

## Handling People's Appeals and Cross Appeals

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A People's appeal is one in which only the prosecution has filed a notice of appeal, and as such, it is the sole appellant.

In contrast, a cross appeal is one in which both parties have filed a notice of appeal. "By definition, a cross-appeal is any appeal filed after the first appeal." (*The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 403, quoting *Life v. County of Los Angeles* (1990) 218 Cal.App.3d 1287, 1297–1298.) In this situation the two parties are both appellants and respondents.

In both People's appeals and cross appeals, there are several key differences in handling the appeal of which appointed counsel should be aware. This article highlights the most important differences.

### Notice of Appeal Considerations

The People's right to appeal in criminal actions is conferred exclusively by statute, and only certain orders can be appealed by the prosecution. (See Pen. Code, § 1238.) If the order does not fall into one of the enumerated sub-sections, then it is not appealable. Counsel representing a defendant in a People's appeal, should immediately review the notice of appeal to consider whether it is subject to a motion to dismiss based on the fact that it is not an appealable order.

Counsel appointed to represent a defendant in a People's appeal might be under the impression that review of the record can wait until the prosecution has filed the opening brief. But actually, counsel should review the entire record as soon as possible to determine if a notice of appeal needs to be filed to present an issue on the client's behalf in a cross appeal.

California Rules of Court, rule 8.308(a) sets forth the normal time to file a notice of appeal as 60 days. But, under rule 8.308(b), if one party has timely filed a notice of appeal, the opposing party has either 60 days, or 30 days after the superior court clerk mails notification that an appeal has been filed, whichever occurs later, to also file a notice of appeal. Even when more than 60 days have elapsed since the entry of judgment, when appellate counsel is appointed on a People's appeal, there may still be time to file a notice of appeal on behalf of the defendant so as to initiate a cross appeal. For this reason, it is important to review the record on appeal as soon as possible and determine whether there are issues that the defendant might want to appeal.

### Record Considerations

Rule 8.320, which sets forth the normal record on appeal, provides for additional parts

of the record to be included in the normal record on appeal when the defendant files the notice of appeal. (See Cal. Rules of Court, rule 8.320(b)(13) and (c)(9).) When appointed counsel receives the record in a People's appeal, these items may not be included in the record on appeal.

Rule 8.324(a) explicitly provides that the prosecution, as appellant, can seek these items. However, if the prosecution does not request the items, and counsel representing the defendant wants them included in the record, counsel will need to prepare a motion to augment rather than a supplemental record request. Counsel should be prepared to explain why the items sought are necessary to handling the limited order being appealed. (See Cal. Rules of Court, rule 8.324(c)(1).)

### Briefing Sequence and Filing Deadlines

When the prosecution is the only party appealing, the normal briefing sequence and filing deadlines set forth in rule 8.360(c) apply. In other words, the prosecution would file the Appellant's Opening Brief first, and then counsel for defendant would have 30 days to file the Respondent's Brief. (Cal. Rules of Court, rule 8.360(c)(2).)

On the other hand, rule 8.360(e) sets forth the briefing sequence for cross appeals in criminal cases. The rule provides that, unless the Court of Appeal orders otherwise, the defendant must file the opening brief first. If counsel is handling a cross appeal in a civil matter, such as an appeal in a MDO, SVP or LPS case, the provisions for briefing sequence set forth in rule 8.216(a) would arguably apply.

### Contents of Briefs and Raising Additional Issues

The contents of briefs in cross appeals is governed by rule 8.216(b). As a preliminary matter, it should be noted that the respondent's brief and cross-appellant's opening brief must be combined. Likewise, the reply brief and cross-respondent's brief must be combined. (Cal. Rules of Court, rule 8.216(b)(1).)

A combined brief in a cross appeal may include a single summary of the significant facts, but must address the points addressed in each appeal separately. (Cal. Rules of Court, rule 8.216(b)(2).) The reply portion of a combined brief must confine itself to points raised by the party in its opening brief. (Cal. Rules of Court, rule 8.216(b)(3).) So, for example, a cross-appellant may not use its cross-appellant's reply brief to answer points raised in the appellant's reply brief.

