

APPELLATE LAW

California Courts of Appeal: When Preparing an Appellate Brief, Prepare the Record, Then Stick to It.

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The California Rules of Court require the appellant to prepare an adequate record on appeal. This must include items filed or lodged with the trial court that support the issues on appeal. All references to facts or procedural events mentioned in the brief must be supported with a citation to the record.



An inadequate record, or an improper brief including facts without proper citations to the record, hurts an appellant's argument. These deficiencies may also invite the Court on its own motion, or the respondent, to move to strike the brief or record.

In California, by court rules and by judicial decision, an appellate court may disregard statements not supported by proper citations to the appellate record. *Doppes v. Bentley Motors Inc.*, 174 Cal. App. 4th 967, 990 (2009). C.R.C. Rule 8.204(e)(2)(B).

The appellate brief nitty gritty

Established appellate standards dictate that documents and facts not presented to the trial court are not properly part of the

Electronic Trend: Maximizing Your Appellate Brief for the iPad

Special considerations should be noted as one prepares their brief for submission. (p. 3)

California Rules of Court: New Rule 8.701 re: California Environmental Quality Act ("CEQA") Filings

The California Legislature, through Senate Bill 743, shortened and tightened filing and service requirements for appellate procedure for CEQA cases. (p. 4)

Town of Greece and Hobby Lobby

Religion in America under the Robert's Court. (p. 7)

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record on appeal and cannot be considered on appeal. *Pulver v. Avco Financial Services*, 182 Cal. App. 3d 622 (1986). Statements, based on improper matter, are disregarded by the appellate court.

The appendix must only include documents that were filed or lodged, or exhibits which were offered, received or refused by the trial court. The Court in *Doppes*, at 988, elaborated on this point as follows:

"Generally speaking, the appendix must contain only documents that were filed or lodged with the superior court. (Cal. Rules of Court, rules 8.122(b) (3), 8.124(b)(1), (2)). California Rules of Court, rule 8.124(g) states: 'Filing an appendix constitutes a representation that the appendix consists of accurate copies of documents in the superior court file. The reviewing court may impose monetary or other sanctions for filing an appendix that contains inaccurate copies or otherwise violates this rule.'"

Motions to strike

It is not uncommon for respondent's counsel to move to strike a brief that lacks citations to the record, includes

mistaken or misleading citations or where it includes materials in the record that were not before the trial court at the time of decision or are immaterial to the issues on appeal. See *Doers v. Golden Gate Bridge, Highway & Transp. Dist.*, 23 Cal. 3d 180 at 184 (1979) and *Kendall v. Allied Investigations Inc.*, 197 Cal. App. 3d 619 at 625 (1988). In cases that grossly misstate facts with erroneous citations to the record or where the record includes inappropriate items, an appellant might face a motion for sanctions, as well.

Filing a motion to strike the opening brief for such violations may be the most efficient way for a respondent to streamline the subject on appeal and get clear issues and a proper record. A motion to strike may be needed where the errors are so extensive or the record is so convoluted with improper

or unnecessary material that it complicates the effort needed by respondent's counsel to address the core issues on appeal.

The Court may order on its own motion or may require an appellant to move to strike the brief and move for leave to file a corrected brief, which causes additional expense and delay. However, the rules and case law are in place to regulate and control appellate proceedings and promote appellate judicial efficiency.

If the errors in the opening brief are minor and not pervasive, addressing them as a point of argument in the respondent's brief with a correct citation to where the information appears in the record, if it does appear, is a better approach, if it inures to the benefit of the respondent's argument.



The onus is on the attorney

Let this be a lesson to attorneys just entering appellate practice. It is incumbent on the appellant to prepare a proper record on appeal that will support the issues and arguments properly brought before the Court with adequate and correct citations to the record and legal authorities supporting each point. The Court will not search the record to see if what is stated in the brief is asserted "somewhere" in the record.

As the California Court of Appeal Second Appellate District states in its Notice to Litigants: "An appellant waives or forfeits any issue not coherently presented in the Appellant's Opening Brief." And, as one appellate court wrote a few years ago: "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one

and two." *Protect Our Water v. County of Merced* (2003) 110 Cal. App. 4th 362, 364.

