

**- CHAPTER FIVE -**

**EFFECTIVE WRITTEN ADVOCACY:  
BRIEFING**

**CALIFORNIA CRIMINAL APPELLATE PRACTICE MANUAL  
MAY 2010 REVISION**

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**EFFECTIVE WRITTEN ADVOCACY:  
BRIEFING**

I. INTRODUCTION [§5.0]

The brief is the foundation of appellate advocacy. It is the most important and often the only medium (when oral argument is waived) for reaching the court. Counsel’s responsibility is to ensure all briefs are accurate, professional, and persuasive. “[C]ompliance with formal requirements, clear and effective writing, proficiency in research and the use of authorities, strong analytical skills, and mastery of the art of advocacy” are all essential. (Appellate Court Committee, San Diego County Bar Association, California Appellate Practice Handbook (7th ed. 2001) § 6.3, p. 193.)<sup>1</sup>

This responsibility is especially acute in appeals by criminal defendants. The attorney must not only carry the heavy burden of establishing grounds to overturn a final judgment, but also bring fundamental credibility to the client’s cause, in order ultimately to convince the court to rule in the client’s favor.

II. APPELLANT’S OPENING BRIEF [§5.1]

Every appellant’s attorney must give the utmost attention and care to the preparation of a persuasive opening brief. That brief is the pivotal document in virtually every appeal. The client’s chances for relief will be profoundly affected by its contents, tone, and effectiveness. It sets up the framework for everything that follows. It gives the court the first picture of the factual background of the case and introduces the principal legal authorities and concepts to be discussed. The most important function, perhaps, is determining what issues will be the basis of the appeal. The entire “conversation” among the parties and the court will revolve around the issues raised in the opening brief.

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<sup>1</sup>Many sources provide guides for the preparation of effective briefs. See Appellate Court Committee, San Diego County Bar Association, California Appellate Practice Handbook, *supra*, pp. 193-214; Robinson, How to Write Effective Statements in Criminal Appeals, Appellate Advocacy College (2000); and Rudman, Effective Argumentation, Appellate Advocacy College (2000). The latter two sources are available at: <http://www.courtinfo.ca.gov/courtadmin/jc/comlists/appcoll.htm>.

The appellant's opening brief bears a heavy laboring oar. No court reverses automatically: the judgment is presumed to be correct, and the appellant must *persuade* it to upset the judgment. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

As a consequence, virtually all of the presumptions and principles on appeal favor the respondent. (See §5.54, *post*.) For example, conflict and silence in the record are resolved in favor of judgment. The trial court is usually presumed to have had adequate reasons for a decision and to know the law; and even if the court gave legally incorrect reasons for a decision, no error will be found if legally correct reasons would require the same result. The jury is presumed to have followed the instructions if they are correct and consistent. Judges, clerks, and court reporters are presumed to have performed their duty. Finally, for most kinds of error, the burden is on the appellant to show prejudice – that is, to show the error actually affected the result. To overcome all of these and similar obstacles, the appellant's opening brief must build a compelling case for relief.

#### A. General Structure [§5.2]

A typical appellant's opening brief usually contains, in approximate order, a green cover, a table of contents, a table of authorities, an introduction (optional but highly recommended), a statement of appealability, a statement of the case and statement of facts confined to matters shown in the record,<sup>2</sup> arguments with headings or subheadings summarizing each contention, a conclusion, a word count certificate, and a proof of service. (Cal. Rules of Court, rules 8.40, 8.204 (a)(1) & (2), 8.212, 8.360, 8.412(a), 8.480(a).)<sup>3</sup> It may have attachments. (Rules 8.204(d), 8.360, 8.412(a), 8.480(a).)

Other formalities for briefs as required by the California Rules of Court are detailed in §5.68 et seq., *post*. These include such matters as form (paper, type, spacing, numbering, copying, binding, length, signature), filing, service, and deadlines.

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<sup>2</sup>Quite often in civil (including juvenile dependency) cases, but infrequently in criminal and juvenile delinquency cases, the facts and case will be combined into a single chronological narrative. Both formats are acceptable; counsel should reflect on whether the combined or separate presentation will be more effective in the particular case.

<sup>3</sup>If the appellant is a corporation or other entity, rule 8.208 on certificates of interested parties also applies. (Rule 8.361.)

B. Cover of Brief [§5.3]

The cover, preferably of recycled stock, must be green and must set forth the title of the brief; the title, trial court number, and the Court of Appeal number of the case; the names of the trial judge and each participating trial judge; the name, address, telephone number, and California State Bar number of each attorney filing or joining in the brief (except supervisors); and the name of the party that each attorney represents. (Cal. Rules of Court, rules 8.204(b)(10), 8.360, 8.412(a), 8.480(a), 8.40(b) & (c); see also Ct. App., Fourth Dist., Local Rules, rule 2 [plastic and acetate covers not permitted].)

*Wende-Anders* briefs<sup>4</sup> must be identified as such prominently on the cover. For example, instead of “Appellant’s Opening Brief,” it could be labeled “Brief Submitted on Behalf of Appellant Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, and *Anders v. California* (1967) 386 U.S. 738.” This label helps the Court of Appeal identify it for internal processing purposes.

Appointed attorneys in the Fourth Appellate District are required to include the following statement after the attorney’s name and other identifying information:

By appointment of the Court of Appeal under the Appellate Defenders, Inc.,  
[assisted or independent] case program.

C. Tables [§5.4]

1. Topical index [§5.5]

A topical index (table of contents) is required by the California Rules of Court. (Rule 8.204(a)(1)(A).) It is more than a technical requisite: it is an important device of advocacy. The table of contents reiterates the argument headings, which in turn should summarize the arguments in a concise, clearly understandable, and forceful manner. This preview gives the reader a conceptual framework for assimilating the facts and the arguments. In other words, the topical index acts as a “window” to the brief, shaping the reader’s approach to all that follows – and, ideally, predisposing the reader to be persuaded. (Appellate Court Committee, San Diego County Bar Association, California Appellate Practice Handbook (7th ed. 2001), § 6.24, p. 200.)

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<sup>4</sup>*Wende-Anders* briefs are filed when appointed counsel is unable to find any arguable issues to raise on appeal. They are discussed in more detail in §1.24 et seq. of chapter 1, “The ABC’s of Panel Membership: Basic Information for Appointed Counsel,” and §4.73 et seq. of chapter 4, “On the Hunt: Issue Spotting and Selection.”

## 2. Table of authorities [§5.6]

The table of authorities must separately list “cases, constitutions, statutes, court rules, and other authorities cited.” (Cal. Rules of Court, rule 8.204(a)(1)(A).) It must indicate on which page(s) of the brief each authority is cited. (“*Passim*” is used when an authority is used so often it is inconvenient to list each reference.)

The organization of the table of authorities is a matter of convention, not rule. The Appellate Court Committee, San Diego County Bar Association, California Appellate Practice Handbook (7th ed. 2001) in section 6.25 at page 200, suggests the following arrangement, which is familiar to the court and thus convenient for it to use:

- Cases: list in alphabetical order by the case title, regardless of court or jurisdiction.
- Constitutions: Cite the United States Constitution goes first, then the California Constitution, and then other state constitutions alphabetically. Within each constitution the listing is numerical, first by articles and then by amendments.
- Statutes: List California statutes alphabetical order by code and, within each code, in numerical order by section. List general laws by date, most recent to oldest. Federal statutes follow the same pattern. Statutes of other states are listed alphabetically by state and, within each, by code and then section number.
- California court rules: Arrange numerically.
- Other authorities, such as treatises: Group alphabetically by author or, if there is no author, by title.

A heading separates and identifies each type of authority (“Cases,” “Statutes,” “Rules,” etc.). (See also Cal. Rules of Court, rule 8.204(a)(1)(A).)

## D. Introduction [§5.7]

An introduction is not required, but it can be very useful, and appellate justices have repeatedly stressed how valuable they find a good introduction. It gives an immediate overview of the case and helps the reader focus on relevant matters when

approaching the brief. An introduction concisely highlights the key facts and issues. It often presents a cogent statement of the result sought and the reasons the court should reach it. An introduction is a good place for presenting a “theme” for the appeal, a distinctive way of characterizing the client’s cause, carried throughout the brief, that gets the reader’s attention and compellingly punctuates the need for relief.

Ideally the introduction should be no more than a paragraph to a page or so in length, except for unusually complex cases, and should avoid sounding merely repetitive of the statements of the case or facts and the argument headings.

E. Statement of Appealability [§5.8]

Rule 8.204(a)(2)(B) of the California Rules of Court requires the opening brief to “state that the judgment appealed from is final, or explain why the order appealed from is appealable.” Preferably located at or near the start of the text in the brief, this statement assures the court it has authority to decide the case and helps counsel identify the occasional case for which a remedy other than appeal might be needed. The following are examples of appropriate statements of appealability:

1. Criminal appeal after a trial [§5.9]

This statement of appealability is appropriate for an appeal from a judgment imposed after trial in a criminal case:

This appeal is from a final judgment following a trial and is authorized by Penal Code section 1237, subdivision (a).

2. Criminal appeal from an order after judgment [§5.10]

This statement of appealability is appropriate for an appeal from an order after judgment in a criminal case:<sup>5</sup>

This appeal is from an order made after judgment, affecting the substantial rights of the defendant, and is authorized by Penal Code section 1237, subdivision (b).

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<sup>5</sup>Examples of such appeals might be a probation revocation or change in the terms of probation, a restitution order, or a correction of an unauthorized sentence. See §2.60 et seq. of chapter 2, “First Things First: What Can Be Appealed and How To Get an Appeal Started.”

3. Criminal appeal after a guilty plea [§5.11]

Any one or any combination of the following statements may be used, as applicable to the case:

This appeal is from a final judgment following a guilty plea and is based on the sentence imposed, within the meaning of California Rules of Court, rule 8.304(b)(4)(B). It is authorized by Penal Code section 1237.

This appeal is from a final judgment following a guilty plea after denial of a Penal Code section 1538.5 motion, within the meaning of California Rules of Court, rule 8.304(b)(4)(A). It is authorized by Penal Code section 1538.5, subdivision (m).

This appeal is from a final judgment following a plea of guilty and issuance of a certificate of probable cause, as prescribed by California Rules of Court, rule 8.304(b)(1) & (2). It is authorized by Penal Code section 1237.5.<sup>[6]</sup>

4. Juvenile law or family law appeal [§5.12]

The following statement is appropriate for an appeal after entry of the dispositional order in juvenile delinquency proceedings under Welfare and Institutions Code section 601 or 602:

This appeal is from a final judgment in proceedings under Welfare and Institutions Code section [601 or 602] and is authorized by Welfare and Institutions Code section 800.

This language may be used for a juvenile dependency case under Welfare and Institutions Code section 300:

This appeal is from [a judgment entered under Welfare and Institutions Code section 300][an order under Welfare and Institutions Code section

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<sup>6</sup>Note to counsel: A certificate of probable cause is required to raise an issue attacking the validity of the plea, or denial of a motion to withdraw the plea, or a stipulated sentence. (Pen. Code, § 1237.5; Cal. Rules of Court, rule 8.304(b); *People v. Panizzon* (1996) 13 Cal.4th 68, 76.) (See §2.43 and §2.105 et seq. of chapter 2, “First Things First: What Can Be Appealed and What It Takes To Get an Appeal Started.”)

(e.g., 366.21, 366.22, 388 – specify)] and is authorized by Welfare and Institutions Code section 395.

or

This appeal is from a judgment entered after a permanency planning hearing pursuant to Welfare and Institutions Code section 366.26 and is authorized by Welfare and Institutions Code sections 366.26, subdivision (l) and 395.

For proceedings under Family Code section 7802, the statement of appealability might read::

This appeal is from a judgment entered pursuant to Family Code section 7802 et seq. and is authorized by Family Code section 7894.

5. Appeal from civil commitment [§5.13]

The following statements may be used for an appeal from an involuntary civil commitment:

This appeal is from a final judgment in a Sexually Violent Predator proceeding under Welfare and Institutions Code section 6600 et seq. and is authorized by Code of Civil Procedure section 904.1.

This appeal is from [an extension of] a commitment under the Mentally Disordered Offender law pursuant to Penal Code section 2960 et seq. and is authorized by Code of Civil Procedure section 904.1.

This appeal is from a commitment under the LPS conservatorship law pursuant to Welfare and Institutions Code section 5300 et seq. and is authorized by section 5352.4 of that code.

This appeal is from an extended detention of a youthful offender pursuant to Welfare and Institutions Code section 1800 et seq. and is authorized by section 1803 of that code.

This appeal is from [an extension of] a commitment of a person found not guilty by reason of insanity under the Penal Code section 1026 et seq. and is

authorized by section 5352.4 of that code. (*People v. Coleman* (1978) 86 Cal.App.3d 746.)

6. Other [§5.14]

For other proceedings counsel should cite the order or judgment being appealed and the statutory or other authorization for the appeal.

F. Statement of the Case [§5.15]

Rule 8.204(a)(2)(A) of the California Rules of Court requires the brief to “state the nature of the action, relief sought in the trial court, and the judgment or order appealed from.” The purpose of this rule is to give the Court of Appeal a concise overview of the relevant trial court proceedings. Usually this would include, in chronological order: the charges,<sup>7</sup> relevant motions and rulings, the type of proceeding,<sup>8</sup> the verdict or other result, the judgment and sentence, and the date the notice of appeal was filed.

The statement should include only information relevant to the issues or necessary to give the appeal an intelligible setting. It should not quote or paraphrase pleadings or other documents extensively or offer excessive detail about dates and procedures not material to the issues. One page or less often suffices. If numerous charges and convictions are involved and the information is relevant to the appeal, a chart may be useful. The key is to offer the court procedural context and focus.

Factual matters mentioned in the statement of the case (and elsewhere) must be supported by citation to the record – usually to the clerk’s transcript in this section of the brief. The citation must include the volume if applicable and the exact page where each matter can be found. (Cal. Rules of Court, rule 8.204(a)(1)(C).)

