

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

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

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

6. **Filing and service.** You must file the original brief plus four copies in the Court of Appeal – unless, under the Second District’s Local Rule 7, you submit an electronic copy of the brief to the Court of Appeal. Under Local Rule 7, a party submitting an electronic copy of a brief is required to file an original and only three paper copies. A party that does not submit an electronic copy of its brief (and therefore must file four paper copies) is required to submit one of the four copies scan-ready at the time of filing. “Scan-ready” means the document is unbound. You must file a proof of service showing service of your brief on opposing counsel and the trial court. The proof of service must also show service on the California Supreme Court of either one electronic copy (as specified in Rule 8.212(c)) or four paper copies. Submission of an electronic copy of the brief will satisfy the requirement of serving the California Supreme Court. When a copy of a civil brief is submitted electronically to the Court of Appeal, a copy is automatically sent to the California Supreme Court and there is no need to submit a separate e-copy to the Supreme Court.

7. **Common pitfalls:**

- Failing to cite the record or relying on material that is not part of the record. As noted above, you must support all statements of factual or procedural matters with citations to the record. You may, however, ask the Court to take judicial notice of legislative history and a few other types of information. This requires a formal motion to the Court, which must include a copy of the material of which you request judicial notice. (See Rule 8.252(a).)
- Ignoring the standard of review. Standards of review are rules that guide the appellate court's decision about whether the trial court decision should be reversed. The appellant's opening brief must state which standard applies to each issue. Generally, there are three standards of review:

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

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

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

For example, if the appellant's only complaint about the trial is that the jury believed Witness A instead of Witness B, the substantial evidence standard will apply. That means the appellate court must accept Witness A's testimony and will affirm as long as that testimony supports the judgment, regardless of what Witness B said. But if the appellant claims that Witness A's testimony was inadmissible (and if the appellant made a proper and timely objection at trial), the Court of Appeal will probably review that claim

under the de novo or abuse of discretion standards, or under some combination of the two. (For example, the de novo standard might govern whether a particular rule of evidence applies to the situation, and the abuse of discretion standard might govern whether the trial court acted within the range of options permitted by that rule.)

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

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

- Waiver. You must be sure the issues you want to raise were preserved for appeal. For example, the Court of Appeal ordinarily will not consider a challenge to the admission of evidence unless trial counsel or a self-represented litigant made a timely objection. Remember that the failure to address a material issue in a brief may be treated as a waiver.
- Overlooking prejudice. No court proceeding is perfect, and errors do not require reversal unless they were prejudicial. An appellant's opening brief therefore must not only identify trial court error but also show prejudice—that is, why it is probable that, without the error, the result would have been different. Conversely, a respondent's brief can acknowledge or assume that error occurred, but argue that the error was not prejudicial.
- String cites. One or two cases are usually enough support for a basic legal proposition. String citations—multiple cases with no discussion of their relevance—are rarely useful.
- Improper citation of unpublished decisions. Do not cite California opinions that are not certified for publication under Rule 8.1105 or Rule 8.1110. (Rule 8.1115.) If the California Supreme Court grants review of a Court of Appeal opinion, the opinion is automatically vacated and cannot be cited unless the Supreme Court orders otherwise.

- Improper tone. Never personally attack an opponent, opposing counsel, or a judge. Name-calling and invective are never appropriate in legal writing, particularly in an appellate brief. They detract from the merits of your appeal, and may well offend the Court.
- Failure to proofread. Read, re-read and re-read again to make sure spelling, grammar and citations are correct.
- Not clearly telling the Court what you want it to do. As the appellant, do you want the Court of Appeal to order a retrial on all issues, a retrial on only some of the issues, or entry of judgment in your favor with no retrial? Depending on the nature of your case and the issues you raise, you may need to provide legal support for the result you request.

