Everything You Need to Know About Preparing Dependency Briefing[1]

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STATEMENTS

Introduction. Rule 8.204 of the California Rules of Court requires opening briefs to contain "a summary of the significant facts limited to matters in the record." Beyond this requirement, the rules give very little guidance as to what should be included. However, readers of many briefs have complained that some contain too little or often too much information or that the briefs were difficult to read. This section will discuss how to make the traditional three statements contain the required information, be readable, and help to set up the arguments.

Statement of Appealability. For many years now, the Rules of Court have required that briefs contain a Statement of Appealability. (See Cal. Rules of Court, rule 8.204(a)(2)(B).) Most courts will accept a short statement of why the order is appealable, with citation to a case or statute. For example: "This appeal is from a final judgment entered pursuant to Welfare and Institutions Code section 366.26 and is therefore authorized by Welfare and Institutions Code

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[1] Thanks go to CCAP staff attorney/resource administrator Laurel Thorpe for her extensive revisions and assistance with updating this article. (Last rev. 02/15/10.)

section 395."

The location of the Statement of Appealability is included in the table of contents. The rules do not specify where in the brief the Statement of Appealability should be placed. If the Statement of Appealability is used at the beginning of the brief, it will also serve as a helpful introduction to the brief when it also informs the court of the nature of the hearing, the order and the issue or issues raised. Other attorneys place the Statement of Appealability following the Statement of the Case/Facts.

In a case having a small number of issues, it may be helpful to provide an introduction stating the issues. Probably no more than a three-sentence paragraph should be devoted to each issue and the total length of the introduction should not exceed a page or so. The introduction will help the reader understand the significance of the proceedings and facts stated in the Statement of the Case/Facts.

Integrated Statement of Case/Facts.

> "It is impossible to give the reader an accurate 'feel' for what is really going on in most juvenile dependency cases without integrating the statement of the case with the statement of facts. (See [former] Cal. Rules of Court, rule 13.) Counsel for the mother has done an excellent job in presenting a readable, integrated narrative to the court, and we encourage all counsel who file briefs in dependency cases to write an integrated statement, rather than preparing separate statements of the procedural history and the facts, which suggest that the real world events involving the parents and children somehow took place apart from the dependency litigation which dominated the lives of the family involved over a period of many months." (*In re Kimberly F.* (1994) 56 Cal.App.4th 519, 522 (fn. 2).)

Dependency appellate practitioners have now routinely adopted this Fourth District suggestion to use integrated statements in their dependency briefing. This briefing skill reduces the repetitiveness that inevitably results if statements of case and fact are laid out separately and then

chronologically hearing by hearing. However, the following two sections address specifically what should be spotted in the record, considered, and then gathered into one smooth integrated story.

Elements of the Traditional Statement of the Case. The purpose of the Statement of the Case is to give the court a brief overview of the relevant procedural steps that took place in the trial court. In a typical appeal, the Statement of the Case may be less than two pages. Because of the protracted nature of some dependency cases, the Statement of the Case may often of necessity extend to several pages. The courts are not interested in, nor should you include, every procedural event. However, the following *should be included* in chronological order with dates of occurrence:

- The contents of the petition;
- The detention hearing, if relevant;
- Jurisdictional hearing;
- Dispositional hearings;
- Review hearings;
- Important motions and orders;
- Date of notice of appeal.

Providing this information *concisely* will give the justices and court attorneys an immediate, easy to remember, general overview of the nature of the case and the important events which transpired.

Petition

In an appeal from the initial disposition, the Statement of the Case should always tell the court which subdivisions of the Welfare and Institutions Code have been alleged. As these subdivisions are renumbered or added to by the Legislature fairly often, an abbreviated description of each will make it easier for the reader to understand the proceedings below. For example: "Welfare and Institutions Code, section 300, subdivision (b) [failure to protect]." The facts alleged in support of jurisdiction for each subdivision allegation should also be provided.

In appeals from orders made at subsequent hearings, the Statement of the Case might focus solely on the counts that were sustained, in a terse summary or list.

Hearings

The statement of the case should include the date and a description of what happened at each hearing, including the findings and the orders of the court. Also, in most cases it is recommended that you briefly describe the conditions of any reunification plan.

Motions and Subsequent Petitions

Often, statements in criminal appeals do not mention trial court motions that are not going to be litigated on appeal. However, the preferred practice in dependency appeals is to include petitions filed under section 342, 387, and 388, and the rulings because these are significant.

Objections (On a Case-by-Case Basis)

Although statements do not often cover the objections made below in great detail, it is sometimes helpful to *briefly mention* objections that are the basis of the appeal (i.e., "Over appellant's objection, the foster parents were granted de facto parent status. (RT 221.)") But the

underlying details of the objection are reserved for the argument portion of the brief.

Events Not Included or Rarely Included.

Keep in mind that in the typical case the clerk or judge who reads your brief has not read the record on appeal. The statements in the appellate brief is their initial source of information about what went on in the case. You want to hold their attention. Cluttering the statement of the case with procedural minutiae is distracting and boring to the reader. Usually, the following unnecessary matters *should not be included*:

- Boilerplate from petitions;
- Lengthy quotes from petitions;
- Lengthy quotes from the social study report;
- Superseded petitions, where the amendment is not an issue on appeal;
- Court dates resulting only in continuances;
- Names of court officers and social workers.

