brief, followed by the reply brief and then goes back to the appellant's opening brief.

"This helps narrow the issues for me before I read appellant's brief," he said in an e-mail. "[There's] nothing more frustrating than spending a lot of time struggling with something in appellant's brief, only to find respondent concedes it or attacks it on a completely different basis than the one anticipated by the appellant.

"Same goes for reading [the] reply brief," Bedsworth added. "Appellant may abandon something he spent 20 pages on in opening brief after hearing respondent's reply, or may have a devastating comeback (or devastating lack of a comeback) to something respondent says."

Fogel said that when he was a senior staff attorney for former Chief Justice Rose Bird more than 20 years ago, he always started with the reply brief.

"The reply brief to me was the most important document in the process," he said. "It's the appellant's last attempt to show why — notwithstanding what the respondent says — the appellant should win."

To Daniel Kolkey, a partner in Gibson, Dunn & Crutcher's San Francisco office and a former
Third District justice, reply briefs are "the mother's milk of appellate advocacy."

"If written with honest clarity," he said, "they are not only your best opportunity to convince the court of the bankruptcy of your adversary's arguments, they may also be your only opportunity — given the limited time available for oral argument."

First District Justice William Stein pointed out that in 10 to 20 percent of cases, appellants don't file a reply brief. That, he said, could mean the appellant realizes he is wrong or can't find a way to respond to a strong argument.

"Either way," he said, "it gives you a clue it's not a strong case."

Bedsworth, of the Fourth District, said that as a former appellate lawyer and a justice for more than a decade, he would definitely advise appellants to file a reply brief.

"Why in the world," he said, "would you ever want to give your opponent the last word before oral argument?"

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