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### **Defective Appellate Briefs**

Appellate briefs must comply with a myriad of formatting and substantive rules. It is surprising how often appellate briefs fail to comply with the rules – although noncompliance is usually of a technical or de minimus nature, rather than a substantive nature. The sanction for filing a nonconforming brief can be as severe as having the brief stricken or in the worst case, the appeal can be dismissed. This article discusses a practical approach to ensuring that your appellate brief complies with all of the rules.

#### The Appellate Court's Power To Police Defective Briefs

In both state and federal appellate courts, the courts have the power to strike a defective brief and if the noncompliance is repeated and substantial, the courts have the power to dismiss the appeal. In state court, California Rule of Court, Rule 8.204 governs the content and format of appellate briefs. California Rule of Court, Rule 8.204(e) sets forth four options for the state appellate courts when a brief fails to comply with the formatting requirements of that rule. First, the appellate court clerk may decline to file the noncomplying brief, but the court clerk must mark the brief “received but not filed” and return it to the party. Second, the appellate court may order the brief returned for corrections and refiling within a specified time. Third, the appellate court can strike the brief with leave to file a new brief within a specified time. Fourth and finally, the appellate court can disregard the noncompliance. However, in cases where the noncompliance is substantial and repeated, the state appellate court has the power to dismiss the appeal. *Berger v. Godden*, 163 Cal. App. 3d 1113, 1118-1119 (1985) (“When a new brief substantially fails to comply with the rules, as in the present case, the appellate court has both statutory and inherent power to dismiss the appeal.”).

Similar to the California state court rule, in the Ninth Circuit Court of Appeals, Ninth Circuit Rule 28-1(a) provides that briefs that do not comply with the Federal Rules of Appellate Procedure may be stricken by the court. In addition, the Ninth Circuit’s “Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases” addresses defective briefs. Rule 6 of the Administrative Order states that when a party files its electronic brief, the court will review the brief for deficiencies. If the brief contains no deficiencies, the court will order the party to file 10 copies of the brief in paper format within 5 working days of the court’s order. If the brief contains deficiencies, the court will order the party to cure the deficiencies and to submit a revised brief electronically within a specified time. The failure to comply with the court’s orders regarding briefs may subject the appeal to dismissal.

In the Ninth Circuit, it is rare that the court will dismiss an appeal based on a defective brief. However, in *Sekiya v. Gates*, 508 F.3d 1198 (9<sup>th</sup> Cir. 2007), the Ninth Circuit did just that. In *Sekiya*, the appellant’s entire opening brief was stricken pursuant to Ninth Circuit Rule 28-1 and the court dismissed the appeal. The decision states “[w]e publish this opinion as a reminder that material breaches of our rules undermine the

administration of justice and cannot be tolerated.” *Id.* at 1200. The deficiencies were significant: the brief failed to provide the applicable standard of review, made virtually no legal arguments, lacked a table of contents and a table of authorities, and lacked citations to legal authority and accurate citations to the record.

### How To Navigate The Morass Of Appellate Rules

One of the challenges with appeals is managing all of the appellate rules related to the filing of briefs and the record, particularly because the rules seem to undergo minor changes on a fairly regular basis. For practitioners who litigate in both state and federal court, there are many subtle differences in the rules between the state and federal appellate courts. For example, state court appellate briefs must be in 13-point font, while the Ninth Circuit requires a 14-point font. Another example, is that in state court, the documents in the Appellant’s Appendix must be in chronological order, while in federal court, documents in the Excerpts of Record are in reverse chronological order. This minutia may not seem like the work for lawyers, but the bottom line is that the lawyer who signs and files the brief is responsible if the brief is defective in any respect.

There seem to be two types of people in the world – those who love lists and those who hate the list makers. Managing appellate rules is a task that is amenable to a good checklist. A checklist allows the lawyer to focus on drafting a compelling appellate brief with confidence that the brief will meet all of the formatting and substantive rules.

My recommendation is to create a checklist about one month before your appellate brief is due. The list serves two purposes – it creates a roadmap for the appellate filing and it reminds you of just how much work you have to do to get that brief on file.

When I create a checklist I review each rule that applies to the appellate filing. This process often takes over an hour, but it is time well-spent. For example, I recently filed an appellant’s opening brief in the Ninth Circuit. My checklist for that filing included a list of all of the component parts of the brief and all of the relevant formatting rules for the brief and for the accompanying excerpts of record. My checklist addressed formatting issues in the brief such as font, line spacing, margins, cover color, caption format, and binding. It also addressed all of the component parts that are required in a Ninth Circuit appellant’s opening brief including (1) the corporate disclosure statement; (2) table of contents; (3) table of authorities; (4) jurisdictional statement; (5) statement of issues presented; (6) statement of the case; (7) statement of facts; (8) summary of argument; (9) argument, including the standard of review for each issue; (10) conclusion; (11) certificate of compliance regarding the word count; (12) statement of related cases; and (13) certificate of service. For each item on my checklist, I provided a citation to the relevant rule – that way I can simply update my checklist and review the rules the next time I file a brief in the Ninth Circuit.

I also recommend including reminder notes on requirements that can be easily overlooked in the heat of a filing. In that vein, on my Ninth Circuit checklist I made a note that the Ninth Circuit requires briefs to be published to PDF rather than manually-

scanned for electronic filing. The failure to publish to PDF will cause the Ninth Circuit to deem the brief defective and the court will require that the defect is cured before the brief is refiled.

When my checklist is completed I share it with the other members of the team (attorneys, paralegals and legal secretaries) assisting me on the appeal and ask them if they have comments or revisions. Once all team members have a chance to review and comment on the checklist it is finalized and the checklist then becomes the governing document or “standard operating procedures” for the filing. The checklist usually avoids any last-minute questions from staff members as they finalize the brief for filing, such as what size font to use.

### Checklists Are Cheap Insurance

Appeals are expensive. Even more expensive for the lawyer involved is an appeal dismissed for substantial non-compliance with the appellate rules. Part of a polished appellate brief is strict compliance with the appellate brief rules. Although the formatting rules can seem burdensome to the practitioner, the rules assist appellate courts – most of which have very heavy caseloads – to resolve appeals efficiently and appropriately. So even if you are not a list maker, develop a system to ensure full compliance with the rules so that the court can focus on the substance and persuasiveness of your appellate arguments.

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