Occasionally, this information may be included *if it is important to an issue on appeal.* The appointed attorney should be careful to ensure that neither too little nor too much is included. And, while the contents of petitions, the results of hearings, and the dates of notice of appeal should always be included, matters such as objections will depend on the nature of the issues raised. After the argument is completed, the statement of the case may be again examined to determine whether there should be any additional matters or whether it should be "pared down" in light of arguments that were ultimately not included in the brief.

The sole purpose of the statement of the case is to set the legal scene for later development of the human situation in the statement of facts. Keep the statement of the case

short and crisp. Amass a grateful following at the courts!

Elements of the Traditional Statement of the Facts. As far as the court is concerned, the purpose of the Statement of the Facts is to inform the court of what happened in the trial court. However, the "Facts" can do much more. They can take control of the case by *setting up the legal issues* you will be raising on appeal, by humanizing your client and/or mitigating the allegations, by demonstrating the inadequacies of the Department's proof or why particular errors were prejudicial. Finally, it is a good opportunity to *establish your credibility with the court.*

Start With Your Reading Of The Record. A good statement of the facts begins while reading the record with precise note-taking while the record is being read. Many attorneys find it helpful to do their first draft of the statements immediately after reading the record, when their memory is fresh.[2] The statements can later be pared down or emphasis added depending on the issues that will actually be raised.

Matters Usually Excluded from the Facts. In most cases, the Statement of the Facts should include only the evidence that was presented to the court during the proceedings, as well as the portions of the social study considered by the court. Unless necessary to preface the facts, one should not restate the procedural matters from the Statement of the Case in the Statement of the Facts (and this can be completely avoided by writing Integrated Statements). Also, avoid lengthy quotation of petitions and social studies. If precise quotation of the testimony of a witness or the ruling by the court is necessary to an argument, then reserve that verbatim quotation to the argument.

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[2] Exceptions would be in cases where the client is making strong indications of an intent to abandon the appeal, or the appeal appears to be from a non-appealable order. Counsel would be justified in waiting before making a detailed statement of the facts in those situations.

Be Clear, Concise And Interesting. It is almost impossible to persuade a reader of anything by use of dull, dry, writing. If the writing is overly long, complex or confusing, all hope of persuasion is lost. It is therefore very important to make the Statement of Facts as *understandable, short and interesting* as possible.

Unlike the sterile procedures outlined in the Statement of the Case, the Statement of the Facts should tell a gripping human story. Although there are no hard and fast rules as to how to do this, these suggestions may be helpful:

Start With An Introduction. It is difficult to tell a compelling and sympathetic story, especially when the record is made up of largely hyper-technical, and negative testimony and reports that were not necessarily presented in a chronological fashion in the trial court. An introduction describing your client's life *before* the filing of the petition (i.e., "Appellant was a foster child herself after her parents abandoned her in the county park") and *during* the pendency of the case ("Appellant struggled very hard to complete the requirements of her reunification plan and consistently visited with her children") is a very effective way to set the stage for your arguments and gives a road map of the case. It also humanizes your client.

Avoid Witness-By-Witness Summaries. A factual summary is best organized by providing a chronological description of the underlying events (i.e, the facts alleged against the parents, their attempts to reunify, etc.) instead of a chronological description of how the evidence was presented at trial. Avoid witness-by-witness summaries. Witnesses are often called out of order, and the testimony rarely proceeds in a fully chronological fashion. Rendition of the testimony in the order that it was given is often confusing and uninteresting. There is nothing worse for the reader than to have to thumb back and forth between the pages to find out what

happened. On the other hand, sometimes the witness-by-witness may work in a particular case, if it makes for a good story.

Use Subsections. This is particularly true now that the courts advise the use of integrated statements in dependency cases. As there may be several hearings and several reports, each will need a separate heading so that the court will know which report was used at each hearing.

Identify The Player Confidentially and Consistently. It is also important to clearly identify the various players so that the reader can keep track of them. In dependency cases, typically there are several people involved; two parents, the social workers, the relatives and the foster parents. It is necessary to pay attention to whether or not you have conveniently identified them. The children may be best identified by their confidential first names or initials. (See discussion of confidentiality below.) The professionals, after their original identification may be best identified by their roles. As to your clients, there is no consensus on how they best be identified, by name, by the "mother or father," or "appellant." But it may be best to identify parties by mother, father, child, etc., when two or more individuals in the case have the same name. And there is consensus that, *whatever you do, use consistent identifiers throughout your brief.*

As appeals in juvenile cases are confidential, anonymity of the parties must be maintained in the brief. The rules state that even the minor's first name should not be used if the minor has a distinctive name. (Rule 8.400(b).) The Third and Fifth generally refer to the parties' first and last names by initials only. Other courts still think it is more convenient to refer to the minor's first name. The way to be safe, is to use follow the lead of the local court, as one would do in describing the parties' names on the cover of the brief.

Be Complete. Make sure you provide an *honest* and *complete* picture of what happened throughout the dependency proceedings. You must include all relevant facts regardless of whether they are good or bad. For example, if you do not mention that your client failed to complete an important part of the reunification plan, your opponent will and it will reflect on your honesty. The key is not to omit these facts but to mitigate them. Along the same lines, be sure not to leave out facts favorable to your client.

Omit Unnecessary Details. Most readers rapidly lose interest with writing that contains useless details. Irrelevant matters add nothing to the brief and seriously detract from its persuasiveness.

If a series of witnesses testify to the same event, don't laboriously detail the testimony of each. It is permissible or preferable to summarize the testimony of one witness and then simply note that two other witnesses testified to the same thing, especially where the testimony was on an uncontroversial point. You would however provide the names of those witnesses.