Citations in a given paragraph need not follow every sentence or individual bit of information, if they are all to the same page of the transcript. But they must be provided at least at the conclusion of each paragraph and be sufficiently frequent to pinpoint for the

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<sup>7</sup>Normally the charges mentioned in the statement of the case would be those in the last accusatory pleading (information or indictment). It is unnecessary to mention earlier versions of the pleading superseded by amendment, unless they are relevant to the issues in the case.

<sup>8</sup>E.g., jury or court trial, guilty plea, probation revocation, Welfare and Institutions Code section 602 or 6600 proceeding.

reader precisely where the information can be located. It is unhelpful and improper to offer a long narrative followed by a sweeping citation – e.g., “II C.T. pp. 2-135.”

G. Statement of Facts [§5.16]

This statement summarizes the facts of the underlying offenses. It is required by California Rules of Court, rule 8.204(a)(2)(C), which provides the opening brief must include “a summary of the significant facts limited to matters in the record.” The facts must be supported by citation to the record, including the volume if applicable and exact page where the particular fact can be found. (Rule 8.204(a)(1)(C); see *Metzenbaum v. Metzenbaum* (1950) 96 Cal.App.2d 197, 199.) Generally, in the statement of the facts, citations will be to the reporter’s transcript.<sup>9</sup>

As the rule indicates, the presentation should be “summary” and include “significant” facts. A tedious recitation of every detail found in the transcripts, whether material or not, is boring and distracting. More specific detail can always be set forth in particular argument sections, where facts will be fresh in the reader’s mind and the relevance of the information will be evident. However, the exposition of the facts should provide sufficient information for the court to understand why the defendant was convicted and to assess the issues in light of the whole case. Thus a careful balance must be reached.

The overall goal in presenting the facts is to start the job of persuading the court to reach the desired result. The facts offer a chance to tell a coherent story, to humanize the client, to set forth the basis for the legal arguments, and to build both counsel’s and the client’s credibility. The following guidelines help achieve these goals.

1. State the facts in the light most favorable to the judgment [§5.17]

This imperative among imperatives for an appeal after a trial<sup>10</sup> has several components:

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<sup>9</sup>If the appeal follows a guilty plea, the facts may be gleaned from the preliminary hearing transcript, the defendant’s statements in court, the probation report, and other sources. Counsel should be aware that all details in such sources are not necessarily official “facts” and should take care to note this in the brief when the sources cited contain potentially prejudicial information not admitted by the plea.

<sup>10</sup>Different rules may apply when there has been no resolution of the underlying facts – for example, a judgment on a demurrer, summary judgment in a civil case, etc.

- The statement should present as “fact” whatever the trier of fact found to be true, as necessarily implied by the verdict or other findings. (In a typical defendant’s appeal, the “facts” would be the evidence supporting the prosecution’s case.)
- The statement should not omit any material evidence supporting the judgment, even if – indeed, *especially* if – it is unfavorable to the client.
- Evidence presented by the losing party and presumably rejected by the trier of fact should be separated from the “facts” and expressly labeled as such. (In a typical defendant’s appeal, the statement of facts would include a separate section labeled “defense.”)

(See Appellate Court Committee, San Diego County Bar Association, California Appellate Practice Handbook (7th ed. 2001) §§ 6.31-6.39, pp. 203-204.)

By no means do any of these principles require that evidence inconsistent with the judgment (e.g., evidence impeaching the prosecution witnesses) be ignored altogether. It is often important to describe evidence inconsistent with the verdict in order to set the stage for arguing error (such as failure to instruct on a certain defense) or for demonstrating prejudice. Further, omission of facts favorable to the client is usually poor advocacy. The goal is not to induce the court to despise and reject the client, but rather quite the opposite: the facts should deftly draw the court into seeing the case from the client’s point of view, so that it will be receptive to the client’s contentions and the need for relief. A skillful presentation honestly renders the facts in a way even the opposing party would agree is fair, while guiding the court to accept the client’s position on the issues.

2. Do not inject opinion into the statement of facts [§5.18]

The statement should have only “facts.” It should not contain argument or judgments about the facts. For example, this section is not the place to express the explicit opinion that a certain witness was “thoroughly impeached” or a scientific test was “unreliable.”

Nevertheless, it is proper and indeed usually advisable to state objectively evidence that might suggest such a conclusion:

The eyewitness observed the defendant from more than 200 feet away at 11:00 p.m. in an unlighted alley. (II R.T. pp. 280-281.) She was not wearing her glasses to assist her 20:400 vision. (II R.T. p. 285.)

The accident reconstruction expert used a homemade device, fashioned from roller skates and never subjected to clinical testing, to conclude the defendant's car was going at speeds in excess of 100 m.p.h. (II R.T. pp. 455-456, 470.)

But the facts should be stated, as just illustrated, in the neutral tone of a reporter, not the opinionated voice of an editorial writer (or advocate). The argument section of the brief is the place to urge the conclusions to be reached from these facts. (See Appellate Court Committee, San Diego County Bar Association, California Appellate Practice Handbook (7th ed. 2001) § 6.38, p. 203.)

3. Tell a short, readable story; do not simply repeat the testimony  
[§5.19]

The statement of facts should tell a story – normally, a chronological narrative of the material events constituting and surrounding the underlying offense. It should strive to capture the interest and concern of the reader. An encyclopedic witness-by-witness recapitulation of the testimony (rather like a deposition summary) is rarely helpful to understanding the case and is almost never engaging or persuasive. A series of paragraphs starting “Witness A testified that . . .” and “Witness B testified that . . .” is usually a tip-off that the statement has rendered the facts mechanically, rather than thoughtfully.<sup>11</sup> (Appellate Court Committee, San Diego County Bar Association, California Appellate Practice Handbook (7th ed. 2001) § 6.35, p. 202.)

The statement should be as short as possible, including only information that has some bearing on the outcome of the appeal or that is necessary to understanding the context of the facts and issues. If the nature of the case demands a lengthier statement, descriptive subheadings can be useful. For example, subheadings can segregate evidence involving multiple incidents (“February 5 robbery at Vons”; March 1 robbery at Mobil station”).

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<sup>11</sup>Occasionally it is necessary to highlight who said what – e.g., “witness A said the robber was tall and skinny; witness B was quite certain he was short and stout.”

4. Be meticulously accurate [§5.20]

Nothing destroys counsel's and, derivatively, the client's credibility more than an inaccurate presentation of the facts or inaccurate (or missing) citations to the record. This is especially true, of course, of material facts; but inaccuracy on even collateral details will erode and ultimately undercut the effort to persuade. Inaccuracy includes relevant and misleading omissions, as well as affirmative misstatements. (See §5.84 et seq., *post*, on credibility and accuracy as one of the essentials of persuasiveness.)

5. Respect privacy of participants [§5.21]

Briefs should be sensitive to privacy interests in identifying persons, whether on the cover, in headings, or in the text. Victims of sex crimes and parties involved in juvenile court or other confidential proceedings generally should be kept anonymous – e.g., “Susan T.,” “the complaining witness,” “the child,” etc. (See California Style Manual (4th ed. 2000) §§ 5.9, 5.10.)

H. Argument: Preliminaries [§5.22]

Before it is possible to begin the legal analysis, thought must be given to how the arguments will be set up and organized.

1. Order of arguments [§5.23]

The order in which the arguments are arranged can be a fairly significant strategic decision. A common rule of thumb is that the strongest issues should go first. It is indeed poor tactics to start off a brief on the wrong foot with a flabby, marginal issue. The court is likely to think, “This is probably the best they’ve got; the case must be a loser.”

However, leading off with an issue of very narrow scope, even if the strongest in terms of likely success, can diminish the stature of later, much broader arguments. In criminal cases, for example, issues concerning trial would normally precede sentencing issues because the former tend to be perceived as the “bigger” ones. An argument urging the sentence must be reduced from 35-to-life to 34-to-life may be a “slam dunk,” but putting it in a lead-off position tends to relegate to second-class status an attack on the defendant's confession that formed the basis for the whole conviction.

A broadest-to-narrowest arrangement of groups of issues, with the stronger points first within each group, is often a good solution. (Appellate Court Committee, San Diego County Bar Association, California Appellate Practice Handbook (7th ed. 2001), p. 206.)

## 2. Headings [§5.24]

Argument headings are required by rule. A brief must “state each point under a separate heading or subheading summarizing the point . . .” (Cal. Rules of Court, rule 8.204(a)(1)(B).)<sup>12</sup> To comply with this requirement, the heading must be a complete sentence, not just a label.

Minimal compliance with rule requirements is a bare beginning, not an end. Much more, the heading is a tool of advocacy that should communicate the client’s position to the court instantly, concisely, and compellingly. The goal is that court upon reading the heading will think, at least tentatively: “That sounds like a really good point. I wonder how the respondent will ever answer it.”

To be persuasive, the heading should be specific, not just general and conclusory, and should succinctly explain the underlying rationale of the argument. (A “because” clause is often helpful in achieving this goal.) For example, a heading for a contention concerning the admissibility of a confession because of an alleged *Miranda*<sup>13</sup> violation could variously be worded:

- *Label (unacceptable)*: “Inadmissible Confession.”
- *General and conclusory (unpersuasive)*: “The Confession Was Inadmissible.”
- *Specific and explanatory (begins the job of persuasion)*: “The Confession Was Inadmissible Because Elicited by Continued Questioning After Defendant Unequivocally Invoked His Right to Silence.”

Insufficiency of the evidence to support a robbery conviction might be described in these ways:

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<sup>12</sup>The court may disregard a point not mentioned in a heading or subheading. (*People v. Schnabel* (2007) 150 Cal.App.4th 83, 84, fn. 1.)

<sup>13</sup>*Miranda v. Arizona* (1966) 384 U.S. 436.

- *Label (unacceptable):* “Insufficient Evidence.”
- *General and conclusory (unpersuasive):* “The Evidence of Robbery Was Insufficient.”
- *Specific and explanatory (begins the job of persuasion):* “The Evidence of Robbery Was Insufficient Because the Victim Admitted She Was Never Subjected to Any Intimidation, Force, or Threat of Force.”

Subheadings are helpful, particularly if the argument is complex, but should not be overused to the extent they visually clutter the brief or distract the reader by accentuating the organizational scheme instead of the substance.<sup>14</sup>

### 3. Defining the issue at the outset [§5.25]

In the text of the argument, the contention and desired result should come first. The appellate court wants to know up front what the trial court allegedly did wrong, what legal theory supports that allegation, and what conclusion to draw from the errors. This sets up the conceptual framework for assimilating the facts and law. Sometimes the argument heading is sufficient for this purpose, but with more complicated issues an expanded explanation of several sentences (or, very rarely, paragraphs) is usually needed.

### 4. Setting the procedural and factual context of the issue before reviewing the applicable law in depth [§5.26]

This point is critical – and often not observed: *The argument should never dive into an abstract legal discussion without first relating it to the facts of the case.* The Court of Appeal wants to know right away whether the issue was raised below, how the trial court ruled on it, and what reasons the trial court gave. It also wants to know the facts that gave rise to the contention.<sup>15</sup>

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<sup>14</sup>As a matter of good style, no subheading should stand alone. If there is an “A,” for example, there should also be a “B”; a “1” requires a “2,” etc.

<sup>15</sup>The facts related to a given issue are not necessarily stated in the light most favorable to the judgment in the argument section. For example, if an issue is failure to instruct on self-defense, the evidence supporting self-defense should be described as if it were true: the appellate court need not defer to the jury as trier of fact when the jury has never had a chance to consider the matter.

The court is exceedingly busy deciding real cases and is unlikely to be receptive to anything it perceives as extended academic discourse. Indeed, the court may well lose interest altogether and turn to the respondent's brief to find out what the case is really about. Needless to say, having the court learn about one's own issues from the opposing party is a disaster of high order in the effort to persuade.

5. Addressing questions of potential waiver or forfeiture [§5.27]

The Court of Appeal always wants to know how the issue was dealt with in the trial court. One reason is to assure itself the issue has properly been preserved for review on appeal. Failure to make a proper objection or otherwise raise an issue in the trial court often means it is waived, or forfeited,<sup>16</sup> for purposes of appellate review.<sup>17</sup> If there is any fairly obvious question of waiver, the opening brief should address the problem forthrightly. Experience shows an opponent is quick to notice and raise waiver issues.

A number of strategies may be used to overcome potential waiver obstacles:

- The opening brief may contend that no objection was *necessary*, because the error was jurisdictional, obvious, or fundamental or involved purely legal issues or a sua sponte duty. (E.g., Pen. Code, § 1259, *People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10,<sup>18</sup> *People v. Hernandez* (1991) 231 Cal.App.3d 1376, 1383 [errors in instructions given can be raised without objection if they affect substantial rights]; *In re Ricky H.* (1981) 30 Cal.3d

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<sup>16</sup>Technically, “waiver” refers to an explicit and intentional relinquishment of a right, while “forfeiture” refers to loss of entitlement to raise an issue on appeal because of failure to follow procedures required to preserve it. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.) The distinction is largely ignored in briefing and opinions; “waiver” is most commonly used for both meanings. For the most part this manual likewise uses “waiver” for both meanings.

<sup>17</sup>Many issues are waived if the defendant entered a guilty plea or admission. (See §2.19 and §2.123, appendix, of chapter 2, “First Things First: What Can Be Appealed and What It Takes To Get an Appeal Started.”)

<sup>18</sup>Overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484.

176, 191 [unauthorized sentence may be corrected at any time];<sup>19</sup> *Sime v. Malouf* (1949) 95 Cal.App.2d 82, 115-117.)

- The brief can urge that an objection adequate to preserve the issue *was* made, even though not exactly in the same form as on appeal, because it gave the trial court a fair opportunity to rule on the essence of the matter and gave the opponent an adequate chance to present argument and evidence on it. (E.g., *People v. Partida* (2005) 37 Cal.4th 428, 431, 435 [objection under Evid. Code, § 352 adequately apprises trial court of argument that admission of evidence would have legal consequence of violating federal due process and so preserves due process issue for appeal];<sup>20</sup> *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907.)
- The brief can urge the Court of Appeal to overlook the default in the interests of fundamental *due process*. (E.g., *People v. Barber* (2002) 102 Cal.App.4th 145, 150; *People v. Allen* (1974) 41 Cal.App.3d 196, 201, fn.1; *People v. Norwood* (1972) 26 Cal.App.3d 148, 152-153.)