Rule 8.204, California Rules of Court

Contents and form of briefs

(a) Contents

(1) Each brief must:

(A) Begin with a table of contents and a table of authorities separately listing cases, constitutions, statutes, court rules, and other authorities cited;

(B) State each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority; and

(C) Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears. If any part of the record is submitted in an electronic format, citations to that part must identify, with the same specificity required for the printed record, the place in the record where the matter appears.

(2) An appellant's opening brief must:

(A) State the nature of the action, the relief sought in the trial court, and the judgment or order appealed from;

(B) State that the judgment appealed from is final, or explain why the order appealed from is appealable; and

(C) Provide a summary of the significant facts limited to matters in the record.

(b) Form

(1) A brief may be reproduced by any process that produces a clear, black image of letter quality. The paper must be white or unbleached, 8 1/2 by 11 inches, and of at least 20-pound weight.

(2) Any conventional typeface may be used. The typeface may be either proportionally spaced or monospaced.

(3) The type style must be roman; but for emphasis, italics or boldface may be used or the text may be underscored. Case names must be italicized or underscored. Headings may be in uppercase letters.

(4) Except as provided in (11), the type size, including footnotes, must not be smaller than 13-point, and both sides of the paper may be used.

(5) The lines of text must be unnumbered and at least one-and-a-half-spaced. Headings and footnotes may be single-spaced. Quotations may be block-indented and single-spaced. Single-spaced means six lines to a vertical inch.

(6) The margins must be at least 1 1/2 inches on the left and right and 1 inch on the top and bottom.

(7) The pages must be consecutively numbered. The tables and the body of the brief may have different numbering systems.

(8) The brief must be bound on the left margin. If the brief is stapled, the bound edge and staples must be covered with tape.

(9) The brief need not be signed.

(10) The cover must be in the color prescribed by rule 8.40(b) and, in addition to providing the cover information required by rule 8.40(c), must state:

- (A) The title of the brief;
- (B) The title, trial court number, and Court of Appeal number of the case;
- (C) The names of the trial court and each participating trial judge;
- (D) The name of the party that each attorney on the brief represents.

(11) If the brief is produced on a typewriter:

(A) A typewritten original and carbon copies may be filed only with the presiding justice's permission, which will ordinarily be given only to unrepresented parties proceeding in forma pauperis. All other typewritten briefs must be filed as photocopies.

(B) Both sides of the paper may be used if a photocopy is filed; only one side may be used if a typewritten original and carbon copies are filed.

(C) The type size, including footnotes, must not be smaller than standard pica, 10 characters per inch. Unrepresented incarcerated litigants may use elite type, 12 characters per inch, if they lack access to a typewriter with larger characters.

(c) Length

(1) A brief produced on a computer must not exceed 14,000 words, including footnotes. Such a brief must include a certificate by appellate counsel or an unrepresented party stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief.

(2) A brief produced on a typewriter must not exceed 50 pages.

(3) The tables required under (a)(1), the cover information required under (b)(10), the Certificate of Interested Entities or Persons required under rule 8.208, a certificate under (1), any signature block, and any attachment under (d) are excluded from the limits stated in (1) or (2).

(4) A combined brief in an appeal governed by rule 8.216 must not exceed double

the limits stated in (1) or (2).

(5) On application, the presiding justice may permit a longer brief for good cause.

(d) Attachments to briefs

A party filing a brief may attach copies of exhibits or other materials in the appellate record or copies of relevant local, state, or federal regulations or rules, out-of-state statutes, or other similar citable materials that are not readily accessible. These attachments must not exceed a combined total of 10 pages, but on application the presiding justice may permit additional pages of attachments for good cause. A copy of an opinion required to be attached to the brief under rule 8.1115(c) does not count toward this 10-page limit.

(e) Noncomplying briefs

If a brief does not comply with this rule:

(1) The reviewing court clerk may decline to file it, but must mark it "received but not filed" and return it to the party; or

(2) If the brief is filed, the reviewing court may, on its own or a party's motion, with or without notice:

(A) Order the brief returned for corrections and refiling within a specified time;

(B) Strike the brief with leave to file a new brief within a specified time; or

(C) Disregard the noncompliance.