Also, details that were very important at the beginning of a case may have declined in importance as the case proceeded. Thus the summary of a contested jurisdictional hearing would be much shorter in an appeal from a subsequent review hearing than it would be on appeal from the original disposition, and it would be very abbreviated on the appeal from a post-permanency hearing.

Do Not Unnecessarily Present Your Client In A Bad Light. Be vigilant about the manner in which you portray your client. You must vigorously defend him, not condemn him through careless writing. For example, the fact that your client yelled at the judge after losing a motion is irrelevant. Exclude it because it adds nothing to your argument and gratuitously makes your

client look bad.

If two witnesses corroborated your client's account that he finished his reunification classes, do not exclude them even though their testimony was the same as that of your client.

Be Accurate. It is extremely important to be accurate when summarizing the facts. The court attorneys and justices rely on the summaries contained in the briefs in deciding the case. If they discover that your summary is not accurate, they will disregard it and rely solely on the County Counsel's version of the facts. Once that has happened, you've lost your ability to persuade because you've lost your credibility.

Never Distort Or Exaggerate. As mentioned above, you must include the bad with the good. Although you may try to mitigate the bad information by use of language or organizational structure, never *distort* the facts.

Also, give honest treatment to the unfavorable testimony. Save your characterization of that testimony for the argument portion of the brief.

Stay Within The Record. *Never* present matters in your factual summary which are not part of the record on appeal. Rule 8.204 provides that factual summaries must be "limited to matters in the record." *Never* run afoul of this rule. You will incur the distaste of the judge or court attorney who reads your brief and lose your credibility. (See, e.g., *In re S.C.* (2006) 138 Cal.App.4th 396, 400-402.) Also, you run a risk that opposing counsel will move to strike part or all of your brief.

Be Persuasive, Not Argumentative. The Statement of the Facts is not the place to affirmatively argue the merits of your case. That is reserved for argument. However, a well thought out, well-organized factual summary can present the facts in a persuasive manner, such

that you are "arguing" between the lines. For example, compare these two draft statements presenting the same set of circumstances:

> Example 1:
> In the words of a mental health clinician who evaluated the minor in March 2009, she "missed numerous and important developmental tasks" due to the instability in her life. (1 CT 140.) However, she was an "uncommonly resilient child" who had learned to manipulate the adults around her to get her needs met, regardless of the effect her actions had on others. (1 CT 170.)

> Example 2:
> Ms. Jones a clinician at Xavier Hospital for Children, evaluated the minor on March 29, 2009 for several hours including observing her play with dolls. During direct-examination she testified that the minor was developmentally behind her peers in several significant respects, probably due to her mother's drug abuse lifestyle and numerous change in homes over the last three years. (1 CT 140.) However, Ms. Jones contradicted this conclusion in cross-examination when she further testified that she felt the minor was resilient to these events in her life, and had learned to cope by playing the adults in her life off of one another as demonstrated by the child's make-believe conversations by the dolls in response to problems presented during her play. She did not think though that the child had a hand in worsening her own situation. (1 CT 170.)

Which one is more persuasive? Which one would you rather read? Which one tells the more interesting story, compelling the reader to read more? Which one is shorter? We hope you picked example 1!

Organize Your Facts So As To Emphasize Good Points And Downplay Bad Points. The inconsistencies in the testimony of several of the County's witnesses might be highlighted by giving each witness a subheading, and by pointing out how that witness differed from the others. (Maybe this is another exception to the policy against summarizing "witness-by-witness.") By contrast, if there were no inconsistencies in the testimony, it might be summarized all as one without subheadings.

Avoid Editorial Comments And Personalities. Editorial comments about the weight of sufficiency of the evidence have *no* place in your factual summary (i.e., "Mrs. Wilson, a patently incredible witness, stated that . . ."). Characterizations of the personalities or actions of the players at trial are equally improper (i.e., "After repeatedly badgering witness Smith, the county counsel finally elicited testimony that . . ."). Instead, make the same points through the organization of your facts or through the careful use of language.

Pay attention as well to the manner in which you describe the various players, as you may inadvertently lend undue respectability, and therefore credibility, to a witness you want to discredit. For example, it may not be necessary to list all of the credentials and titles of a police officer or social worker who testified unfavorably to your client. There is no need to give a police officer any further identification than "officer" or "Officer Smith."

Use Your Facts To Set Up Your Arguments. When you edit your final version of the Statement of the Facts, you will use only the facts precisely necessary for the arguments that you will be raising in the brief. On a challenge to the sufficiency of the evidence, your factual statement will need to be somewhat detailed. A challenge to the exclusion of evidence at the jurisdictional hearing would need to discuss the content of that testimony or exhibit. On the other hand, in a brief raising a collateral issue, such as a challenge to a foster placement, the above-mentioned summaries would not be necessary, at least as to the present argument.

Oftentimes, when there is no dispute about a particular event, you can simply concede that on appeal. If the issue is not whether a child was molested, but who did it, perhaps there is no need to belabor the details of the abuse. Describe it generally, concede it if appropriate, and focus instead on the specific descriptions of the perpetrator or other important facts.

It is also good practice to note when evidence came in over appellant's objection. This alerts the reader, who is learning the facts of the case from your summary, that there might be something wrong with the evidence. By the same token you would not mention the objection if the point is not to be litigated on appeal and thereby avoid distracting the reader who may think you are going to argue that point.