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<sup>19</sup>Cf. *People v. Welch* (1993) 5 Cal.4th 228, 235 (impermissible probation condition not “unauthorized sentence” for this purpose and requires objection).

<sup>20</sup>*Partida*’s rationale is rather abstruse. It distinguishes the question whether the trial court committed error for reasons other than those stated in the trial objection from the question whether the alleged error in overruling the objection violated due process. Counsel should frame the issue as exactly as possible in the terms used in the opinion, in order to distinguish earlier, closely similar cases, which *Partida* apparently does not disagree with, such as:

- *People v. Rowland* (1992) 4 Cal.4th 238, 273, fn. 14: “Defendant claims that by denying his motion, the court committed error not only under Evidence Code section 352, but also under the United States Constitution including the due process clause of the Fourteenth Amendment. He failed to make an argument below based on any federal constitutional provision. Hence, he may not raise such an argument here.”
- *Duncan v. Henry* (1995) 513 U.S. 364, 366: “The California Court of Appeal analyzed the evidentiary error by asking whether its prejudicial effect outweighed its probative value, not whether it was so inflammatory as to prevent a fair trial. . . . [T]hose standards are no more than ‘somewhat similar,’ not ‘virtually identical.’ . . . [M]ere similarity of claims is insufficient to exhaust.”

- It may argue an objection would have been *futile*, given the state of the law at the time or the trial court’s previous rulings. (*People v. Turner* (1990) 50 Cal.3d 668, 703 [pertinent law changed so unforeseeably after trial it is unreasonable to expect defendant to have made anticipatory objection]; *People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567 [futile to object to multiple incidents of judicial misconduct].)
- If the case is a potential vehicle for a newly announced objection requirement, the brief may argue it would be *unfair* to hold the defendant to it. (*People v. Welch* (1993) 5 Cal.4th 228, 237-238 [requirement of objection to probation condition not retroactive; unfair to hold defendant to standards not in existence at time of sentencing].)
- The issue might be raised via ineffective assistance of counsel, arguing on appeal or in a habeas corpus petition that the attorney either could not conceivably have had a reasonable tactical purpose for failing to object or did not in fact have such a purpose. (E.g., *In re Rocha* (2005) 135 Cal.App.4th 252; *People v. Burnett* (1999) 71 Cal.App.4th 151; see *People v. Mitchell* (2008) 164 Cal.App.4th 442 [such an argument must be developed properly, explaining how counsel’s failure fell below an objective standard of reasonableness and resulted in prejudice].)<sup>21</sup>

If one or more of these arguments or some equivalent cannot credibly be made, counsel should seriously question whether the issue should be raised at all.

## 6. Identifying the standard(s) of review [§5.28]

To assess the arguments the reviewing court needs to know the degree of deference it must give to the trial court’s findings. At some point in the argument, therefore – usually fairly early – the relevant standard or standards of review must be established. This part of the argument may discuss, as well, which party has the burden

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<sup>21</sup>It is rarely proper to raise ineffective assistance of counsel as an issue on appeal, as opposed to habeas corpus. The issue should not be raised in an appellate brief except in the unusual circumstance where (a) there are no conceivable tactical reasons for counsel’s actions or (b) the record affirmatively shows that trial counsel in fact did not have valid reasons for the actions. In most cases, establishing ineffective assistance of counsel depends on facts outside the appellate record and thus requires habeas corpus. (See ADI newsletter at [http://www.adi-sandiego.com/newsletters/2004\\_july.pdf](http://www.adi-sandiego.com/newsletters/2004_july.pdf), pp. 2-3, and §8.1 of chapter 8, “Putting on the Writs: California Extraordinary Remedies.”)

of proving or disproving the error and how heavy that burden is. Unless the standard of review is in dispute, the discussion should be short. (See §4.45 et seq. of chapter 4, “On the Hunt: Issue Spotting and Selection,” for more detail on this topic.)

The most common standards of review are abuse of discretion, substantial evidence, and de novo. When an issue involves both factual and legal issues, a mixed standard may be applied.

a. Abuse of discretion [§5.29]

Under this standard, the reviewing court will not second-guess the trial court’s exercise of judgment unless no reasonable judge could have reached that result. (*People v. Williams* (1998) 17 Cal.4th 148, 162; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) This standard is applied to a wide range of decisions involving the conduct of the trial – severance or joinder, change of venue, admissibility of evidence, order of proceedings, continuances, sentencing, etc.<sup>22</sup>

The theory is that the trial court is in the best position to observe the proceedings, parties, jurors, witnesses, etc., and to make judgment calls about the steps needed to handle the case in an orderly way. In addition, a reviewing court’s routine substitution of its judgment for that of the trial court would undermine the trial court’s authority.

b. Substantial evidence [§5.30]

The “substantial evidence” standard is similar to “abuse of discretion” in the degree of deference, but is applied to factual findings rather than the exercise of judgment. Under this standard, the reviewing court will not disturb the findings of the trier of fact unless the findings are not supported by substantial evidence – which means no reasonable trier could have made those findings under the applicable burden of proof. (*Jackson v. Virginia* (1979) 443 U.S. 307; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) For example, in a criminal case the Court of Appeal will not reverse a jury verdict of guilty for insufficient evidence unless no reasonable jury could have found guilt beyond a reasonable doubt. It will not disturb a trial court’s finding of *fact* on a search

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<sup>22</sup>A decision by a trial court based on an error of law is an abuse of discretion. (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737,746.)

and seizure issue unless no reasonable judge could have made that finding by a preponderance of the evidence. (*People v. Lawler* (1978) 9 Cal.3d 156, 160.)<sup>23</sup>

The theory is that the jury or trial court is in the best position to observe the demeanor of witnesses and can weigh evidence more accurately than can an appellate court looking at a cold record. A jury also brings into the courtroom community values and a collective common sense. To preserve the authority of the jury or trial court and ensure reasonable finality of their decisions, the system has given them the institutional role as primary trier of fact.

c. De novo review [§5.31]

The reviewing court does not defer at all to the lower court under the “de novo” standard, which applies most commonly to issues of pure law. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242-1243.) Examples might be the interpretation of a statute, the legal correctness of a jury instruction, the *reasonableness* of a search and seizure, or the constitutionality of a certain procedure.

The theory here is that a reviewing court is institutionally in a superior position to decide a question of law: its judges occupy higher office than trial judges and usually have more experience in the law; appellate decisions are collective; and the court’s fundamental processes are intrinsically deliberative. Further, the law is supposed to mean the same no matter where in the jurisdiction it is being applied; assigning trial judges the final say on the law, with only deferential review, would almost certainly fragment legal interpretation and introduce inconsistency and unpredictability into the system.

d. Mixed standard of review [§5.32]

If the issue has mixed questions of fact and law, the appellate court will apply the deferential “substantial evidence” standard to the factual questions and the de novo standard to the legal ones. An example is a search and seizure issue. What observations the officer made before conducting a search would be a factual question, and the reviewing court will defer to the trial court’s findings if they are reasonable, i.e., supported by substantial evidence. The question of whether the search was reasonable given these observations, on the other hand, is a legal one, to be reviewed de novo. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

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<sup>23</sup>The question whether the search or seizure was *reasonable* is one of law, not fact, and is governed by another standard. See §§5.31 and 5.32, *post*.

## I. Legal Analysis [§5.33]

Once the argument is introduced and its context is established as described above, the legal framework must be constructed. The principles and authorities governing the issue need to be set forth, and the law must be applied to the present case – the most important and often most difficult part of the argument.

Rule 8.204(a)(1)(B) of the California Rules of Court requires the brief to “support each point by argument and, if possible, by citation of authority.”<sup>24</sup> That requirement in itself is deceptively simple. As all experienced appellate lawyers recognize, good advocacy requires more than “some” argument and “some” citation of authority, even though that may satisfy the minimum requirements of the rules. The ultimate goal is to support each argument with the skillful use of legal reasoning and authority and to structure it so that it is logical, clear, concise, and persuasive. The following principles offer a guide to this often elusive goal.

### 1. Setting forth the law: analogy and analysis [§5.34]

It is important to take great care in the use of authorities. One of the most common and most serious mistakes is citing cases only to quote abstract legal principles recited in the opinion and failing to analyze their factual context, actual holding, or analogous relationship to the present case. While of course some cases stand primarily for a particular legal principle, many are important because they apply established principles to a particular set of facts. Whenever appropriate, counsel should use factually similar authorities: those are far more persuasive than mere quotations. This approach also helps avoid misinterpretations caused by taking statements in opinions out of context.

Persuasive explication of the law requires analysis, not just description. A series of paragraphs beginning, “In *People v. X*, the court held . . . ,” with no effort to explain *X*’s concrete relevance to the issue at hand, does not advance the argument very far or hold the audience’s attention very long. The Appellate Court Committee, San Diego

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<sup>24</sup>“Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion.’ (Citation.)” (*People v. Morse* (1993) 21 Cal.App.4th 259, 275; see also *People v. Stanley* (1995) 10 Cal.4th 764, 793 [if point not supported, court may treat it as waived]; *Jones v. Superior Court* (1994) 26 Cal.App.4th. 92, 99 [“Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived”]; *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1118.)

County Bar Association, California Appellate Practice Handbook (7th ed. 2001) section 6.54, page 208, observes:

You will rarely have an authority so completely on point that no discussion is necessary. You need to argue why Case A and Case B apply and suggest the conclusion you want, and why Case C does not suggest a contrary conclusion (i.e., why it can be distinguished). You will need to deal with general principles, public policies, rules, subtle variations of rules, and the reasons behind rules. In short, you will have to analyze the law and argue what it means or should mean in your case.

## 2. Purposes and policies behind the law [§5.35]

The purposes behind a rule of law are often critical to understanding its meaning. Judicial interpretations and legislative history may also need to be examined.

A requirement in a state statute may have had its genesis in the need to conform to federal constitutional requirements. A judicial gloss on a criminal statute may have originated because of the disparity between the penalties for the enumerated offense and another, similar one. A seemingly-clear phrase in a common-law test may have meant something very different when the test was first formulated.

(Rudman, *Effective Argumentation*, Appellate Advocacy College (2000), p. 13.)<sup>25</sup>

Various sources for statutory history are available.<sup>26</sup> The Judicial Council maintains a history showing the reasons behind the adoption, amendment, or repeal of a rule of the California Rules of Court.

## 3. Shakespeare versus ABC's [§5.36]

Assessing the extent of legal information individual justices will bring to the case and pitching the argument to an appropriate level of sophistication can be tricky. As Rudman says, “[I]t is a mistake to assume that the court knows the law.” (Rudman,

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<sup>25</sup><http://www.courtinfo.ca.gov/jc/comlists/documents/lecture11.pdf>.

<sup>26</sup> For example, the Legislature has a website, <http://www.leginfo.ca.gov/index.html>. The California State Archives can be reached at (916) 653-2246.

Effective Argumentation, Appellate Advocacy College (2000) at p. 9.)<sup>27</sup> That rather irreverent observation reflects the reality that justices tend to be generalists rather than specialists, particularly on esoteric points of law. And new justices with a background primarily in civil law need more introduction to fundamental principles of criminal law than seasoned appellate jurists.

On the other hand, it can be numbing and even mildly insulting to start at too elementary a level – for example, expounding at length on the holding of *Miranda*<sup>28</sup> or the applicability of the exclusionary rule to evidence seized in violation of the Fourth Amendment. Common sense and some familiarity with the background of the court will be the best guides. Rudman suggests:

[A] paragraph or two at most should suffice to state elementary principles of criminal or constitutional law. . . . More or less explication may be necessary, depending on the familiarity of the court with the general issue. E.g., an “open fields” issue may require more discussion of legal background than a “stop and frisk” issue, a *Massiah* issue more than a *Miranda* issue.

(Rudman, Effective Argumentation, Appellate Advocacy College (2000) at p. 9.)<sup>29</sup>

#### 4. Adverse law and significant counter-arguments [§5.37]

For both ethical and credibility reasons, counsel must advise the court of binding adverse authority. It is futile and extremely counterproductive to try to hide such law. The authority needs to be confronted and either distinguished or challenged as wrong. Even if the authority is not strictly binding but is almost sure to be highly persuasive – as with direct Court of Appeal precedents or strong dicta from the California or United States Supreme Court – the brief should almost always acknowledge it.

Consideration should also be given to citing prominent decisions from a federal court of appeals (especially the geographically local court – in California, the Ninth Circuit) or an exceptionally well-known decision from another state. Citing such

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<sup>27</sup><http://www.courtinfo.ca.gov/jc/comlists/documents/lecture11.pdf>.

<sup>28</sup>*Miranda v. Arizona* (1966) 384 U.S. 436.

<sup>29</sup><http://www.courtinfo.ca.gov/jc/comlists/documents/lecture11.pdf>.

authority lends credence to the brief and offers the opportunity to blunt the impact of the adverse law before the opponent has a chance to exploit it.

For the same reasons, it is usually a good idea to discuss up front fairly obvious points almost surely to be raised by opposing counsel or discerned by the court, rather than saving rebuttal for the reply brief. Otherwise, the court will be left at the end of the opening brief with an almost inescapable question: “But what about . . . ?” Such a question subverts the goal of having the court finish the opening brief at least tentatively persuaded on the merits. Waiting for the reply brief also runs the all-too-frequent risk that the respondent will miss the counter-argument but the court will not. That means the rebuttal may be presented for the first time at a highly disadvantageous stage (a petition for rehearing) and may be held to have been forfeited altogether.

On the other hand, as the probability decreases that a particular non-binding authority or counter-argument will be used, counsel confronts contrary strategic considerations. It may not be a good idea to invite attention to a potential weakness that may never otherwise be perceived or to create a series of “straw men” merely for the purpose of rebutting them. It is weak advocacy to structure an argument around a series of points beginning, “The respondent may contend that . . . .” Counsel must weigh the relative advantages of raising the point spontaneously versus keeping the focus on the strongest and most obvious issues until and unless counsel’s hand is forced.