When representing the defendant as the respondent in a People's appeal, counsel needs to keep in mind a very important limitation:

When a defendant appeals, Penal Code section 1252 permits the Attorney General to ask the reviewing court to consider and pass upon all rulings of the trial court which were

adverse to the State, in addition to resolving the issues raised by the defendant.<sup>1</sup> But, there is no similar statutory provision permitting a defendant to ask the appellate court to consider and rule upon adverse rulings as to him or her. This means that counsel representing defendant cannot add additional issues to a respondent's brief. If defendant wants to appeal an issue, a cross-appeal must be filed. The only possible exception to this limitation might be the ability to raise an issue regarding an unauthorized sentence. Since the general rule is that an unauthorized sentence can be corrected at any time (*People v. Scott* (1994) 9 Cal.4th 331, 354; *People v. Serrato* (1973) 9 Cal.3d 753, 763), appellate counsel could ask the court to exercise its discretion and to consider the issue.

### Other Brief Requirements

Counsel will need to pay attention to how to designate the parties in the brief captions. When the prosecution appeals, it is designated "Plaintiff and Appellant," and the defendant is designated "Defendant and Respondent." But, otherwise, the title of the action would not change. (Pen. Code, § 1236.) And, don't forget that when representing the respondent in a People's appeal, the color of the cover for the respondent's brief is yellow. (Cal. Rules of Court, rule 8.40(b)(1).)

In cross-appeals, the parties are referred to as "Appellant and Cross-Respondent" and "Respondent and Cross-Appellant." Counsel should review the appointment order to see which designation applies to his or her client.

The color of covers for briefs in cross appeals is governed by rule 8.40(b)(2). The cover of the first opening brief (usually filed by the defendant per rule 8.360(e) at least in criminal cases), is green. The cover of a combined respondent's brief and appellant's opening brief is yellow. The cover of a combined reply brief and respondent's brief is tan.

As far as limitations on the length of the briefs in cross appeals, a combined brief must not exceed 51,000 words (including footnotes), and 150 pages. (Cal. Rules of Court, rule 8.360(b)(4).)

### Oral Argument

If counsel will be presenting oral argument in a People's appeal, there are two things to remember for the argument day. First, counsel will sit on the right side of the courtroom, not the left. And second, whereas when representing the appellant, counsel has the right to open and close (Cal. Rules of Court, rule 8.256(c)(1)), when representing respondent, counsel will present argument after the prosecution and will not have an opportunity for rebuttal.

In cross-appeals, the court sets the sequence for oral argument. (Cal. Rules of Court,

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<sup>1</sup> The question of the parameters of Penal Code section 1252 is beyond the scope of this article.

rule 8.256(c)(1).)

### Compensation Considerations

When counsel is appointed to handle a People's Appeal, an interim claim can be submitted after the filing of the respondent's brief.

Even though line 6 of the claim form is labeled "Appellant's Opening Brief" counsel should claim the time for preparing the respondent's brief in this category, and add an explanation that this is a People's appeal.

Counsel should still claim the time spent reviewing the prosecution's briefs on line 10, opposing parties' briefs. If the guidelines of 2.5 hours is exceeded because the opposing opening brief is lengthy, or because a reply brief and/or a petition for review also had to be read, provide a breakdown for the time spent on each brief and any specific comments regarding the need to spend extra time in review.

The time for filing an interim claim in a cross appeal would be when appellate counsel files the opening brief. If the briefing sequence set forth in rule 8.360(e) is followed, meaning counsel representing the defendant files the first opening brief, then appellate counsel would claim opening brief time on line 6. The combined reply brief and cross-respondent's brief would be claimed on line 8, the reply brief line. But, counsel would need to explain that this document is essentially two separate briefs, and so the ordinary 1/3 the opening brief guideline may not be reasonable. Similarly, additional time for reviewing opposing counsel's briefs should be explained.