4. Use The Correct Citation Format. Citations to the record need not appear with every sentence, unless the page numbers of the record are changing dramatically with every sentence. The clerks at the Third District are trained to look for a citation to the record by the end of every paragraph, but not necessarily in every sentence. There is no need to provide line references in citing to the record.

There is a right way and a wrong way to cite cases and other legal authorities in the California courts. Every appellate practitioner should be familiar with the correct way in which to present legal citations, either "Bluebook" style, or using the California Style Manual (CSM). The Third and Fifth Districts prefer the California Style Manual and counsel is strongly urged to adapt it for all filed briefs and documents. A summary article of the proper form for the most frequently "used and abused" rules in CSM format is located on the CCAP website under Brief Writing tools. The website also has a citation format comparison chart of Bluebook style to CSM style.

PHOENIX H. BRIEFS

The right of to independent review of the record by the appellate court where appellate counsel cannot find an issue existing in criminal appeals under *People v. Wende* (1979) 25 Cal.3d 436, does not exist in dependency cases. (*In re Phoenix H.* (2009) 47 Cal.4th 835; *In re Sade C.*

(1996) 13 Cal.4th 952.) In the "no issue" situation, appellate counsel faces questions of how much investigation and how many contacts to make before making an ultimate determination that the situation is in fact covered by *Sade C.*, and if so, what document should be filed with the court?

Investigation and Research. Before making the determination that there are no arguable issues to file, counsel should write to the client at his or her last known address, and await a reasonable time for a response. Use other reasonable means, such as telephone contact, to contact the client when there is reason to believe that correspondence will not reach the client. It may be necessary to have the correspondence translated when the client had needed an interpreter in the juvenile court. (Seek authorization for interpreter expenses first! See the CCAP website for Third and Fifth District Interpreter & Travel Expenses policies.)

It is also advisable to contact the trial counsel for appellant, especially when trial counsel took an active role in making objections below or in filing the notice of appeal. Trial counsel may provide valuable insights as to possible issues, record needs and/or the client's present situation.

Finally, before making the ultimate determination that there are no arguable issues, the attorney must contact the assisting attorney or other staff "buddy" at the appellate project. It is best to contact staff attorneys enough in advance of the opening brief's due date/deadline that there will be time for both attorneys to complete any further review of the record that is necessary and discuss potential issues. Also, the question of whether there is any need for record correction should be completely resolved by appointed counsel before the case is submitted to the project attorney as having no issues. Project attorneys are available to answer questions about the

record.

***Phoenix H.*: What To File?** Each court has its own requirements that must be followed.

Third District. Pursuant to the dictates of the new California Supreme Court case of *In re Phoenix H.* (2009) 47 Cal.4th 835, if no arguable issue can be discerned, counsel should no longer file a letter to that effect or move to substitute appellant to proceed in pro per. Rather, counsel should file a "Wende-type" brief [a "*Phoenix H.* brief"] which shall include a brief recitation of the relevant facts and procedure and a declaration establishing that counsel has advised appellant that counsel has reviewed the entire record, served a copy of the brief on appellant, and informed appellant of appellant's right to file, within 30 days of the filing of the "*Phoenix H.* brief," a motion to file a supplemental brief supported by a showing of good cause that an arguable issue does exist. A sample *Phoenix H.* brief for use in the Third District is now available on CCAP's website.

In any case where appellant already has been permitted to proceed in pro per, the court will proceed to dispose of the appeal on the merits if an opening brief is filed by appellant.)

Henceforth, all *Sade C.* letters and motions to substitute appellant in pro per will be rejected with a directive to file an opening brief in compliance with *Phoenix H.*

Fifth District. The policy of the Fifth District with respect to *Phoenix H.* still permits a letter brief, but the procedure differs with what is expected of appellant after the *Phoenix H.* brief is filed. The policy is a follows:

When court-appointed counsel find no arguable issue to be pursued on appeal, they should so inform the court, file a brief setting out the applicable facts, procedure and law (*Phoenix H.* brief), and provide a copy of the *Phoenix H.* brief to the appellant with a proof of

service to the court. Counsel may submit a Phoenix H. Brief in letter format; compliance with California Rules of Court, 8.360(a) is not mandatory with the court when court-appointed counsel find no arguable issue to be pursued on appeal.

Once a *Phoenix H.* brief is filed, it shall be the appellant's burden to personally make a good cause showing that an arguable issue does in fact exist. Court-appointed counsel are urged to so inform their appellant-clients. Upon the filing of a *Phoenix H*. brief, the court will extend 30-days leave for appellant to personally file with the court a letter stating a good cause showing that an arguable issue does exist on appeal.

No formal motion or other pleading will be required of the appellant, except that appellant must attach a proof of service of the letter upon the superior court clerk, trial counsel for the children, appellant's counsel, and counsel for respondent. If the appellant does not file such a letter within the time permitted or otherwise does not make a good cause showing that an arguable issue does exist, the appeal will be dismissed.

A Note On Compensation: Counsel must wait the 30 days from the date of filing the *Phoenix H.* brief, or the date of the court's opinion, whichever comes first. The time claimed for the *Phoenix H.* filing should be billed on line 6. Billing too soon is the most common reason that a dependency claim is delayed for correction in Fifth District cases.

Other Districts. Other Courts of Appeal have different procedures, or a combination of these procedures; appointed counsel should check with the respective projects. Other projects may also have different compensation billing practices; again, check with the respective project.