## 5. Use of quotations [§5.38]

Quotations are most effective (a) when they are used to deliver special dramatic impact or (b) when they are needed to set out exact language.

If used for the first purpose (rhetorical effect), quotations *must* be kept concise. Lengthy blocks of quotations not only fail to impress, but also stupefy and inevitably issue a loud invitation, certain to be heeded: “Please ignore me.”

If the precise language is at issue, however, as when a statute or jury instruction is being analyzed, full quotation, not just paraphrase, is essential. A brief must be adequate within its own two covers in order to persuade. Forcing the reader to look up something critical in an external source just to understand the argument is annoying, distracting, and potentially dangerous: in the process the brief loses its audience, perhaps permanently. If the quotation is long, the key passage can be emphasized or quoted by itself in the main body, with the full context in a footnote.

## J. Prejudice [§5.39]

An important and often decisive part of the argument is showing the court how the error affected the outcome of the case to the client's detriment. The most compelling demonstration of error will mean nothing if the respondent persuades the court the error had no effect on the case. Indeed, a showing of prejudice is required by California Constitution, article VI, section 13, Penal Code sections 1258 and 1404, and Evidence Code sections 353 and 354. (See also Code Civ. Proc., § 475.) §4.50 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection," deals at length with issues of prejudice.

### 1. Standards [§5.40]

There are three principal standards by which error is assessed:

- reversal per se – the relatively rare standard used for “structural” error that affects the basic integrity of the proceedings;<sup>30</sup>
- reversal unless the record demonstrates the error harmless beyond a reasonable doubt – *Chapman* error,<sup>31</sup> the standard for most federal constitutional errors; and
- reversal only if the record demonstrates a reasonable probability that but for the error the result would have more favorable for the defendant – *Watson* error,<sup>32</sup> the standard for most errors of state law.

These are not rigid categories allowing for easy pigeonholing of all errors. Their source (e.g. federal Constitution, state law) is one factor. Others include how fundamental or absolute a right or procedure is, and how difficult and speculative the job of assessing prejudice is.

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<sup>30</sup>See *Sullivan v. Louisiana* (1993) 508 U.S. 275; see §4.51 of chapter 4, “On the Hunt: Issue Spotting and Selection.”

<sup>31</sup>*Chapman v. California* (1967) 386 U.S. 18; see §4.52 of chapter 4, “On the Hunt: Issue Spotting and Selection.”

<sup>32</sup>*People v. Watson* (1956) 46 Cal.2d 818; see §4.53 of chapter 4, “On the Hunt: Issue Spotting and Selection.” “[P]robability’ in this context does not mean more likely than not, but merely *a reasonable chance*, more than an *abstract possibility*.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics original.)

Some areas of the law, such as ineffective assistance of counsel, prosecutorial failure to disclose favorable defense evidence, and conflicts of interest on defense counsel's part, use specialized "boutique" standards of prejudice. (See §4.54 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection.")

2. Establishing prejudice in the case [§5.41]

Prejudice can be established in a number of ways. Some kinds of error inherently carry a high probability of prejudice, such as confessions, comments by judges or prosecutors, and evidence of other crimes or gang affiliation. Sometimes the error may be prejudicial because it was exploited or given special prominence by the prosecutor during argument. The error may have directly affected the key issue in the case. The jury may have asked for rereading of testimony or asked questions related to the area of the error. The fact the case was close factually, or the jury deliberated a long time, or the verdict occurred in close proximity to the error may be used to establish prejudice.

§4.50 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection," deals at length with issues of prejudice.

K. Federalization [§5.42]

It can be important to "federalize" an issue where appropriate – that is, show the applicability of federal law (usually, the federal Constitution). Doing so gives the client the opportunity to present the claim in federal court by certiorari or habeas corpus. (See *Duncan v. Louisiana* (1955) 513 U.S. 364, 365-366; see also 28 U.S.C. § 2254(b)(1)(A) [a state petitioner must exhaust all available state remedies before seeking federal habeas corpus relief].) Exhaustion of state remedies is treated more extensively in §9.66 et seq. of chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus."

1. Issues that might be federalized [§5.43]

Many issues directly implicate federal law, such as self-incrimination, cruel and unusual punishment, and double jeopardy. Other federal issues may be less obvious. For example, the clear misapplication of state constitutional, statutory, or case law may constitute a deprivation of federal due process or equal protection. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347 [state sentencing statute created liberty interest in right to jury sentencing]; see *Toney v. Gammon* (8th Cir. 1996) 79 F.3d 693, 699-700 [defendant had federal due process liberty interest in being sentenced under correct interpretation of state statute, which required trial court to exercise discretion]; *Walker v. Deeds* (9th Cir. 1995) 50 F.3d 670, 673 [liberty interest in application of state statute requiring trial court

to make individualized determination as to whether defendant is habitual offender]; *Rust v. Hopkins* (8th Cir. 1993) 984 F.2d 1486, 1493 [liberty interest in having sentencing authority apply statutorily prescribed standards and procedures]; *Willeford v. Estelle* (5th Cir. 1981) 637 F.2d 271, 272 [liberty interest in having trial judge exercise statutorily prescribed sentencing discretion].)<sup>33</sup>

Accordingly, counsel should consider federalizing such issues as insufficiency of the evidence (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319), sentencing violations, cumulative error (*People v. Woods* (2006) 146 Cal.App.4th 106, 113, 117-118), and any trial error or instructional error that “so infused the trial with unfairness as to deny due process of law” (*Estelle v. McGuire* (1991) 502 U.S. 62, 75).

## 2. Method of federalizing an issue in the brief [§5.44]

As explained more fully in §9.71 et seq. of chapter 9, “The Courthouse Across the Street: Federal Habeas Corpus,” although federalizing an issue need not be time-consuming or elaborate, the issue needs to be sufficiently highlighted and well developed to give the state court notice it is being raised as a separate ground for relief. For this purpose it is important to:

- State the federal claim in a *heading or subheading* of the argument and not bury it in the text.<sup>34</sup> (See Cal. Rules of Court, rule 8.204(a)(1)(B).)
- Set forth the specific *factual* bases for the federal claim. (*Kelly v. Small* (9th Cir. 2002) 315 F.3d 1063, 1069.)
- Cite the specific federal legal *authority* for the claim, including the federal constitutional provisions relied on and any leading cases, especially those of

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<sup>33</sup>Cf. *Rivera v. Illinois* (2009) \_\_\_ U.S. \_\_\_ [129 S.Ct. 1446] (good faith error by trial court in denying defendant’s peremptory challenge to a juror is not federal constitutional error).

<sup>34</sup>The state court may disregard a point not mentioned in a heading or subheading (*People v. Schnabel* (2007) 150 Cal.App.4th 83, 84, fn. 1), thus running the risk the federal court will find procedural default.

the United States Supreme Court.<sup>35</sup> (*Gray v. Netherland* (1996) 518 U.S. 152, 162-163.)

- Present *argument* (not a bare, conclusory claim), articulating a legal theory for why the facts violated the constitutional provision. (*Castillo v. McFadden* (9th Cir. 2004) 399 F.3d 993, 1002.)

### 3. Follow-through needed to exhaust state remedies [§5.45]

Exhaustion of state remedies requires a petition for review to the California Supreme Court. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838.) The petition must raise the federal issue sufficiently prominently to put the court on notice of its presence in the case. (*Baldwin v. Reese* (2004) 541 U.S. 27, 30-32; *Gray v. Netherland* (1996) 518 U.S. 152, 162-163; *Anderson v. Harless* (1982) 459 U.S. 4, 7; *Shumway v. Payne* (9th Cir. 2000) 223 F.3d 982, 987; *Hiivala v. Wood* (9th Cir. 1999) 195 F.3d 1098, 1106.) See §9.76 of chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus," for more detail.

Rule 8.508 of the California Rules of Court allows an abbreviated petition for review when the primary intention is to exhaust state remedies and the case does not present grounds for plenary review by the California Supreme Court within the terms of rule 8.500(b) of the California Rules of Court.<sup>36</sup>

If the Court of Appeal omits an issue in its opinion, the Supreme Court normally will decline to review it unless the omission is called to attention of the Court of Appeal in a petition for rehearing. (Cal. Rules of Court, rule 8.500(c)(2).) To avoid possible procedural default, it is therefore advisable to file a petition for rehearing.<sup>37</sup>

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<sup>35</sup>If the United States Supreme Court has already granted certiorari to consider a related constitutional issue, the brief should cite the pending case, the applicable parts of the United States Constitution, and relevant United States Supreme Court precedents.

<sup>36</sup>The ADI website gives guidance on preparing a rule 8.508 petition for review. [http://www.adi-sandiego.com/PDFs/exhaustion\\_petitions.pdf](http://www.adi-sandiego.com/PDFs/exhaustion_petitions.pdf).

<sup>37</sup>Attorneys Clifford Gardner and Richard Neuhaus raise contrary considerations at <http://www.cadc.net/News/read.asp?newsID=40> on the California Appellate Defense Counsel website. ADI continues to adhere to the position stated here. We have researched this issue extensively and prepared an analysis, which is available to attorneys on request, so that they can make an informed decision.

L. Conclusion to the Brief [§5.46]

The concluding section of the brief may concisely summarize the contentions, unless that would be unduly repetitive of the arguments or argument headings. Argument summaries in the conclusion are often valuable in complex issues or cases with multiple issues. The conclusion can offer an excellent opportunity to demonstrate the relationship among the arguments and the way they interact to present a compelling case for relief. It is also a good place to remind the court of any “theme” developed through the brief and to argue its implications for the result being urged.

The conclusion should state the exact relief sought for each contention. For example, a multiple-part conclusion might state:

For the reasons given in argument I, the evidence was insufficient to support defendant’s conviction of simple kidnaping in count one. The conviction on that count must be reversed and remanded with directions to dismiss the charge without leave to refile.

For the reasons given in argument II, the trial court erred in failing to instruct on the lesser included offense of simple possession of cocaine as to counts two and four. The convictions on those counts must be reversed for a new trial.

For the reasons given in argument III, the trial court relied on improper factors in imposing the upper term on count three, first degree robbery. The matter must be remanded for resentencing on that count.

M. Attachments [§5.47]

Rule 8.204(d) of the California Rules of Court states that “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.” This approach facilitates the appellate court’s review when such materials are important to the resolution of the issues. The combined attachments may not exceed 10 pages without leave of court. (*Ibid.*)

California Rules of Court, rule 8.1115(c) requires that any citable<sup>38</sup> unpublished opinion of the Court of Appeal and any opinion available only in a computer data base must be attached to the brief.

### III. RESPONDENT'S BRIEF [§5.48]

Although ordinarily criminal appellate defense attorneys represent appellants, occasionally counsel are called on to handle a People's appeal. (See Pen. Code, § 1238.) In such a situation, it will be necessary to file a respondent's brief.<sup>39</sup> Many of the principles for good brief writing discussed in the preceding treatment of the appellant's opening brief apply to the respondent's brief. This section addresses a few considerations especially applicable to a respondent's brief.

#### A. Importance [§5.49]

A respondent's brief is covered by rules 8.200(a)(2) and 8.360(c) of the California Rules of Court and is of supreme importance to the appellate process. It is important systemically: if no respondent's brief is filed, there may well be no defense of the lower court's judgment in the appellate court, and the adversary system on which the decision-making process is based will fail to perform its function.

It is obviously important to the respondent as a party, as well. The respondent's brief is usually that party's one and only chance to make a comprehensive written presentation to the appellate court. The brief responds to the appellant's contentions and offers an opportunity to show how the appellant's arguments are legally or logically flawed and why the authorities the appellant relies on do not compel a conclusion favorable to the appellant. It can call the court's attention to procedural and other formal

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<sup>38</sup>Rule 8.1115(b) lists the narrow and fairly rare occasions when it is appropriate to cite an unpublished California opinion. For further discussion of publication and citability, see §7.8 et seq. of chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision."

<sup>39</sup>In cases where there are cross-appeals by both the defendant and the People, unless the court orders otherwise the defendant files the first opening brief; the People file a combined appellant's opening brief and respondent's brief; then the defendant files a combined respondent's and reply brief; the People file a reply. (Cal. Rules of Court, rules 8.216(b), 8.360(e).) A combined brief must address the points in each appeal separately but provide a single summary of the facts. (Rule 8.216(b)(2).) Rule 8.40(b)(2) governs the cover color.

obstacles to resolution on the merits, such as waiver or forfeiture, invited error, res judicata, collateral estoppel, law of the case, non-appealability, or lack of standing. It can analyze the alleged errors in context and urge they caused no prejudice to the appellant. It can help the appellate court see the respondent's case through the eyes of the respondent, can take away the momentum established by the appellant's having had the stage alone during the opening brief, and can ultimately be used to persuade the appellate court the lower court was correct.

B. Formal Considerations [§5.50]

For the most part a respondent's brief should follow the general form for the appellant's opening brief, as detailed above. Rule 8.204(a)(1) of the California Rules of Court requires a table of contents, table of authorities, headings, argument supported by authority, and citations to the record. A statement of appealability is unnecessary. (See rule 8.204(a)(2).) The brief may adopt the statement of the case and facts in the appellant's brief, if they are satisfactory, but doing so may deprive the respondent of a chance to begin the job of persuasion right at the start of the brief. The rules as to form discussed in §5.68 et seq., *post*, apply to a respondent's brief.

C. Formulation of Issues [§5.51]

The respondent should answer the principal contentions by the appellant, but is not bound to agree to the way they are formulated. The respondent may restate the issues as the respondent sees them and may rearrange them, if necessary, to make a logical presentation.

1. Restating the appellant's contentions [§5.52]

The respondent of course will want to frame the issues in a way most likely to result in a favorable outcome to the respondent. If the appellant has overstated or otherwise incorrectly represented the law or facts and formulated the issues accordingly, the respondent must urge the court to view the case from a different perspective.

It is a dubious tactic, however, to recast the appellant's contentions in a form weaker than the appellant presented them and weaker than they really are and then to answer only the weaker version, hoping the court will uncritically accept the respondent's statement of what the appellant is contending. That approach leaves the respondent vulnerable, since the appellant (who has the last word in briefing) is likely to jump on the

failure to answer the real contention;<sup>40</sup> and even if the appellant overlooks the attempted transformation of the issues, the court likely will not.

