

Parts in blue print are instructions to user, not to be included in filed document unless so noted. [Parts and references in green font, if any, refer to juvenile proceedings. See Practice Note, this web page, for guidance in adapting forms to juvenile cases.]

**Practice tip:** Depending on the issues and the timing of this motion, the court may require a supplemental brief instead of a new brief – especially if the respondent's brief has been filed. Check with the clerk's office, the ADI staff attorney, and the ADI website page on Fourth District practice at [http://www.adi-sandiego.com/practice/fourth\\_dist.asp](http://www.adi-sandiego.com/practice/fourth_dist.asp) under "Briefs."

**Practice tip:** Alternative ADI sample forms may be preferable, depending on the timing and the court – e.g., erratum letter or motion or request to file supplemental opening brief.

*[Attorney's name, bar number]*  
*[Address and telephone number]*  
*[Email address and fax number if available]*  
Attorney for Defendant *[name]*

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**  
**FOURTH APPELLATE DISTRICT**

**DIVISION** *[Number]*

THE PEOPLE OF THE STATE OF CALIFORNIA,  
Plaintiff and Respondent,

v.

*[Defendant's name],*  
Defendant and Appellant.

Court of Appeal  
No. *[number]*

Superior Court  
No. *[number]*

**APPEAL FROM THE SUPERIOR COURT OF *[NAME]* COUNTY**

Honorable *[name]*, Judge

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**DEFENDANT'S REQUEST TO STRIKE  
APPELLANT'S OPENING BRIEF AND  
REPLACE WITH NEW OPENING BRIEF**

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TO THE HONORABLE *[NAME]*, PRESIDING JUSTICE, AND TO THE  
HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT,  
DIVISION *[NUMBER]*:

Defendant *[name]* respectfully requests that this court strike the appellant's opening brief filed on *[date]* and to grant defendant permission to file the new, substituted opening brief enclosed with this motion. The reason is *[state briefly: E.g.: Counsel failed to argue a necessary point in the opening brief, or argued it inadequately; new law has created an issue not available at the time of the opening brief; etc.]*.

This motion is based on the present moving papers, the supporting memorandum of points and authorities, the declaration of appellate counsel (Exhibit A), and the documents already filed in this court.

Dated: *[date]*

Respectfully submitted,

*[Attorney's name]*

State Bar No. *[number]*

Attorney for Defendant *[name]*

## MEMORANDUM OF POINTS AND AUTHORITIES

A party may file supplemental briefing with the permission of the Presiding Justice of the Court of Appeal. (Cal. Rules of Court, rules 8.200(a)(4), 8.360(a) [and 8.412(a)(1)].)

*[Provide sufficiently detailed explanation of reason for new brief: issue sought to be included or amended, why it was omitted or argued differently, etc.; other situations.]*

Appellate counsel has an obligation to raise meritorious claims of error on appeal. (*Anders v. California* (1967) 386 U.S. 738, 743-744 [87 S.Ct. 1396, 18 L.Ed.2d 493]; *People v. Johnson* (1981) 123 Cal.App.3d 106, 111.) Meritorious claims include those of sufficient substance to have a reasonably strong potential for obtaining reversal or other relief or for making new law. (*People v. Johnson, supra*, 123 Cal.App.3d 106, 111; *People v. Von Staich* (1980) 101 Cal.App.3d 172, 175.)

The defendant's right to effective assistance of appointed appellate counsel requires that when a meritorious claim of error is omitted from the initial briefing, appellant's counsel take steps to present that claim of error to the reviewing court in supplemental briefing. (See *In re Smith* (1970) 3 Cal.3d 192, 202-204.)

*[[If applicable:]]* Failure to raise such an issue in proper form may have the practical effect of not raising it at all. Even if such a problem can be cured by supplemental briefing, in this case a correction would require

restructuring of the argument, and a new corrected brief would be more efficient for both the respondent and the court.]

Neither justice nor judicial economy is served by refusing supplemental briefing and consequently failing to consider the issue properly on appeal. Later writ proceedings and claims of ineffective assistance of appellate counsel or other grounds for collateral attack are costly, indirect, duplicative, and less effective than proper appellate processes in the first place. When the trigger for such an attack can be prevented before it occurs, the parties, the court, and the public all benefit.

Dated: *[date]*

Respectfully submitted,

*[Attorney's name]*

State Bar No. *[number]*

Attorney for Defendant *[name]*

**EXHIBIT A**

**DECLARATION OF APPELLATE COUNSEL**

## DECLARATION OF *[ATTORNEY'S NAME]*

I, *[name]*, declare:

1. I am appointed counsel for defendant *[name]* in case number *[number]*.
2. On *[date]*, I filed the appellant's opening brief.
3. After filing the appellant's opening brief, I became aware that *[describe defect or omission in opening brief]*.
4. I consulted with a staff attorney at Appellate Defenders, Inc., and we both agreed that it would be more appropriate to submit a new opening brief rather than attempt to correct the mistake in supplemental briefing. We concluded that a supplemental brief would be confusing for the court and for the parties.
5. *[[If applicable:]* On *[date]*, I spoke by telephone with the [Deputy Attorney General / *[opposing counsel]*] assigned to the case for respondent, *[name]*. [He / She] informed me that [he / she] did not object to my filing a new opening brief.]

I declare under penalty of perjury, under the laws of the state of California, that the foregoing is true and correct.

Dated: *[date]*

*[Attorney's signature]*  
*[Attorney's name]*  
State Bar No. *[number]*  
Attorney for Defendant *[name]*

## **PROOF OF SERVICE**