REPLY BRIEFS

Reply Briefs Favored. Although the reply brief is "discretionary," its use is

recommended because it is appellant's best chance to refine the legal arguments, correct mischaracterization of facts or analysis, and generally have the last word. As it is a written memorial, it offers a much greater opportunity than oral argument to "carve in stone" the reasons why respondent is incorrect. Also, by its submission relatively early in the case, it may be more influential than oral argument in the outcome of the case. Like the opening brief, there are some recommended do's and don'ts:

Timing. The deadline for filing a reply brief is 20 days after the filing of the respondent's brief. Note that the date appellant is served with the respondent's brief is not always the same date as the date the respondent's brief was filed, and the correct information as to the actual date of filing can be obtained by contacting the court or looking online at the court's docket information. If the reply brief cannot be completed within the 20-day period, counsel may seek an extension of time. But beware! Because the reply is a "discretionary" brief and dependency cases have a priority attached to them in the court's docket, it is not uncommon to receive a denial for an extension request at this point in the case. The Third and Fifth will scrutinize an extension for a showing of good cause; "press of business" reasons (i.e., other case work with looming deadlines) will not usually suffice.

Preparation. The outlining of the reply brief may begin as early as the reading of the respondent's brief. It is also helpful at this stage to reread the opening brief to see how the flow of ideas in the briefing thus far will appear to the court and to more quickly observe which of appellant's points have not been addressed by in the respondent's brief.

The respondent's brief is checked for accuracy in its summary of what occurred in the juvenile court. Any factual inaccuracies are noted.

Also noted are cases cited by the respondent that were not referred to in the appellant's opening brief. These authorities are read to see if they actually stand for the propositions cited by respondent and the citations are checked for current validity.

The respondent's brief is also checked for points that are not addressed, what respondent *fails* to say. (While worth commenting on, the Third and the Fifth District are unlikely to find an argument "wins" simply because respondent did not address it.) Finally, has respondent made an important assertion unsupported by authority?

What Should Be Included

The reply brief is an ideal opportunity to point out any factual inaccuracies in the respondent's brief. Meticulous care should be taken at this stage in citing to the record to demonstrate that appellant's version of the facts is correct.

Arguments should be addressed in the order raised in the opening brief.

The arguments of the parties should be recapitulated. (Be brief!) This is also a good time to point out the areas of agreement between the parties or any concessions by the respondent, which will take the briefing one step further in the framing of the issues.

Concisely state where respondent is wrong, with citation to authority. Point out where the issue is mischaracterized by respondent or where respondent has failed to address matters raised in the opening brief.

It is absolutely essential at this stage to address any claim of procedural default raised by the respondent, especially if this subject was not covered in the opening brief. A procedural default may result in the court not addressing a valid claim of error, and it should be avoided if at all possible.

Some matters raised by the respondent that were not addressed in the opening brief may require further attention in the reply and additional citation of authority, or, on rarer occasions a concession. A change in focus or a concession may be necessary in order to maintain credibility.

A looser style is suggested for the reply brief. The basic education phase of the opening brief is now complete, and there is more freedom to talk about general principles. A more informal, conversational tone is permitted. Without overdoing it, the brief can incorporate memorable phrases, etc., respond colorfully to ridiculous assertions in the respondent's brief, and end with a flourish. But don't overdo it.

What Should NOT Be Included.

Do Not Include New Issues! A supplemental brief is needed to raise a point not previously briefed; the procedures for this differ slightly in the Third and the Fifth District. (See our article "Clearing up Confusion in Filing a Supplemental Brief in the Third & the Fifth District Courts.")

A new issue should not be raised for the first time in the reply brief. For example, appellant should not reply for the first time that the failure to object does not foreclose raising the issue because the issue is cognizable as one of ineffective assistance of trial counsel. Raising ineffective assistance of counsel for the first time in a reply brief is very risky and should be avoided. (Cf., *Reichart v. Hoffman* (1997) 52 Cal.App.4th 754, 764; *People* v. *Dunn* (1995) 40 Cal.App.4th 1039, 1055.) To avoid this risk, ineffective assistance of counsel should be raised by a supplemental brief, if it was not already covered in the opening brief. (More on Supplemental Briefs below.)

Do Not Leave Important Issues For The Reply Brief. Leaving important issues (such

as waiver) for the reply brief is inadvisable because it may deprive the client of the opportunity to brief the issues and it greatly detracts from the credibility of the briefing. If the attorney sees an important issue, the court and the respondent will see it too; problem areas need to be addressed early rather than late. Perhaps the only issue that should be left open for possible reply is something that would be a weak, inappropriate contention by respondent. The reply brief is adequate to address silly points raised by the respondent.

Do Not Snipe. Even when the respondent has misstated the law or the facts, the reply must be civil in tone to avoid "going overboard" and offending judicial sensibilities. Be firm but moderate:

> [M]aintain credibility with the court by fairly addressing the other side's arguments. Be absolutely accurate with respect to the record and avoid ad hominem attacks on the other side. While a reply provides an opportunity to present un-rebutted arguments, there is a responsibility to maintain accuracy and fairness that comes with this opportunity. Failure to do so can be devastating to one's credibility with the court. ("Preparing an Effective Reply Brief," by Roussos & Toledo, Esqs.)

Use a "cooling off" period to perhaps rewrite a reply that may be too harsh in tone.

See also, the State Bar's California Attorney Guidelines of Civility & Professionalism. Finally, worth reading on this subject is *In re S.C., supra*, 138 Cal.App.4th 396.