Ideally counsel should state the opposing party's contention so skillfully even that party would say, "I wish I had said it that well" – and then refute it. (This does not mean, of course, that counsel for a criminal defendant in a respondent's role should bring up *new issues* on the prosecution's behalf.<sup>41</sup>)

## 2. Developing issues of procedural default [§5.53]

As noted above, matters such as waiver or forfeiture, invited error, lack of standing, estoppel, and other obstacles to resolution on the merits may prevent consideration of some issues the appellant has raised. Counsel for respondent should review each issue carefully for compliance with procedural prerequisites and point out problems in this area.

Doing so is not just opportunism or mean-spirited insistence on "technicalities." The procedural requirements serve a public policy. For example, rules of waiver and forfeiture exist to shield the trial process from endless repetitions because of failure to call a problem to the court's attention at a time when it can be cured on the spot. They also protect parties from being "sandbagged" and having to endure (and, sometimes, pay for) still another trial. (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468.) Rules on res judicata, collateral estoppel, and law of the case serve to preserve the stability of judgments and guard against the costs of repetitive litigation.

Usually it is advisable for the respondent's brief to address the issues on the merits, even if strong procedural default arguments are made. The court may disagree with the respondent on the question of default, and in that event as a matter of self-protection the respondent will want to have gotten its arguments and authorities on the merits before the court.

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<sup>40</sup>Indeed, failure to address the appellant's contention might even be seen as a concession. (*People v. Bouzas* (1991) 53 Cal.3d 467, 480.)

<sup>41</sup>The Attorney General has somewhat different obligations here, since a prosecutor has a special duty to promote the ends of justice. (*United States v. Augurs* (1976) 427 U.S. 97, 110-111; *In re Ferguson* (1971) 5 Cal.3d 525, 531; *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1378.)

D. Appellate Presumptions and Principles [§5.54]

Most presumptions and principles on appeal favor the respondent, and the respondent must be poised to take advantage of them. For example:

- Conflict and silence in the record are resolved in favor of the decision below. (*People v. Woods* (1999) 21 Cal.4th 668, 673; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.)
- An appellate court will presume the trial court had adequate reasons for a decision, unless the record affirmatively shows otherwise (or unless the law requires reasons to be stated explicitly). (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *People v. Golliver* (1990) 219 Cal.App.3d 1612, 1620.)
- The evidence is viewed in the light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)
- The trial court is presumed to know the law. (*People v. Braxton* (2004) 34 Cal.4th 798, 814; *People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; *In re Justin B.* (1999) 69 Cal.App.4th 879, 888; *People v. Torres* (1950) 98 Cal.App.2d 189, 192.)
- Under the “right result, wrong reason” principle, even if the court gave legally incorrect reasons for a decision such as admitting or excluding evidence, no error will be found if legally correct reasons would require the same result. (*People v. Smithey* (1999) 20 Cal.4th 936, 972; *People v. Zapien* (1993) 4 Cal.4th 929, 976; *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19.)
- The jury is presumed to have understood and followed the instructions if they are correct and consistent. (*People v. Delgado* (1993) 5 Cal.4th 312, 331; *People v. Rich* (1988) 45 Cal.3d 1036, 1090; cf. *Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9.)
- Judges, clerks, and court reporters are presumed to have performed their duty. (*People v. Wader* (1993) 5 Cal.4th 610, 661; *People v. Ward* (1953) 118 Cal.App.2d 604, 608; see Evid. Code, § 664.)

- For most kinds of error, the burden is on the appellant to show prejudice – that is, to prove the error actually affected the result. (*People v. Watson* (1956) 46 Cal.2d 818, 837.)<sup>42</sup>

A respondent should keep these advantages in mind and make skillful use of them when possible.

E. Primary Focus: Salient Points in the Case [§5.55]

The respondent’s brief should always keep in mind the likely response of the court to the conversation between the parties. What did the appellant say that is most likely to persuade the court? The respondent should focus on rebutting or neutralizing that. What are the weakest points in the appellant’s case? The respondent’s brief should prominently call them to the court’s attention and take maximum advantage of them. However, it is poor tactics to point out every trivial error in the appellant’s brief, because that can make the respondent look petty and bury the good points among the inconsequential.

F. Concessions [§5.56]

Occasionally it may be necessary to concede a particular point raised in the opening brief because the appellant has proved it conclusively. In a such a case, the respondent’s brief should do so forthrightly. It will enhance the credibility of the respondent’s entire case and make the arguments on the remaining issues all the more persuasive, because counsel will have shown the ability and willingness to exercise critical judgment in the course of advocacy.

G. Steadfast Professionalism [§5.57]

Sometimes an appellant will make absurd arguments or attack the respondent or even respondent’s counsel personally. It is vital respondent’s counsel not take the bait and answer in kind, but instead keep a professional tone. The court will note and appreciate the difference between the respondent’s professionalism in focusing on the merits and the appellant’s lack thereof.

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<sup>42</sup>See §5.39, *ante*, and §4.50 et seq. of chapter 4, “On the Hunt: Issue Spotting and Selection,” for further discussion of prejudice standards.

#### IV. APPELLANT'S REPLY BRIEF [§5.58]

The principal formal and practical purpose of a reply brief is to respond to the points and authorities raised in the respondent's brief. Reply briefs in criminal cases are permitted under rules 8.200(a)(3) and 8.360(a) of the California Rules of Court. They are due 20 days after the respondent's brief is filed (rule 8.360(c)(3)) and should follow the general principles and forms required for all briefs, as detailed in §5.1 et seq., *ante*, and §5.68 et seq., *post*.<sup>43</sup>

##### A. Importance [§5.59]

Attorneys in the ADI program are expected to file reply briefs in their cases unless strong justification appears for not doing so. It is the rare case indeed when the opening and respondent's briefs have so thoroughly covered the issues that nothing further could be said on behalf of the client. Further, a reply brief is an exceedingly important tool of advocacy that performs a number of critical strategic functions:

- The reply brief is a chance to answer the respondent's arguments and authorities.
- It offers an opportunity to counter procedural obstacles such as waiver or invited error and to rebut claims of harmless error.
- A reply brief can take account of new legal developments, arguments by the respondent not anticipated in the opening brief, and other "surprises."
- It can reshape, refine, or bolster arguments that are basically sound but were less than optimally stated in the opening brief. (But see §5.60, *post*, on not raising new issues.)

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<sup>43</sup>In cases where there are cross-appeals by both the defendant and the People, unless the court orders otherwise the defendant files the first opening brief; the People file a combined appellant's opening brief and respondent's brief; then the defendant files a combined respondent's and reply brief; the People file a reply. (Cal. Rules of Court, rules 8.216(b), 8.360(e).) A combined brief must address the points in each appeal separately but provide a single summary of the facts. (Rule 8.216(b)(2).) Rule 8.40(b)(2) governs the cover color.

- Filing a reply brief avoids the possibility the court might construe silence as an acknowledgment of weakness or an outright concession. (See *California Products, Inc. v. Mitchell* (1921) 52 Cal.App. 312, 315.) This is a special danger when the respondent has raised a point not anticipated in the opening brief.<sup>44</sup>
- Replying communicates confidence in the case. Conversely, failing to answer suggests discouragement and resignation to inevitable defeat.
- A reply brief can retake the psychological initiative temporarily seized by the respondent in its attack on the opening brief arguments and redirect the momentum in the appellant's favor. It can show why, despite the respondent's efforts to salvage the case, relief for the client is compelled.
- It is a chance to have the last word in written form and to leave a final impression on the court before it drafts an opinion. (Most if not all California appellate courts have draft opinions or bench memos reaching a tentative conclusion before oral argument.)

B. Restriction Against Raising New Issues [§5.60]

Although a reply brief may be used to beef up or reshape the approaches taken in the opening brief in light of the respondent's positions, it is not the place to raise truly new issues. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) It properly functions as an answer to the respondent's brief, not as a new opening brief.<sup>45</sup>

If the appellant wants to raise a genuinely new contention after filing the opening brief, the proper procedure is to submit a supplemental opening brief, along with a request to the presiding justice for permission to file it. (Cal. Rules of Court, rule 8.200(a)(4).) Simply inserting the new issue into the reply brief runs a high risk the court will refuse to consider it. By the time the court gets around to making that ruling, it may well be too late to file a supplemental opening brief; courts in exercising their discretion under rule

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<sup>44</sup>It is often advisable to add a disclaimer to a reply brief saying that failure to address a matter in the brief is not a concession, but rather a reflection of counsel's belief the subject has been covered adequately in the opening brief.

<sup>45</sup>One reason for this restriction is fairness to the respondent. The rules do not provide a chance to answer the reply brief. The respondent thus could be deprived of a chance to answer genuinely new issues raised for the first time in the reply brief.

8.200 tend not to be receptive to filings changing the basic contours of the appeal after most of the work is done. The issue will then be lost.<sup>46</sup>

C. Preparing a Reply Brief [§5.61]

A common first reaction to getting a respondent's brief is to feel daunted. Counsel for the appellant ideally had persuaded himself or herself in the opening brief that this is a strong case. Now the respondent is throwing cold water all over those compelling points and raising some objections counsel had not even considered. The natural temptation is to put the brief away and say, "I'll think about it tomorrow." This may suffice for an initial psychological defense mechanism, but the reply brief is due in 20 days, and so fairly soon it is time to reopen the respondent's brief and really think about it.

More often than not, appellant's counsel is pleasantly surprised. Those confident assertions by the respondent can actually be answered, the allegedly devastating cases are not so unequivocal as the respondent has painted them, and there really is a good case for showing the client was prejudiced by the errors at trial. At this point counsel can recapture the sense of being on the road to a likely win.

The whole focus of the reply brief should be to hammer home the message, "There is no way around it; relief is compelled." For maximum effectiveness, counsel should keep these key goals and concepts in mind:

1. Aim for conciseness [§5.62]

The reply brief should be concise and to the point. Although it may be useful to summarize the basic arguments in order to put the reply in context, there is no need to rehash the opening brief – indeed, doing so at length may prompt the court to stop reading the reply. The purpose is to rebut the respondent's positions and to explain succinctly the reasons the court needs to grant the relief requested, not to reargue the whole case from scratch.

Counsel is well advised to reread the opening and respondent's briefs together before writing the reply. The opening and respondent's briefs typically are filed several

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<sup>46</sup>There is an exception for briefing before the California Supreme Court. California Rules of Court, rule 8.520(d)(1) permits supplemental brief(s) "limited to new authorities, new legislation, or other matters that were not available in time to be included in the party's brief on the merits." The brief must be filed no later than 10 days before oral argument. (Rule 8.520(d)(2).)

months apart, and so the appellant's counsel needs a refresher when resuming work on the case at the reply brief stage. But the court has a different frame of reference: it will probably read all briefs at one sitting and so will find unnecessary repetition boring, even irritating. The reply will be more focused and effective if it just gets to the point.

2. Take tactical advantage of omissions in respondent's brief or attempts to water down the issues [§5.63]

It is a common tactic on the part of respondents to ignore a position difficult to refute or convert it into something much weaker. The reply brief can take advantage of such tactics by noting the respondent's failure to refute the real argument and insisting that the issues be defined, debated, and decided in the way the appellant has framed them.

3. Follow commonsense rules for answering the opponent's points [§5.64]

Many of the principles discussed in §5.48 et seq., *ante*, for respondent's briefs apply as well to reply briefs. Counsel should focus on countering the strongest points made by the respondent and calling attention to the areas of weakness. The reply should not pounce on immaterial petty errors in the respondent's brief. If necessary, it should forthrightly concede when the respondent has proved conclusively that a point raised in the opening brief is invalid; this will enhance the credibility of the appellant's entire case and make the arguments on the remaining issues all the more persuasive.

If the respondent's attorney has adopted a dismissive, scornful, and disrespectful tone, the reply brief should not answer in kind. Counsel need not be worried that the court will be impressed by the respondent's interjections of "nonsense," "balderdash," "hogwash," and other efforts to substitute name-calling for analysis; to the contrary, the appellant's professionalism will stand in prominent contrast to the respondent's display of the opposite.

V. RESEARCH AND CITATIONS [§5.65]

A. Citation Form [§5.66]

The Court of Appeal uses the system of citation adopted by the California Reporter of Decisions and based on the California Style Manual (4th ed. 2000). Because use of

another system, such as the Harvard “Bluebook,”<sup>47</sup> potentially distracts the court’s attention from the substance of an argument to the form, ADI recommends the Style Manual system. Likewise, the Judicial Council Appellate Advisory Committee’s comment to California Rules of Court, rule 8.204(b) states: “Brief writers are encouraged to follow the citation form of the *California Style Manual* (4th ed., 2000).” However, a brief that consistently follows any recognized system is acceptable.<sup>48</sup>

It is extremely important to give the exact page number from which a cited quote or point is located.<sup>49</sup> The court has expressed impatience toward and even occasional distrust of attorneys who have failed to do so. ADI staff attorneys consider compliance with this requirement in evaluating panel attorneys’ work.

Parallel citations to the California Reporter are not necessary or desirable in the text of the brief, but they can be helpful in the table of authorities.<sup>50</sup> Full parallel citations for United States Supreme Court cases, including the Supreme Court Reporter and Lawyer’s Edition, should be provided in both the table and the initial citation in the text. (California Style Manual (4th ed. 2000), § 1:32[B].)

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<sup>47</sup>The Bluebook: A Uniform System of Citation (16th ed. 1996).

<sup>48</sup> For more information on citations, see California Style Manual (4th ed. 2000), and a related ADI newsletter article at [http://www.adi-sandiego.com/newsletters/2000\\_summer.pdf](http://www.adi-sandiego.com/newsletters/2000_summer.pdf), pp. 6-7.