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Electronic Trend: Maximizing Your Appellate Brief for the iPad



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The trend in all courts across the country is to accept, and, in some cases, require electronic filing of documents. Associated with this growing development is an increase of justices who are reading briefs on iPads and other tablet devices. In light of this trend, special considerations should be noted as one prepares their brief for submission. Below are a few practical tips that I typically share with clients. (For some more useful insights, I strongly recommend reading an article

published earlier this year in the *Columbia Business Law Review* titled, "Writing a Brief for the iPad Judge.")

Traditional hierarchical structure vs. scientific hierarchical structure

Before you even start writing, I suggest determining whether you want to follow a traditional legal hierarchical structure or go with a scientific hierarchical structure. Traditionally, brief headings start with Part I, Section A, Subsection 1, etc. However,

Heading I.A will look the same as heading VI.A to someone who is reading on an iPad. Scientific numbering avoids this confusion because Part 1 is followed by Section 1.1 and Subsection 1.1.1. Note that court restrictions may limit your option to follow a scientific structure.

Bookmark document sections

The use of bookmarks in your PDF adds further structure and helps the reader navigate your brief with a clearer understanding of the outline. If

you want to get fancy, you can add hyperlinks within your brief if you need to direct the reader to a different section or page of your documents. The table of contents is an ideal location to add this feature.

Avoid footnotes, if possible

A key feature of reading briefs on an iPad is the ability to zoom in on text. Accordingly, excessive use of footnotes distracts the reader since they must zoom out or scroll down to read footnotes. 1.5 line-spacing is preferred over double-spacing, if the court rules in your jurisdiction allow for this, for the same reason. The ability to zoom negates any advantage

of double-spaced text.

Avoid excessive use of acronyms

Acronyms require a glossary of terms. Reading a physical brief is difficult enough when one must flip back-and-forth to refer to a glossary of terms. The distraction is compounded when the reader must navigate the brief on an iPad because it is much harder to jump back-and-forth without losing their place.

Run OCR on scanned documents

It is crucial that you run the OCR (Optical Character Recognition) process because this will identify the individual characters in your brief and make your brief

text-searchable. For example, if the reader wants to find your jurisdiction statement, they may do a search for "jurisdiction" and find where it appears in your brief. Some courts even have this as a requirement.

How to get it done correctly the first time, every time?

As all courts expand their acceptance of electronic briefs and usage of tablet devices, these tips will become second nature for all practitioners. In the meanwhile, Counsel Press can aid you in creating the best brief possible for courts which accept electronic submissions or electronic filings of briefs. ■

New Rule 8.701 re: California Environmental Quality Act (CEQA) Affecting "Leadership" Project Filings – Effective July 1, 2014

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Effective July 1, 2014, California Rules of Court, Rules 8.700, *et seq.* severely shortened and tightened filing and service requirements and procedure for appellate relief in CEQA cases.

In 2011, California AB 900, the Jobs and Economic Improvement Through Environmental

Leadership Act, was passed to streamline resolution of California Environmental Quality Act ("CEQA") challenges to California's key construction (specifically designed "leadership projects") which are required to meet specific environmental standards. (Judicial Council, CEQA Actions:

Rules to Implement Senate Bill 743, Invitation to Comment W14-02). To accomplish this, AB 900 gave the Court of Appeal direct and immediate jurisdiction to review such CEQA challenges, filed as Petitions for Writ Relief, and required complete resolution within 175 days, with the intent to keep key California

construction projects moving, while assuring compliance with the CEQA. (*Id.*, citing Cal. Pub. Res. Code, § 21185, *et seq.* and § 21178(i)).

However, AB 900 itself came under judicial scrutiny, and an Alameda County Trial Court Judge, the Honorable Frank Roesch, ruled that restricting CEQA challenges to appellate writ relief was unconstitutional as it deprived the Superior Courts and Supreme Court, which violated original jurisdiction under Article 6, section 10 of the California Constitution. (*Planning and Conservation League, et al. v. State of California and the California State Controller*, Case No. RG12-626904).