Do Not Focus on Minutiae. In the end, the reply brief should address the "big picture." So, although one may begin by pointing out the factual inaccuracies of the respondent's brief, the ultimate focus of the brief should return to the overall injustice that occurred , not simply nitpicking at small points. On the other hand, do not simply rehash the opening brief arguments. Instead, counter each of the legal arguments and factual assertions of the respondent. Address the structure of the respondent's argument and why their position is not supported. Look at their

authorities; *read* cases that you have not previously covered in your research. Are they on point? Can they be distinguished? Don't just *say* your argument is more compelling, but substantiate *why*. Finally, it is a common misconception that appellant will "waive" arguments that are not included in the reply brief – not so.

SUPPLEMENTAL BRIEFS

Use of Supplemental Briefs. The supplemental brief is used to address a new issue not covered in an opening brief. It is also used to address a new case taking a novel or controlling approach. For example, if the California Supreme Court decides an issue of importance to the appellant's case, the new holding would be the subject of a supplemental brief.

Permission to File. A supplemental brief may be filed with the permission of the court. Many courts require a formal application. The procedures differ slightly in the Third and the Fifth District. (See our article "Clearing up Confusion in Filing a Supplemental Brief in the Third & the Fifth District Courts.") In the Third District, the application must state good cause why the issue was not raised in the opening brief, and counsel should seek pre-approval from the court before submitting the brief. In establishing good cause, it may be necessary to argue that effective assistance of the client requires the brief be accepted for filing.

What format? Except where the court has *expressly* invited a letter brief format, supplemental briefs in both the Third and the Fifth should follow the same format as other formal opening briefs, i.e., should include tables and green covers.

Oral Argument Authorities. When the sole item to be briefed is a newly decided case that is not wholly revolutionary in its approach to an issue, many attorneys simply provide the case in the "supplementary authorities" to be discussed at oral argument. Again, procedures for

filing this differ slight in the Third and the Fifth District. (See Oral Argument below.)

ORAL ARGUMENT

Requesting Oral Argument; Special Rule in Fast Track Cases. Generally, a memorandum is sent to counsel, indicating the time period for requesting oral argument, sometimes as short as 10 days. The Fifth District often sends out two memorandum, one to help them with scheduling, and a second one from Chambers inviting a waiver. The Fifth District also wants to know if telephonic argument is requested.

Counsel's response – either an oral argument request or a waiver – must include a proof of service showing service on all necessary parties. In a typical case, counsel will be given notice of the date argument is set at least 30 days before the argument is set to be heard.

Occasionally, the court will set argument on its own motion and direct counsel to appear.

Counsel should be mindful that things may proceed more quickly to oral argument on rule 8.416 "Fast Track" parental rights termination appeals and rule 5.600 & 8.452 writs (review after order setting sec. 366.26 hearing). The time period for oral argument demand in a rule 8.416 case is due 15 days from the due date for the reply brief. (Cal. Rules of Court, rule 8.416(b)(1).) The rules are a bit more generous in a rule 8.452 writ case where oral argument must be herd within 30 days after the response is filed or due. (Cal. Rules of Court, rule 8.452(b)(1).) Counsel should monitor this date closely if argument is desired. Some courts send a memorandum to counsel even on a rule 8.416 case, but it is counsel's duty to timely demand argument, even if the court has not sent out a memorandum.

It is a common misconception that an appeal cannot prevail without oral argument. Do not request oral argument if you do not have anything to add to the briefs. And definitely do not

request argument where your position is weak and cannot withstand scrutiny. But in close cases, cases having novel points, or in cases in which the other party has confused or misrepresented the facts or law or your position, argument may be appropriate even though your reply brief was good.

Many courts give only a minimal amount of time, such as 15 minutes, per side unless more time is requested in writing. Typically, not more than 30 minutes per side will be allotted. If time is desired for rebuttal, that should be requested at the beginning of appellant's opening argument.

Preparing for Oral Argument.

There are currently two MCLE video training tapes available to appointed counsel on preparing for oral argument at the CCAP web site www.capcentralMCLE.org. Many of these same points and tips are covered, and more:

- **Updating.** Preparation begins with updating your authorities (which you probably already started at the time of your decision to request argument).
- **Organize your argument.** Decide your most important points, and prepare to begin with your most important point. The court may not actually allow you to finish all of the points you intended to make, or even one of them, but if you begin with what you want to discuss, you will at least have a chance to discuss that point. If you start with an unimportant point, it is more likely that you will never get to say what you intended to say. Keep in mind that the focus of your case may have shifted since you prepared the opening brief in light of what the respondent said, changing law, etc. You may not necessarily be starting off with the first argument from your brief.

- **Use note cards.** This will help you remember your points. Use "one-word" reminders, as opposed to full sentences, because you do not want to appear to be reading from your brief.
- **Re-read the briefs.** Obviously, you will read your own briefs to give yourself an idea of what needs attention and what does not. But the greatest attention should be given to the points made by the respondent, as this is an area in which you are likely to receive questions by the court. And re-read important authorities, especially the cases cited by respondent on the crucial points. You may be questioned on fact in those cases, and you want to be able to answer the questions!