<sup>49</sup>Most rules have exceptions; the commonsense one here is that no pinpoint citation is needed (although it is always proper) when the case in its entirety is well known for a legal principle – e.g., *Teague v. Lane* (1989) 489 U.S. 288 [retroactive application of changes in the law]; *Faretta v. California* (1975) 422 U.S. 806 [self-representation at trial]; *Boykin v. Alabama* (1969) 395 U.S. 238 [guilty plea advice]; *Chapman v. California* (1967) 386 U.S. 18 and *People v. Watson* (1956) 46 Cal.2d 818 [prejudicial error]; *Miranda v. Arizona* (1966) 384 U.S. 436 [defendant’s statements to police]; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 [California stare decisis].

<sup>50</sup>Parallel citations to unofficial reports are added during editorial preparation of opinions for the Official Reports. They are not required for the original opinion, although their inclusion is preferred. (California Style Manual (4th ed. 2000), §§ 1:1[F], 1:12.) Given the almost universal availability of computerized legal databases, the functionality of providing parallel citations in the text of briefs is slight, and the information adds significant visual “clutter,” distracting from the flow of the discussion.

B. Updating Cited Authorities [§5.67]

Attorneys should of course be sure all research is current. This includes checking the current validity of cases, recent amendments to statutes and rules, and other potential changes. A published California opinion may be cited as soon as it is certified for publication or ordered published. (Cal. Rules of Court, rule 8.1115(d).) With computerized legal data base systems, attorneys have at their fingertips powerful resources, some of which are cost-free. The ADI website<sup>51</sup> provides a number of criminal law research links.

A surprisingly large number of attorneys overlook the need to determine whether a case has been depublished, the California Supreme Court has granted review, or the Court of Appeal has granted rehearing. One cannot cite the Court of Appeal opinion in any of these situations. (Cal. Rules of Court, rule 8.1115(a).) For any case not yet in a bound volume, the attorney should always check the cumulative subsequent history table in the back of the latest official advance sheets book, a court website, or an up-to-date electronic citation data base.<sup>52</sup> For further discussion of citability and publication, see §7.8 et seq. of chapter 7, “The End Game: Decisions by Reviewing Courts and Processes After Decision.”

VI. BRIEFING FORMALITIES IN CRIMINAL CASES [§5.68]

A. Form of the Brief [§5.69]

Unless a specific criminal rule applies, briefs in criminal cases must comply, as far as practicable, with the rules governing the form of civil appellate briefs. (Cal. Rules of Court, rule 8.360(a); see rules 8.204(a) & (b), 8.40(a).)<sup>53</sup> Under rules 8.400(a), 8.412, 8.480, and 8.482, the criminal rules govern briefs on appeals from juvenile dependency

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<sup>51</sup><http://www.adi-sandiego.com>, under “Legal Resources.”

<sup>52</sup>Rule 8.1115(a) refers only to California opinions. Therefore, unpublished opinions from other jurisdictions may be cited. If the cited out-of-state opinion is available only in a computer-based source, rule 8.1115(c) requires it to be attached to the brief in which the case is cited or, if citation is to be made at oral argument, to a letter submitted a reasonable time in advance of the argument.

<sup>53</sup>Exceptions to some formal requirements may be allowed for those who are filing in forma pauperis or who are incarcerated. (E.g., Cal. Rules of Court, rule 14(b)(11)(A) & (C).)

and delinquency, Family Code section 7800 et seq., conservatorship, and sterilization proceedings.

1. Paper [§5.70]

White or unbleached recycled paper, 8½" x 11" in size, of at least 20- pound weight is required. (Cal. Rules of Court, rules 8.204(b)(1), 8.360(a).) Line-numbered pleading paper is not permitted. (Rule 8.204(b)(5).)

2. Type [§5.71]

Briefs may be prepared through use of a typewriter or a computer as defined under California Rules of Court, rule 8.204. (Rule 8.360(a).) The type style must be roman, but italics, boldface, and underscoring may be used for emphasis. Case names must be italicized or underscored. Headings may be in uppercase letters. (Rule 8.204(b)(3).) In computer-produced briefs, the type size, including footnotes, must be at least 13-point; the typeface may be either proportionally spaced or monospaced. (Rule 8.204(b)(2) & (4).) In typewritten briefs, the type size, including footnotes, must be at least standard pica, 10 characters per inch. (Rule 8.204(b)(11)(C).)

3. Line spacing [§5.72]

The lines of the text must be at least one-and-a-half-spaced. Double spacing is generally preferred by the court as easier to read. Given that brief length is governed by word rather than page count (Cal. Rules of Court, rule 8.360(b)(1)), there is little reason to use more cramped spacing. Headings and footnotes may be single-spaced (six lines to a vertical inch). Quotations may be block-indented and single-spaced. (Rule 8.204(b)(5).)

4. Margins [§5.73]

The margins must be at least one and one-half inches on the left and right, and at least one inch on the top and bottom. (Cal. Rules of Court, rule 8.204(b)(6).)

5. Page numbering [§5.74]

The pages of the brief must be consecutively numbered. The tables and body of the brief may have different numbering systems. (Cal. Rules of Court, rule 8.204(b)(7).)

6. Copying [§5.75]

The brief may be reproduced by any process that creates a clear, letter-quality black image. (Cal. Rules of Court, rule 8.204(b)(1).) Typewritten briefs must be filed as photocopies. (Rule 8.204(b)(11)(A).) In copying, both sides of the paper may be used. (Rule 8.204(b)(4) & (b)(11)(B).)

7. Binding [§5.76]

The brief must be bound on the left margin. If it is stapled, the bound edge and the staples must be covered with tape. (Cal. Rules of Court, rule 8.204(b)(8).)

8. Length [§5.77]

In non-capital criminal cases in the Court of Appeal, briefs may not exceed 25,500 words<sup>54</sup> (excluding tables, attachments, and certification), unless the presiding justice gives permission for a longer brief.<sup>55</sup> (Cal. Rules of Court, rule 8.360(b)(1).) Some courts rarely grant such permission.<sup>56</sup>

California Rules of Court rule 8.204(c)(3) excludes from the limits any attachments referenced in rule 8.204(d), such as exhibits and other materials in the appellate record; but under rule 8.204(d) the attachments are themselves subject to a separate 10-page limit, unless the presiding justice grants permission for a longer attachment.

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<sup>54</sup>If the brief is typewritten, the limit is 75 pages. (California Rules of Court, rule 8.360(b)(2).) Note that criminal and civil rules differ here; in civil appeals, rule 8.204(c) limits length to 14,000-words or 50 pages. In dependency appeals, the criminal limits govern. (Rule 8.412(a).)

<sup>55</sup>In the combined briefs required by rules 8.216 and 8.360 for cross-appeals, the length limit is subject to rule 8.204(c)(4) (double the length of a normal brief).

<sup>56</sup>As a matter of effective advocacy, counsel should make every effort to keep briefs concise and avoid having to request special permission under rule 8.360(b)(5). In the unusual situation, a very lengthy record with multiple complex issues may necessitate a brief in excess of the limit.

9. Signature [§5.78]

A brief need not be signed. (Cal. Rules of Court, rule 8.204(b)(9).) However, it is the better practice to do so. Usually the court expects counsel of record, not associate counsel or some other person, to sign the brief.

B. Filing and Service in Criminal Cases [§5.79]

1. Time [§5.80]

In criminal cases, the opening brief is due within 40 days after the filing of the record in the Court of Appeal, unless the court grants an extension of time. (Cal. Rules of Court, rules 8.360(c)(1).) The respondent's brief is due 30 days after the opening brief is filed, which time may be extended. (Rule 8.360(c)(2).) If the appellant or respondent fails to file its brief, notice under rule 8.360(c)(5) will be issued, advising the party that if the brief is not filed in 30 days the following sanctions may be imposed: (a) the appellant is told new counsel may be appointed<sup>57</sup> or, if there is no appointed counsel, the appeal may be dismissed; (b) the respondent is told the case may be decided on the record, the opening brief, and the appellant's oral argument, if any. The appellant's reply brief is due 20 days after the respondent's brief is filed. (Rule 8.360(c)(3).)

Rules 8.360(c)(4), 8.50, 8.60, and 8.63 govern extensions of time. See also §3.32 et seq. of chapter 3, "Pre-Briefing Responsibilities: Record Completion, Extensions of Time, Release on Appeal."

Counsel can confirm whether and when pleadings are filed and discover any court action on them by accessing the Court of Appeal website<sup>58</sup> (other than in juvenile and other confidential cases). Counsel should register for automatic e-mail notification of developments in the case<sup>59</sup> and also visit the site periodically.

2. Number of copies [§5.81]

An original brief plus four copies, with proof of service, must be filed in the Court of Appeal. (Cal. Rules of Court, rule 8.44(b)(1).)

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<sup>57</sup>In practice, an order relieving counsel for failure to file a brief is "without compensation"; the issuance of such a notice puts the attorney's panel status in jeopardy.

<sup>58</sup><http://appellatecases.courtinfo.ca.gov>.

<sup>59</sup><http://appellatecases.courtinfo.ca.gov/>, "E-mail."

### 3. Service [§5.82]

A copy of the brief must be served on the superior court clerk for delivery to the trial judge (Cal. Rules of Court, rule 8.360(d)(4)); on the defendant, unless defendant has expressly requested otherwise in writing (rule 8.360(d)(1) & (2)<sup>60</sup>); on the Attorney General and district attorney (rule 8.360(d)(1)); and on counsel for co-appellants (rule 8.25(a)). Appellate Defenders, Inc., requires service on ADI and trial counsel, as well. The People must also serve two copies on appellate counsel for each appealing defendant and one on ADI (or the applicable appellate project). (Rule 8.360(d)(3).)

For cases in the Fourth Appellate District, panel attorneys are reminded to send all mail for the San Diego Attorney General's office to its *P.O. Box* and to use the *four-digit extension* on its Zip Code. The correct address is: 110 West "A" Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266. Use of the box number and Zip Code extension is critical. The court might not accept a brief for filing if the proof of service on opposing counsel shows an incorrect address.

Under California Rules of Court, rule 8.328(b)(4), if the opening brief raises a *Marsden*<sup>61</sup> issue, counsel must file with it a notice stating whether the confidential transcript contains any confidential material not relevant to the issues on appeal. If it does, the notice must identify the page and line numbers of the transcript containing this irrelevant material.

### VII. PERSUASIVENESS [§5.83]

Persuasive written advocacy is an art and a learned skill. The measures needed to turn mechanically "okay" position statements into persuasive arguments vary to some extent according to the case, the court, and counsel's own personality, and this kind of individuality should never be ignored. However, certain universal requirements always apply – credibility, forceful and effective use of the written word, and technical proficiency in the language.

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<sup>60</sup>Rule 8.360(d)(2) requires that on the proof of service counsel must state that a copy was sent to the defendant or else provide a signed statement that the defendant requested in writing no copy be sent. There is no express requirement to include the defendant's address on the proof of service.

<sup>61</sup>*People v. Marsden* (1970) 2 Cal.3d 118 (motion to remove appointed counsel because of failure to provide effective assistance).

A. Credibility [§5.84]

An attorney is the client’s window to the court. If the attorney is not rigorously credible, the client will have a hard time persuading the court to grant relief. Counsel therefore needs to consider thoughtfully what enhances or undercuts credibility.

1. Accuracy [§5.85]

As every sworn witness knows, the law at all times seeks and demands “the truth, the whole truth, and nothing but the truth.”

“*The truth*”: Counsel must meticulously avoid any misstatements of law or fact or citation. Even one slip-up, especially on a material point, can cripple not only the case, but years of effort to build the attorney’s reputation.

“*The whole truth*”: Accuracy includes thoroughness. It is not sufficient to avoid incorrect statements: all relevant information must be included, so that the court receives an undistorted picture. Omission of relevant unfavorable information – “hiding the ball” – is especially devastating to credibility.<sup>62</sup>

“*Nothing but the truth*”: Even on relatively immaterial details, inaccuracies are harmful. Counsel should avoid breezy exaggerations, “lazy” statements based on untested assumptions or hazy memory instead of investigation, misquotation or improperly attributed quotation, and the like. After catching counsel in a few such misstatements, whether or not they are material to the outcome of the appeal, the court will begin to doubt whether anything counsel says can be counted on without full and independent verification. An attorney in that position has lost credibility both as an officer of the court and as an advocate.

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<sup>62</sup>It can even subject counsel to sanctions. (E.g., *Jones v. Superior Court* (1994) 26 Cal.App.4th. 92, 98-99: “As an officer of the court and member of the bar, the lawyer is obligated to use only such means as are consistent with truth: he may not seek to mislead a judge by artifice or suppress evidence he has a legal obligation to reveal. (Rules Prof. Conduct, rules 5-220, 5-200(A), (B).) In the final analysis, we cannot accept the notion that a selective recitation of facts satisfies the rules: half the truth in this case is just as misleading as a complete fabrication.”

## 2. Objectivity [§5.86]

An advocate must of course sound persuaded in order to persuade. However, credibility in a legal setting demands an adequate distance from the subject matter and personalities of the case. The attorney cannot be effective if coming across as a personally interested or emotionally involved participant, rather than a professional. The goal is to sound persuaded by the merits of the position, so that the court can relate to and ultimately share the attorney's sense of conviction.

## 3. Reasonableness and sound judgment [§5.87]

One can hardly persuade a critical professional audience such as a panel of appellate justices by pressing unreasonable positions. Credibility requires critical judgment, the ability to perceive the weaknesses in one's own positions, and the good sense to weed out points that cannot be legally or logically defended.

The exercise of critical judgment may require an occasional concession or withdrawal of a point fully refuted. While counsel should give a great deal of thought to such an action before taking it, the willingness to do so when necessary ultimately enhances the attorney's credibility – and the remaining positions in the client's case.

Far better than withdrawing an argument, of course, is to exercise critical judgment in the first place, when preparing the opening brief. Counsel should always go through the discipline of ruthlessly asking how opposing counsel could counter each argument and how the counter-argument could be rebutted. If there would be no reasonable way to refute a likely counter-argument, the point probably should be discarded as frivolous.

Reasonableness includes a sense of proportion. The client is often best served when technically arguable but relatively weak or trivial arguments are left out, to avoid detracting from the strong ones. (See *Jones v. Barnes* (1983) 463 U.S. 745, 751-754 [appellate counsel has no constitutional duty to raise non-frivolous issues desired by the client].)