In response, the Legislature went back to work and came up with Senate Bill 743 (SB 743), with new rules and amendments intended to bring the process into constitutional compliance. On April 25, 2014, the Judicial Counsel set forth the changes that became effective on July 1, 2014.

While the rules still specifically expedite CEQA lawsuits on large “environmental leadership projects” as defined under

California Public Resource Code, section 21180(b), the new timeline requires resolution, including an appeal, within 270 days of certification of the administrative record, excluding review by the Supreme Court.



California Appellate Rule 8.701, regarding filing and service of documents on appeal, went into effect on July 1, 2014. The following are important shortened timeframes that impact a CEQA appeal:

All filing and service must be electronic: Electronic filing and service are **required** for all documents. All attorney-represented parties automatically agree to electronic service of process, and the two-day extension in CCP 1010.6(a)(1)(C)(4) does not apply. In the event that electronic service is not required under a separate rule, personal or overnight service is required. (Rule 8.701(a)-(c)).

Shortened time to appeal: The Notice of Appeal **must be filed within five court days** of the stamped date of the Entry of Judgment or the service date on the Notice of Entry of Judgment, whichever is EARLIER. (Rule 8.702(b)(1)).

Notice of Appeal content requirements: The Notice of Appeal must state that the judgment or order is governed by CEQA, and whether it pertains to the Sacramento Arena or other “leadership project,” and, if so, provide notice to the person or entity that applied for the project certification; that person or entity must pay the \$100,000 fee and other costs to the Court of Appeal. (Rule 8.702(b)(2)(C) and Rule 8.705).

What extends the time to file an appeal: If a valid Notice of Motion or Motion for a New Trial, valid Notice of Motion or Motion to Vacate the Judgment, or a valid Motion to Reconsider an Appealable Order is filed, the time to file a Notice of Appeal on a CEQA case is extended by five court days from the date of service of the Order Denying the Motion or five court days after the denial of the motion, whichever is earlier. (Rule 8.702(c)(1)-(3)).

Filing a cross-appeal: Notice of Cross-Appeal must be filed within five court days after the Superior Court clerk serves notification of the first appeal. (Rule 8.702(c)(4)).

Expedited designation of Record on Appeal: The Designation of Record must be served and filed **concurrently with the Notice of Appeal**. (Rule 8.702).

Record on Appeal:

Written documents – Appendix required: CEQA cases do not allow for the designation of a clerk's transcript. A Joint Appendix or separate Appellant's and Respondent's Appendix must be designated in accord with Rule 8.124. (Rule 8.702(d)(1)).

Oral proceedings: Reporter's fees must be paid when filing the Designation of Record, if oral proceedings are designated. (Rule 8.702(d)(2)(A)).

Any application for the "Transcript Reimbursement Fund" must be served on all parties concurrently with the Notice of Designation and Notice of Appeal. (Rule 8.702(d)(2)(B)).

The court reporter must prepare,

certify and file the Reporter's Transcript within **10 days** of notice by the Superior Court clerk. (Rule 8.702(d)(2)(C)).

Reduced time to cure default:

The appealing party will only have **two court days** from the date of the Notice of Default, if that party fails to designate the record and/or pay the required fees when the Notice of Appeal is filed. Failure to cure the default within two court days will result in dismissal of the appeal. (Rule 8.702(d)(2)(D)).

Accelerated briefing schedule:

The appellant's opening brief is due **within 25 days after the Notice of Appeal** is served and filed, the respondent's opening brief is due **within 25 days** after the opening brief is filed and the appellant's reply brief is due **within 15 days** of the filed respondent's brief. (Rule 8.702(f)(2)). Electronic filing of briefs is required. (Rule 8.702(f)(1)).

What if the Reporter's Transcript is late?:

If the Reporter's Transcript is not filed at least five days prior to the due date of the appellant's opening brief, then the appellant may file a brief with references to the matters in the Reporter's Transcript, and then must file a revised, fully-

cited and referenced version of the brief within 10 days after the Reporter's Transcript is filed. (Rule 8.702(f)(3)(B)).

e-Briefs required: Unless otherwise ordered by the Court, within five days after each party has filed its brief, each party must submit an e-Brief that has hyperlinks to the Appendix, Reporter's Transcript, the other parties' briefs and cited decisions. (Rule 8.702(f)(3)(C)).