The Court Appearance – Do's and Don't's

- **Begin With Your Name & the Party You Represent.** One reason for this is so that it is more easy for a justice or court attorney to identify attorneys when listening to the audio taped argument. If your client is present, it is not necessary to note the client's presence.
- **Do Not Begin Argument By Offering to Submit Without Argument!** There may be an exception when the court hints that you have won, and states that it would like to hear from the other side. But you should not go into argument planning for it to go this way. Go prepared to argue your side. If the court hints that it's time to sit down and be quiet – take the hint and do so! Never ask for oral argument if you have nothing to say.
- **Do Not Read Your Presentation.** That is boring and poor form.
- **Do Not Wander From the Lectern While Speaking.** When you get out of range of the microphone, the court may not hear you and the audio-tape may miss you completely.
- **Do Not Begin With a Lengthy Recitation the Facts.** Presumably, the court read the

briefs and will not need to revisit your Statement of the Facts. Of course, you must be conversant with the facts, and the questioning may require lengthy discussion of the facts later in the argument, but let them draw you out on this.

- **Listen to the Court's Questions & Take Direction Where Appropriate.** Although counsel need not always concede points where the court has indicated an intent to rule contrary to counsel's position, counsel must answer questions asked that assume points that counsel would not like to assume. Also, it is logically better for counsel to move into other areas that may prevail rather than stay in an area in which no progress can be made.
- **Do Not Take Umbrage & Try Not to Become Flustered.** What is meant by "oral argument" is not "heated exchange." Counsel should take the role of someone who is providing information, trying to help the court to resolve the case. Think of it as a discussion where some tough questions are going to come your way and you need to be thoroughly prepared in order to contribute to the discussion.
- **Direct All Comments to the Court & Not to Opposing Counsel.** Argument is directed to the court, not each other. Don't criticize opposing counsel.
- **Do Not Direct Questions to the Court.** Generally, the court wants to ask the questions. If you do not understand a question from one of the justices, it may be proper to ask for clarification.
- **Do Not Interrupt the Court.** The court may interrupt you, but you should not interrupt the court.
- **Do Not Try to Bluff the Court.** If you really do not know the answer to a question about the record or the facts or holding of a case, you should say so. This is better than the loss

credibility with the court you will suffer if you try to bluff your way through.

- **Instead, Consider Seeking Leave to File a Supplemental Brief.** Of course, it is best to know the answer, but in some cases the court will permit further briefing.
- **Counsel For Appellant Reserves a Few Minutes For Rebuttal.** The exact amount of time to be reserved depends on the case, but usually does not exceed five minutes.

PETITIONS FOR REVIEW

The Decision to File a Petition for Review.

Some of the factors to be considered in making the decision include:

- How correct or incorrect is the appellate decision?
- Does the case have important issues for review?
- Does the case have federal issues?
- Does the client want to proceed?
- Will the client gain more than may potentially be lost by filing?
- Does the client have a disability keeping him from pursuing a petition in pro. per.?
- Is there time for the client to file the petition in pro. per.?

Time for Filing. A party may petition for review in the California Supreme Court from the 31st to the 40th day after the filing of the appellate opinion,[3] or may answer another party's

[3] Actually, the rule is 10 days after the finality of the opinion. In appeals, the deadline is 40 days because the decision does not become final to the appellate court until the 30th day. (Cal. Rules of Ct., rules 8.500(e)(1) & 8.264(b)(1), 8.470.) For finality of other orders, see rules 8.264(b)(2) [finality of voluntary dismissals], 8.490(b) [finality of writ proceedings].)

petition for review within 20 days after the filing of that petition. (Rule 8.500(e)(4).) The answer may raise new issues. (Rule 8.504(c).) The rules also provide for a reply 10 days after the filing of the answer. (Rule 8.500(e)(5).)

The Supreme Court may rule on the petition for review within 60 days after filing or may extend its time for filing up to 90 days after the finality of the appellate decision. (Rule 8.512(b)(1).)

Also, the Supreme Court may act on a late petition between the 40th and 60th day, but it loses jurisdiction after the 60th day. (Rules 8.500(e)(2), 8.512(c).)

Because of the narrow time period in which the California Supreme Court has jurisdiction to act, last minute filing and/or last minute use of rule 8.25(b)(3) mailing should be avoided, as it is possible to simply run out of time, and then be placed in a situation of having to seek relief from default. If the Postal Service is used, a return receipt should be sought, to help keep the documents from being lost in the mail. Other common carriers can provide a tracking number.

Rules Guiding Consideration of the Petition. Rule 8.500(b) provides:

> The Supreme Court may order review of a Court of Appeal decision: (1) When necessary to secure uniformity of decision or to settle an important question of law; (2) When the Court of Appeal lacked jurisdiction; (3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or (4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

Note that rule 8.500(c) forecloses review of issues that could have been but were not presented to the Court of Appeal. (See Petition for Rehearing.)

What to Include in the Petition. As almost all petitions are pursued under theory (b)(1) that review is necessary to secure uniformity of decision or to settle important questions of law,

most petitions contain sections entitled, "Issues Presented," and "Necessity for Review." The best petitions make an attempt at explaining *why* the issue is of importance. Obviously, if there is a split of authority between published opinions, that would be discussed. Whether or not the Court has spoken on the issue is also important. At a minimum, the petition should at least attempt to cite to the page of the slip opinion that is in error, and state why.

Although the rules applying to briefs apply to petitions for review, and therefore it should have "statements" and "argument" portions, the statements in particular must be "concise" and "nonargumentative." (Rule 8.504(b)(1).) The statements can also refer to the slip opinion for the facts. (See Rule 8.500(c)(2).) The length of the argument(s) may depend upon the thoroughness of the discussion of the importance of review. In many cases, a short petition that adequately states the reasons why review should be granted with reference to where the errors occurred below and citation to the applicable authority, may be as effective as a much longer cut-and-paste petition that completely repeats the briefing in the appellate court.