## 4. Professionalism [§5.88]

It is always tempting to “get personal” when personally attacked or when faced with what appears to be a totally unreasonable position on the part of opposing counsel or the court. The natural reaction is anger, resentment, or frustration, and it can be very difficult to avoid expressing that feeling in a responsive pleading such as a reply brief or petition for rehearing. Nevertheless, “venting” invariably comes across as

unprofessional, impairing the attorney's credibility and focusing the case on the personality of the attorney rather than the merits of the issues.

*Venting against opposing counsel.* It should go without saying that cases cannot be won by assailing the opponent's attorney. But they can be lost that way – and it occasionally happens if the behavior gets too far out of bounds. It is far better to stay above the mud-slinging fray, leaving the low road to the opposition. The court will notice the difference in approaches, and the client whose attorney maintains consistent professionalism will gain a tactical benefit.

*Venting against the court.* Even more evidently, one would think, cases cannot be won by showing disrespect to the court. What rational advocate would try to win over a court by insulting the judges? Does any attorney really think the justices will slap their collective foreheads and say, “Of course! Now that you point it out, we really are incompetent, biased, and corrupt. We’ll rule in your favor!”? Yet attorneys have occasionally succumbed to the temptation to lash out at the court for making what appears to be a significant error.<sup>63</sup>

Persuasive advocacy requires a vigorous but respectful presentation – one entirely on the merits. When faced with a serious mistake by the court, counsel can act most effectively by appealing to the court's best sense of duty. Counsel can convey (subtly, of course, to avoid sounding manipulative) a message such as this:

The decision is in error, and here is why . . . . My client's vital interests will be gravely and unjustly impaired by the ruling. We know the court is dedicated to reaching the right result and will correct the error.

This approach forcefully attacks the ruling, not the court or the judges personally, and at the same time affirms the attorney's respect for the dignity and integrity of the court.

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<sup>63</sup>In *In re Koven* (2005) 134 Cal.App.4th 262, 264, 276-277, the court held in contempt an appellate counsel who, in a petition for rehearing, accused the court of “deliberate judicial dishonesty” and other misconduct. (See also *In re S.C. v. Kelly E.* (2006) 138 Cal.App.4th 396 [referral to State Bar in lieu of contempt for unreasonably impugning integrity of trial court].)

B. Forceful and Effective Use of the Written Word [§5.89]

Mastery of written advocacy is of dominant importance in appellate practice. In a brief, counsel cannot gesture or change the inflection of the voice to help convey the message. Skillful use of words – rhetorical proficiency – must do the written equivalent. Keys to rhetorical effectiveness include the following:

1. Simplicity – to a point [§5.90]

A cardinal rule for persuasiveness is to keep the argument concise and easy to understand.<sup>64</sup> It must convey with unmistakable clarity the reasons the client should win. That means keeping these basic precepts in mind:

- The point should be made in the *best* way, not all possible ways; a one-two punch carries more impact than a series of feeble jabs.
- Collateral details and digressions distract far more than they persuade.
- Cumbersome, convoluted sentences that lose the reader in a maze of subordinate clauses, participles, prepositional phrases, parenthetical insertions, footnotes, and the like may lose the reader *period*.
- Self-conscious erudition, legalisms, archaic and foreign phrases, and “\$100 words” that require a dictionary usually reflect negatively on the attorney as a showoff and detract from the merits.

Simplicity is occasionally carried to an extreme, with omission of critical points and facts. Counsel needs to gear the sophistication of the presentation to the intrinsic complexity of the issues.<sup>65</sup> Failure to recognize and address the genuine and unavoidable subtleties of an issue can be even more fatal to persuasiveness than burying the big points in a morass of trivia. While counsel should not patronize the court and pedantically spell out obvious matters, making the court do crucial parts of the analysis in a complicated case is a risky practice.

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<sup>64</sup>See Auwarter, *Keep Those Briefs Brief*, Appellate Defenders Issues (March 2002), pages 9-10, available at [http://www.adi-sandiego.com/news\\_newsletters.html](http://www.adi-sandiego.com/news_newsletters.html).

<sup>65</sup>Even as to style, simplicity can be overdone. An unbroken, staccato-like series of very short sentences can be wearisome and undercut sophisticated analysis. Structural variety, consistent with the ultimate goal of clarity, will command attention most effectively.

## 2. Knowledge of the audience(s) [§5.91]

All effective writing, not just legal writing, speaks to its intended audience. In appellate practice, the primary audience is the court – the justices and their research attorneys. As noted above (see §5.36, *ante*), counsel must assess the likely level of legal knowledge and sophistication these readers will bring to the case. In courts such as the Fourth Appellate District, with a large number of justices and many possible combinations of panels, that task can be extremely challenging. The brief will need to inform the court of the legal authorities, principles, and points essential to the argument without boring or insulting it with overly elementary matters. An effective balance might be achieved by an approach that employs a respectful tone, in acknowledgment of the audience’s professional stature, but carefully leads the discussion through the applicable law and logic.

The opposing party and its counsel are another part of the audience. While counsel is not exactly writing for their “benefit,” it is important the brief make sure they understand exactly what the appellant is arguing and why. Careful delineation of the issues and skillful use of analysis and authority will promote discussion of the issues on the appellant’s chosen terms. Counsel does not want to be blind-sided by a respondent’s brief, much less an opinion, redefining the case in such a way that the opening brief loses its dominant position as the director of the discussion.

The client is still another part of the audience. A vital role for an appellant’s counsel is convincing the client he or she is getting a fair day in court and is represented by a strong advocate who truly cares about the case and the client. Vigorous advocacy, not dry, academic discussion, is essential to persuading the client, as well as the court. (As noted in §5.86, *ante*, however, counsel must not lose the objectivity and professional distance crucial to credibility.) Although counsel need not and should not raise every point the client wants if that is against counsel’s best judgment (see *Jones v. Barnes* (1983) 463 U.S. 745, 751-754), counsel should explain such decisions respectfully to the client in non-technical language the client can understand.

## 3. Re-re-revision [§5.92]

As once famously observed, good writing is essentially rewriting.<sup>66</sup> Editing and revision are absolute requirements for effective writing. In this area, written advocacy

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<sup>66</sup>The observation is variously attributed to Roald Dahl or James Thurber. In any case, appellate counsel should make it their own motto.

has an advantage over other forms, since counsel has the luxury of making a point over and over in various ways, until the exact wording needed to nail the point has been achieved. (ADI is aware, of course, of the constraints of compensation guidelines and court filing deadlines. The ideal suggested here always must be balanced against practical realities.)

It is a good practice to ask someone else to read a brief. Another lawyer can provide expert criticism before the respondent or the court has a chance to do so. A layperson can offer invaluable feedback on whether the goal of clear communication has been achieved.

#### 4. Confidence [§5.93]

Counsel must sound persuaded in order to persuade. A passive, tentative tone that limply suggests the court might want to consider a given position is not going to have much impact on a court that is trying to process hundreds of “routine” cases and is predisposed to think this one, too, is destined for assembly-line disposition. The attorney’s job is to make the case “special” – to convince the court that the case needs close attention and that the client deserves and expects to win.

To use examples from the Appellate Court Committee, San Diego County Bar Association, California Appellate Practice Handbook (7th ed. 2001), unassertive language such as “appellant respectfully submits the instruction was wrong” or “appellant beseeches this Honorable Court to find the instruction was wrong” suggests a hope for a favor, rather than a call for and expectation of justice. The point should be stated unequivocally – “the instruction was wrong” – in order to communicate the message that relief is compelled by justice and the law. (*Id.* at § 6.66, p. 212.)

#### 5. Using the tools of the language for maximum impact [§5.94]

A skillful writer must cultivate an intimate acquaintance with the nuances of the language and the ways word choice and use affect communication. In addition to that venerable tool, the dictionary, a good resource for this purpose is the classic English language guide, Strunk et al., *The Elements of Style* (4th ed. 2000). Rudman also offers a number of pointers specifically geared to appellate advocacy. (Rudman, *Effective Argumentation*, Appellate Advocacy College (2000) at pp. 16-23.)<sup>67</sup> While the principles covered in these authorities cannot be reviewed in their entirety here, certain fundamentals deserve specific attention.

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<sup>67</sup><http://www.courtinfo.ca.gov/jc/comlists/documents/lecture11.pdf>.

a. Strong, vivid language [§5.95]

The careful use of words and grammatical constructs for maximum impact is vital for effective appellate brief writing.

Conscious choice of words becomes second nature to the appellate practitioner . . . . Consider Bertrand Russell’s description of a game he called “conjugating irregular comparatives.” A sample round goes, “I am firm, you are stubborn, she is pigheaded.”

(Rudman, *Effective Argumentation*, Appellate Advocacy College (2000) at p. 20.)<sup>68</sup>

As Russell’s game illustrates, strong, evocative words carry more punch than relatively neutral ones. For example, *vital* is more compelling than *important*, and *ignored* or *neglected* is stronger than *omitted*. Concrete words that call to mind a lively image (*the gunman raced to the getaway car*) carry more immediacy and elicit a stronger response than more abstract, removed words (*the subject with the weapon was observed proceeding to the vehicle operated by the second subject*). The active voice (*the burglar broke in through the window screen*) speaks more dramatically than the passive (*entry was made through the window screen*).

On the other hand, writing needs pace and variety to deliver ultimate impact and to give the most important points their due. Counsel should heed such caveats as:

- Credibility is impaired if an image is overdrawn or a point is overstated.
- The ultimate punch line can be swallowed up if the entire brief, even on the most collateral detail, “screams.”
- Precision is often more important than drama in legal analysis.
- Counsel should be wary of addressing the court as if it were a jury. The court might feel manipulated, and counsel might inadvertently send an undesired message: “I’m an appellate amateur.”
- Understatement can be an effective rhetorical tool in its own right and can sometimes capture the audience better than a “hard sell.”

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<sup>68</sup><http://www.courtinfo.ca.gov/jc/comlists/documents/lecture11.pdf>.

b. Use of emphasis [§5.96]

The judicious use of emphasis can clarify meaning and hammer a point home. It can also highlight especially relevant segments from long passages or quotations.

Explicit emphasis is so easily overused, however, that appellate writers should employ a strong, though not irrebuttable, presumption against it. Usually the intended emphasis is discernible from the context, and supplying it explicitly may tend to patronize the reader. (It is *not* necessary to emphasize every “not” in one’s sentences, for example.) Letting the reader collaborate in the argument and ultimately acquire ownership of the desired conclusion is often an extremely effective tool of persuasion. In addition, overused emphasis tends to be a visual and mental distraction; pages filled with a variety of underscorings, italics, bold fonts, and capital letters are bewildering, wearying, and repelling – just the opposite of the intended goals of clarifying and persuading.

A closely related technique is attempting to strengthen a point by cloaking it with such rhetorical boosters as *clearly* and *it is clear that*. Here the presumption against use should be virtually absolute. Those words at best are superfluous (if the proposition is clear, it will speak for itself) and at worst send a red flag that counsel has little confidence in the point and is trying to prop it up with labels.

c. Effective transitions [§5.97]

An aid to readability can be a segue, or transition, which helps move the argument from one point to another and clarify the relationship between them. Transitions might be words or phrases such as *however*, *therefore*, *consequently*, *alternatively*, *for example*, or *in any event*, or even complete sentences or paragraphs. (See Rudman, *Effective Argumentation*, Appellate Advocacy College (2000) at pp. 17-18.)<sup>69</sup>

As with emphasis, the writer needs to be conscious of the easy temptation to overuse transitions. A series of sentences laden with such words as *however* or *moreover* or the ubiquitous (and often misused) *thus* can be tedious, distracting, and even slightly insulting, suggesting the reader is unable to identify contrasts or logical consequences without aid. Often the relationship of one point to another is obvious. Why not let the reader make the transition and be drawn into the argument as a participant rather than spectator?

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<sup>69</sup><http://www.courtinfo.ca.gov/jc/comlists/documents/lecture11.pdf>.

### C. Technical Proficiency [§5.98]

Effective use of language includes technical as well as rhetorical mastery. Small lapses of grammar, syntax, and diction that would slip by in an oral presentation are fixed forever in the unforgiving glare of the written word. “Formal” matters such as capitalization, spelling, and punctuation are elevated to the realm of the essential. Meticulous editing becomes an absolute, not just a nice touch. Strunk et al., *The Elements of Style* (4th ed. 2000) is commended to counsel as a classic resource on the formal and practical necessities of good writing. *The California Style Manual* (4th ed. 2000) has a section on style mechanics (§ 4.1 et seq.), which sets forth the rules the court itself uses.

The importance of these matters is magnified in legal writing, where professional credibility can perish with a single elementary mistake. It is virtually a law of nature (and a categorical certainty of appellate practice) that justices *will* notice such lapses. The Appellate Court Committee, San Diego County Bar Association, *California Appellate Practice Handbook* (7th ed. 2001), advises bluntly: “Do not impair the professionalism of your work by displays of carelessness and illiteracy.” (*Id.* at p. 212.)

Some common problem areas to watch include the following:

#### 1. Proofreading [§5.99]

The review of the written page needs to be exhaustive and uncompromising – in a word, perfect. Reliance on a simple spell-check program is reckless. One suggestion is to set the brief aside for a day or so and then review a hard copy (not just the computer screen). Mistakes previously elided in the brain may suddenly jump out. Better still, have someone else (perhaps a non-attorney) proofread the work.

#### 2. Compliance with court rules [§5.100]

Basic professional competence for a criminal appellate lawyer requires knowledge of the California Rules of Court as they apply to this area of practice. As ADI’s founding executive director, the Honorable J. Perry Langford (now retired judge of the superior court), used to tell his attorneys:

It is impossible to know all of the criminal law or all of criminal procedure.  
But at least you should know the rules.

It is inadvisable indeed to play fast and loose with formal rule requirements. The court may forgive lapses – or it may not. Briefs that do not conform with rules may be

refused for filing or stricken. (See Cal. Rules of Court, rule 8.204(e).) Assuming permission to refile is granted, the new deadline may be highly awkward for counsel, if not outright unmanageable. Even if the court relents, ADI’s reviewing attorneys probably will not when preparing their evaluations.