Shortened "grace" period: If a party fails to timely file their brief, the time to cure that default is **only two court days** from the date of the clerk's Notice of Default. (Rule 8.702(f)(5)).

No waiting for oral argument:

Oral argument will be set **within 45 days of the last reply brief** filed. The clerk must give **at least 15 days' notice** of the oral argument hearing date. The Court can shorten that time, and, if so, the clerk will call or e-mail the parties. (Rule 8.702(g)).

The foregoing is a true example of how fluid the California Rules of Court can be. We will cover the new CEQA writ rules in the next issue of the *Appellate Law Journal*. Stay tuned! ■

Town of Greece and Hobby Lobby – Religion in America Under the Robert’s Court

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In *Town of Greece v. Galloway*, which was decided about two months ago, the Supreme Court held in a 5-4 decision that a town board's practice of beginning its public sessions with a Christian prayer did not violate the Establishment clause of the Constitution. The Court reversed the Court of Appeals' decision and, in light of this decision, one is hard-pressed to think of an Establishment claim that would now prevail at the Court. (Decisions barring school prayers, clergy-led prayer at a public high school, student-led prayer at football games, etc., may be in jeopardy unless the Court views prayers in a school setting in a different light.)

Fast-forward to June 27 and we have the *Burwell v. Hobby Lobby* case decided by the same five Justices. This opinion held that owners of a closely held, for-profit, corporation may exercise their religious beliefs by refusing to provide contraception coverage for employees, as required by the Affordable

Care Act. The suit in *Hobby Lobby* was brought under the Religious Freedom Restoration Act passed by Congress to overrule a Supreme Court decision in which Congress felt the Court had overstepped its bounds relating to a particular Free Exercise exemption. Justice Samuel J. Alito, Jr., writing for the majority, held that Congress intended to expand and provide broader protection for religious liberty and not merely to restore the balance that had existed before.

Justice Alito, writing for the 5-4

majority, and Justice Anthony Kennedy concurring, reasoned, in part, that the employees would still be covered for all forms of contraception through a process created by the Obama administration to accommodate religious nonprofit organizations. That process allows religious nonprofits to obtain an exemption by signing a short form certifying its religious objections and sending a copy to its third-party insurance administrator, which then is obligated to provide the coverage separately to



employees without charge.

A few days later, however, those same Justices signed a temporary order that appears to backtrack from the assurances given by Justices Alito and Kennedy. The Court's new action temporarily (the Court could reverse its order) frees Wheaton College, a Christian college in Illinois, from having to go through the exemption process. Wheaton filed a lawsuit arguing that the mere signing of the form would burden its religious exercise rights by making it complicit in providing certain forms of contraception which it objects to.

The Court's order in the Wheaton matter stated that no form or notification to insurance providers was needed — all Wheaton had to do is tell the government in writing "that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraception services."

The difference between the opt-out procedure relied upon in the *Hobby Lobby* case and the notice allowed by the Court's subsequent order in the Wheaton matter may not seem

like much, but it could have a substantial effect in hampering contraception coverage.

Now, in the wake of *Hobby Lobby*, President Obama is under increased pressure from religious groups demanding that they be excluded from an expected executive order barring discrimination against gays and lesbians by companies with government contracts.

There is no telling how far this will go, but clearly *Town of Greece v. Galloway* and *Hobby Lobby* appear to be just the opening salvos. For a more in-depth analysis of the *Town of Greece* and *Hobby Lobby* decisions, please see an article in *The New York Times* written by Linda Greenhouse on July 9, 2014: "Reading Hobby Lobby in Context." (Link available in the electronic version of this article. To view, visit Counsel Press' Blog.)

Please contact Roy Liebman with any questions regarding the U.S. Supreme Court rules. Mr. Liebman is the Director of Counsel Press' U.S. Supreme Court Department; he specializes exclusively in U.S. Supreme Court practice and has an in-depth knowledge of what is happening at the Court, at all times. **I**



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