Dispositions. The great majority of petitions (e.g., 96% in many years) are denied. Of the remaining, a typical resolution is a grant of review or a "grant and hold" in which the Supreme Court takes no action on a case while awaiting resolution of another related case. If review is granted, the Supreme Court will appoint counsel upon the client's request after contacting the appellate project for a recommended appointment.

If the case is a "grant and hold" case, briefing is deferred until further notice, usually pending resolution of a "lead case." (Rule 8.512(d)(2).) Later the case may be transferred to the Court of Appeal with directions to reconsider the appeal in light of the Supreme Court's resolution of the lead case, or review may be dismissed. (Rule 8.528(d).) If the matter is

transferred to the Court of Appeal, the parties may seek leave to submit additional briefs. (Rule 8.528(f).)

WRITS IN DEPENDENCY CASES

Traditional Extraordinary Writs. The Code of Civil Procedure authorizes the granting of writ relief in the nature of mandate or prohibition where the appellate remedy would be inadequate. (See, e.g., Code Civ. Proc., secs. 1086, et seq.; rule 8.485, et seq.) This form of relief has been held to apply in child custody proceedings, including juvenile matters, and its use has been encouraged by several of the appellate courts at various times. Unlike typical civil and criminal appeals, which are very difficult to expedite, in juvenile cases, the courts may be far more willing to recognize the harmful effects of the slow appellate process. Thus, where there is a potential that the family relationship may be harmed or destroyed by the slowness of the appeal, appellate counsel should consider the alternatives of filing (or attempting to have the trial attorney file) a petition for extraordinary relief.

Some courts, such as the Fifth District, will on occasion deem an appeal to be a writ. (*In re Albert B.* (1989) 215 Cal.App.3d 361, 373.) This can greatly increase the speed by which the case is resolved.

Petitions for writs of mandate and prohibition have special format requirements. The CEB book, *California Civil Writ Practice*, which is periodically updated, should be consulted to learn the complete pleading requirements. The record requirements are set forth in rule 8.486(b)(1). Attached exhibits must be tabbed in an attached booklet. (Rule 8.486(c).)

In the Third and Fifth Districts, attorneys must seek prior expansion of their appointment to include compensation for work done on a petition for extraordinary relief. (See "Procedural

Policies Chart: Expansion Requests.") In all other districts, the project should be consulted before writ relief is sought.

Rule 8.452 writs. Under Welfare and Institutions Code section 366.26, subdivision (l), and rule 8.452 (d), the findings and orders made by the juvenile court in setting the permanency planning hearing are not appealable. Review must be sought by writ under rule 8.452. These issues will not be reviewed on appeal at any time, except on appeal from a order made at a permanency planning hearing when a timely filed petition was summarily denied or otherwise not resolved on the merits.

As these petitions are normally handled by the trial attorneys, the counsel on appeal is not normally required to pursue a writ. However, counsel appointed on appeal from the setting hearing or the permanency planning hearing needs to know what issues should have been the subject of a rule 8.452 petition because it will be necessary to determine whether what appears to be an inappropriate appeal from a setting order should be deemed a petition for writ relief, or whether some other action should be taken due to apparent ineffective assistance of trial counsel in not seeking writ relief.

In appeals from the section 366.26 hearings, it will be necessary to know which, if any, of the rule 8.452 writ issues the court of appeal did not reach on the merits, as these issues may be raised on appeal from the permanency planning order. Although the petition and the ruling thereon may not be part of the record on appeal, these items can often be obtained by contacting trial counsel, and placed before the reviewing court by motion for judicial notice. Issues raised at the time of the setting order may also be reached on appeal from the section 366.26 order when a rule 8.452 writ petition was not filed due to lack of notice of the writ requirement. (*In re Cathina*

W. (1998) 68 Cal.App.4th 716, 723.) The courts have expressed a possible willingness to review this hearing on appeal despite the parent's non-compliance with rule 8.452, if there was a blatant due process violation. (See, e.g., *In re Janee J.* (1999) 74 Cal.App.4th 198.)

Other courts have permitted the issue to be reached on an erroneously filed appeal from the setting hearing where the appellant was not properly advised of the writ requirement. (*In re Merrick V.* (2004) 122 Cal.App.4th 235 [addressed issue on appeal]; *Jennifer T. v. Superior Court* (2007) 159 Cal.App.4th 254 [deemed purported appeal a timely filed writ].)

Petitions for Writ of Habeas Corpus. Habeas corpus relief lies in child custody proceedings. (*Adoption of Alexander S.* (1987) 44 Cal.3d 857, 866-868.) It is an appropriate remedy when the ineffective assistance of counsel does not appear on the record. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635.) One case has held that its use has been disallowed after parental rights have been terminated. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143; but see *In re Darlice C.* (2003) 105 Cal.App.4th 459, 464, permitting habeas corpus remedy initiated while timely appeal from section 366.26 hearing is still pending.) The writ preferred by some courts in lieu of a motion for relief from default remedy for defects in notices of appeal.

Counsel who are appointed in the Third District and the Fifth District must seek expansion of appointment when a petition for writ of habeas corpus is to be filed. In all districts, the project should be contacted before a petition is filed.

Also, in cases in which ineffective assistance of trial counsel is alleged, it is expected that counsel will be contacted, as input from the trial counsel is needed to determine the existence or non-existence of a valid tactical decision for counsel's action or inaction.

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