3. Conscientious conformity to good style [§5.101]

Since it is impossible to do a comprehensive review of the rules of grammar, punctuation, style, capitalization, and the like here, counsel are referred to Strunk et al., *The Elements of Style* (4th ed. 2000), the *California Style Manual* (4th ed. 2000), and other authorities. This section will highlight a few of the most common appellate brief transgressions, some of which are among the pet peeves of justices, research attorneys, and ADI attorneys.

a. Run-on sentences [§5.102]

Run-on sentences have independent clauses separated by inadequate punctuation or conjunctions. They are very serious grammatical transgressions and in the classroom might be considered cause for an automatic “F” on any paper. Basic principles include the following.

First, a comma by itself is an inadequate separator between independent clauses (those that can stand alone as a sentence). There must be an authorized “linking” word such as *and*, *but*, *or*, *nor*, and *yet*. Use of a semicolon [;] or separation into two sentences is also proper.

*Incorrect:* The police failed to administer *Miranda* warnings, the confession should be dismissed. (Comma by itself.)

*Correct:* (1) The police failed to administer *Miranda* warnings, and the confession should be dismissed. (2) The police failed to administer *Miranda* warnings; the confession should be dismissed. (3) The police failed to administer *Miranda* warnings. The confession should be dismissed.

Second, mere transitional words such as *however*, *nevertheless*, *therefore*, *moreover*, and *thus* are not authorized linking words and cannot be teamed with a comma to separate independent clauses. They require a semicolon; alternatively, the two clauses should be written as two separate sentences. Use of an authorized coordinating conjunction is also proper.

*Incorrect:* The police administered *Miranda* warnings, however, they failed to cease questioning when the defendant invoked the right to silence.

*Correct:* (1) The police administered *Miranda* warnings; however, they failed to cease questioning when the defendant invoked the right to silence. (2) The police administered *Miranda* warnings. However, they failed to cease questioning when the defendant invoked the right to silence. (3) The police administered *Miranda* warnings, but they failed to cease questioning when the defendant invoked the right to silence.

b. Non-parallel sentence structure [§5.103]

Two or more elements of a compound structure (joined with *and* or *or*) within a sentence should be of the same grammatical form. This produces balance and preserves the syntactical logic. For example:

*Incorrect:* The robber told the victims to hand over their wallets and that they must lie down on the floor.

The robber gave a two-fold order – (a) hand over the wallets and (b) lie down on the floor. In the illustrated sentence these two elements are of different grammatical forms: first an infinitive phrase (“to hand over”) and then a subordinate clause (“they must lie down”). Parallelism requires the same form. Both could be infinitive phrases or both could be subordinate clauses:

*Correct:* (1) The robber told the victims to hand over their wallets and to lie down on the floor. (2) The robber told the victims that they must hand over their wallets and that they must lie down on the floor.

c. Random commas [§5.104]

A number of writers apparently think commas are to be inserted on an entirely discretionary (“whenever”) basis. For instance, if a reader giving an oral rendition would pause for dramatic effect, if there is a slight change of thought, or even (seemingly) if the writer can’t think of what to say next, a comma is the answer. On the other hand, if the thought seems to be progressing smoothly, punctuation should not intrude. This purely intuitive approach overlooks the fact there are objective rules governing punctuation, including the ill-treated comma. The rules cannot be detailed here, but a few might be singled out for special reminders in legal writing.

First, ordinarily a single comma may not separate the subject and predicate of a sentence. There should be either two or more, or none.

*Incorrect:* Equal protection, rather than due process would seem to be the applicable theory. (A single comma).

*Correct:* (1) Equal protection rather than due process would seem to be the applicable theory. (2) Equal protection, rather than due process, would seem to be the applicable theory.

The rule against a single comma also applies when the predicate has several parts:

*Incorrect:* The officer saw the car, and sped after it. (A single comma between *officer* and *sped*.)

*Correct:* The officer saw the car and sped after it.

Second, commas joined with an authorized linking word (*and, but, or, nor, yet*) should be used to separate independent clauses (those that could be separated into two complete sentences), unless they are very short:

The federal Constitution guarantees the right to a trial by jury in criminal cases, and the state Constitution goes even further by requiring the defendant's personal jury waiver.

Commas should be used to set off the year in a date if both month and day are also given: *On July 1, 2001, the court decided the case.* If only the month and year are given, no comma at all is needed: *In July 2001 the court decided the case.*<sup>70</sup>

#### d. Abused apostrophes [§5.105]

Even more maltreated than the unfortunate comma is the apostrophe, which often is omitted or inserted in exactly the *opposite* way of its proper usage. Indeed, the Apostrophe Protection Society has been formed to police and eradicate abuses.<sup>71</sup> A few rules govern this area:

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<sup>70</sup>California Style Manual (4th ed. 2000) sections 4:29, 4:50.

<sup>71</sup>See the society's website at <http://www.apostrophe.fsnet.co.uk/>.

Apostrophes are used before an “s” to show singular possession:

*Incorrect:* The court turned down the defendants efforts to get a new trial.

*Correct:* The court turned down the defendant’s efforts to get a new trial.

An apostrophe is used after a plural word ending in “s” to show possession, but must be followed by an “s” if the plural word has another ending:

*Incorrect:* The witnesses stories were conflicting.

*Correct:* The witnesses’ stories were conflicting.

*Incorrect:* The Childrens’ Advocacy Group.

*Correct:* The Children’s Advocacy Group.

Apostrophes are not used in simple plurals.

*Incorrect:* The justices’ affirmed the judgment.

*Correct:* The justices affirmed the judgment.

Apostrophes are used to show the missing letters in a contraction (such as *can’t*, *we’ll*, *they’ve*, *you’re*, *he’s*).

*Incorrect:* Lets assume the denial of the motion is an appealable order.

*Correct:* Let’s assume the denial of the motion is an appealable order.

Possessive pronouns do not take an apostrophe (*his*, *hers*, *yours*, *its*, etc.). (*Its* is especially baffling. See special caveat below.)

*Incorrect:* The burden of proof is your’s.

*Correct:* The burden of proof is yours.

Care must be used to distinguish sound-alike words (*whose* and *who's*, *your* and *you're*, *their* and *there* and *they're*, etc.).

*Incorrect:* The plaintiff *who's* house burned down has won a \$1 million verdict.

*Correct:* The plaintiff *whose* house burned down has won a \$1 million verdict.

*Incorrect:* I know *your* disappointed by the affirmance.

*Correct:* I know *you're* disappointed by the affirmance.

**Special caveat:** The difference between *its* and *it's* tends to wreak havoc. The latter looks exactly as if it should be the possessive of *it*. But it's not: it is a contraction for *it is* – and never anything else. The possessive of *it* is *its*.

*Correct:* It's very clear that the statute of limitations ran *its* course at least 10 months ago.

Attorneys should commit these rules to memory – or at least look them up whenever they have the slightest doubt. It is far better to earn membership in the Apostrophe Protection Society than to have an excerpt from your brief posted on the “Examples” pages of its website!

e. Errant diction [§5.106]

Words that seem similar cause chronic confusion. Errors are particularly common in choosing between *infer* and *imply*, *effect* and *affect*, *lie* and *lay*, *principle* and *principal*, *disinterested* and *uninterested*, *tenant* and *tenet*, *duplicative* and *duplicitous*, etc. Writers who are unable to articulate the exact distinction between the words in any of these or other confusing couplets need to memorize the rules or check them *every time* the occasion arises. A single misstep is a major embarrassment.

f. Misplaced and misused modifiers [§5.107]

Modifiers such as adjectives and participles can be tricky occasionally. Placing a modifier in an inappropriate part of a sentence may be a source of potential misunderstanding – or at least amusement. Examples might be:

*On June 17, 2000, appellant testified he was accosted by the police.* Probably what is meant is that the accosting took place on June 17, 2000, but the structure of the sentence suggests that was the date of the testimony.

*The drugs were seized after arresting the alleged manufacturers.* This undoubtedly means the police (rather than the drugs) arrested the alleged manufacturers; it should say so.

From a real brief (with names changed): *Deputy Holmes collected shorts and a T-shirt worn by Ms. Baskerville that evening along with I.D. Technician Watson, as well as various other items.* We invite the reader to unscramble that one.

Use of adjectives or adjective phrases to describe something other a noun is another hazard. All should be familiar with this example from grade (grammar?) school:

*Incorrect:* We were tardy due to a flat tire on our school bus.

*Correct (but awkward):* Our tardiness was due to a flat tire.

*Correct:* We were tardy because of a flat tire. (*Due to* is an adjective phrase that should describe a noun, not a verb.)

Legal writing abounds with dubious constructions of the same sort as the *due to* infraction. Indeed, lawyers are so accustomed to it that many readers reviewing the following examples will say, “What’s wrong with that? I use it all the time.”

*Dubious:* The Court of Appeal reversed *based* on a new decision by the Supreme Court.

*Correct:* (1) The Court of Appeal reversed on the basis of a new decision by the Supreme Court. Or (2) The Court of Appeal’s reversal was based on a new decision by the Supreme Court.

*Dubious:* *Prior to* entering the house the officers announced their purpose.

*Correct:* (1) Before entering the house the officers announced their purpose. Or (2) The announcement was prior to the entry.

*Dubious:* The court stayed the sentence *pursuant to* Penal Code section 654.

*Correct:* (1) The court stayed the sentence under Penal Code section 654. Or (2) The stay of sentence was pursuant to Penal Code section 654.

To be fair, common usage may in time legitimate a formerly proscribed construction. Some of those listed above are sanctioned in some dictionaries, but not in others. However, there is little to commend such suspect constructions when there are incontestable (and more readable) alternatives. It is not as if any are highly effective rhetorical devices; indeed, they tend to be stodgy and legalistic.

g. Mismatches in number (singular vs. plural) [§5.108]

Most attorneys have no difficulty with the elementary rule of grammar requiring the agreement of subject and predicate, at least when the sentences are straightforward, but a few situations are tricky.

The word *there* precedes a verb:

*Problem:* The court stated there [is/are] abundant factors in aggravation to justify the upper term. *Answer:* *Are*. The verb agrees with its subject, which is not *there* but *factors*.

A subject and its complement are different in number:

*Problem:* Three extensions of time to file a brief [is/are] a virtually unknown occurrence in that court. *Answer:* *Are*. The verb always agrees with the subject – here, *extensions*.

The subject has two elements joined by the word *or*, one of which is singular and the other plural:

*Problem:* Either the defense attorneys or the Attorney General [go/goes] first in oral argument. *Answer:* *Goes*. The verb should agree with the one located closer to it in the sentence. The flip side of this example would be: Either the Attorney General or the defense attorneys *go* first in oral argument.

An occasional problem is making the noun and pronoun agree:

*Incorrect:* An attorney must file their brief on unlined paper to comply with the rules. *Correct:* (1) An attorney must file his or her

brief on unlined paper. (2) Attorneys must file their briefs on unlined paper.

h. Wrong case (*I vs. me*) [§5.109]

Every once in a while, a writer intending to be very correct stumbles in a compound construction. A beguiling trap tends to be the word *I*. We are sensitized to the trickiness of saying something like *It was I*. But often a writer will transfer that caution to inappropriate settings: *between you and I* or *the court gave both the Attorney General and I part of what we had requested*. One would never say *between I* or *the court gave I*. The pronoun remains the object of the preposition or verb, whether or not there are other objects.

Another problem handled more often incorrectly than correctly is selecting case in a sentence such as:

The court authorized the bailiff to expel [whoever/whomever] he believed was acting obstreperously during the trial.

The correct choice is *whoever*, because it is the subject of the verb *was acting*. The entire clause *whoever he thought was acting obstreperously during the trial* is the object of the verb *expel*. The words *he believed* qualify and are merely parenthetical to the main thought – indeed, mentally putting commas or parentheses around the words helps to clarify their relationship to the rest of the sentence.

i. Overuse of *that* [§5.110]

Many readers are taught to shun use of the word *that* as a conjunction introducing a subordinate clause.

*People v. Henderson* held ~~that~~ the state constitutional principle against double jeopardy prohibits . . . .

This rule of thumb is a virtual obsession with some readers. If some justices in the particular court are notoriously among those, counsel is well advised to heed the taboo. Otherwise, common sense is a good guide. A sentence should not be cluttered when the meaning is evident without *that*, but the word should be used if it makes the thought more readily intelligible. Some sentences have to be read several times to discern their meaning for lack of *that* in appropriate places. Unless the readers are among the “obsessed,” such sentences are just poor writing.

j. Careless capitalization [§5.111]

Briefs should conform to recognized conventions in deciding whether to capitalize words. The California Style Manual (4th ed. 2000) section 4.1 et seq. offers considerable guidance on this matter. For words not covered in that authority, standard English practice is to capitalize proper nouns (the name of a specific person, place, or thing – Dolly Madison, Washington, White House) and not to capitalize common nouns (generic labels – woman, city, home).

The Style Manual capitalizes appellate but not trial tribunals (Court of Appeal, Supreme Court, superior court) and state but not local officials (Attorney General, district attorney), unless a specific name is used (Superior Court of San Diego County, District Attorney ). The word “court” is not capitalized when it stands alone, including a court being addressed: “On January 5, this court ordered supplemental briefing on *Blakely v. Washington*.”

Some attorneys capitalize every pleading or part thereof and party – Information, Count 10, Declaration, Respondent’s Brief, Appellant. This practice is not consistent with standard English and tends to look contrived and self-conscious. The modern convention is to streamline writing by confining capitalization to its natural role as a name, not a label.

VIII. CONCLUSION [§5.112]

This chapter has reviewed a variety of topics on effective brief writing. The subjects range from the great rhetorical arts of eloquence and persuasion to the nitty-gritty of grammar, citation style, and the Rules of Court. A single chapter obviously cannot accommodate so immense a subject. It is hoped that the ideas discussed here will promote further study of the topic and further thought. A superb advocate does not spring from the earth or receive talents as a jolt of lightning from the sky. Counsel must patiently and assiduously build the necessary skills by learning about the craft, reflecting on its fundamental principles, refining them to suit the attorney’s individual aptitudes, and then applying them thoughtfully and creatively to each situation.