

# Step by Step

## Winning an Appeal Begins With Following the Rules

By Marc J. Poster

Appellate courts have traditionally tolerated most procedural flaws in the preparation of the appellate record and briefs. This was especially true where the flaws caused only inconvenience and did not materially interfere with the courts' ability to dispose of appeals on the merits.

However, as workloads have increased, tolerance for rule violations has decreased. The 9th U.S. Circuit Court of Appeals, for example, now decides a staggering number of appeals. Each circuit judge is responsible for about 400 cases a year, nearly two appeals per working day. As Senior Judge Ruggero J. Aldisert puts it: "Today there is no quiet time in the library. The circuit judge is on a treadmill, and each case comes to him or her in the midst of a gallop." Ruggero J. Aldisert, "Then and Now: Danger in the Courts," *The Federal Lawyer* 41 (Jan. 1997).

Two recent 9th Circuit decisions express that court's growing frustration with practitioners who do not follow procedural rules designed to facilitate the court's job of deciding cases on their merits. The first decision concerns a litigant's failure to present the judges with an adequate record. In federal appellate courts, the official record on appeal consists of the original papers and exhibits filed in the district court, the court's docket and a transcript of the proceedings.

But there is only one (usually voluminous and sometimes disorganized) district court file in each case, and that file may be hard to locate. Moreover, three circuit judges hear each appeal, and seldom do all three judges happen to maintain offices in the same place. It is therefore necessary for the litigants to provide the court with multiple copies of all pertinent documents from the district court file. Litigants do this by filing five bound and consecutively paginated copies of "Excerpts of Record."

Circuit Rule 30-1.3 specifies the materials the excerpts must contain. These include the district court's docket, the judgment or order appealed from and the notice of appeal and other documents required for the appellate court to determine its jurisdiction, the appealability of

the judgment or order appealed from and the timeliness of the appeal. In addition, the excerpts must contain those portions of any documents and exhibits in the record that are cited in the appellate brief and are necessary to the resolution of an issue on appeal. If the appellant challenges the admission or exclusion of evidence or any other oral ruling by the district court, the excerpts must include pertinent portions of the reporter's transcript.

On the other hand, the excerpts should not be any larger than they have to be to support the issues presented to the appellate court. For example, Rule 30-1.4 specifies that the excerpts shall *not* include briefs or other legal memoranda filed in the district court unless they are necessary to the resolution of an issue on appeal, and then only those pages necessary for that purpose.

In *Dela Rosa v. Scottsdale Memorial Health Sys. Inc.*, 136 F.3d 1241 (9th Cir. 1998), the 9th Circuit found the appellant's excerpts woefully inadequate to permit that court to review the district court's summary judgment ruling. The appellant failed to include the complaint or any of the evidence submitted to the district court on the summary judgment motion. The appellant also failed to consecutively paginate the excerpts, so it was difficult for the judges to find the documents cited in the appellant's brief. It was, in the appellate court's words, "quite possibly, the most useless collection of papers that members of this panel have ever seen."

The 9th Circuit emphasized that circuit rules regarding the appellate record "are not optional suggestions to active members of the bar, but *rules* that complement the federal rules, are entitled to respect, and command compliance." Although Rule 30-2 authorizes the court to impose a range of penalties for rule violations, the court chose not to single out the *Dela Rosa* appellant for monetary sanctions "when we have allowed so many previous rules violations to slide by without comment. We are, however, reaching the end of our patience in these matters and therefore declare that this habit of non-compliance must end."

The court noted: "Especially in this time of high numbers of judicial vacancies, attorneys should accept the responsibility of presenting an appeal of professional quality, which necessarily includes full compliance with the rules of court for the Ninth Circuit."

The second decision concerns a litigant's failure to follow rules for preparation of briefs on appeal. Federal Rule of Appellate Procedure 28 and Circuit Rule 28-2 contain detailed specifications of the contents and order of presentation of appellate briefs. An appellant's brief must contain a table of contents; a table of authorities cited; a statement of subject matter and appellate jurisdiction; a statement of issues presented for review; a statement of the applicable standard of appellate review for each issue; a statement of the case and a statement of facts with citations to the excerpts; a summary of argument; the argument; a short conclusion stating the precise relief sought; a statement of compliance with court rules on word-length and typography; a statement of related cases; and a proof of service.

In particular cases, the rules may also require a corporate disclosure and an addendum of statutes, regulations or rules relevant to the appeal. The rules also specify the colors for the covers of each party's brief and of the excerpts. There are set limits on the number of words in each brief and the size of type.

In *N/S Corp. v. Liberty Mutual Ins. Co.*, 127 F.3d 1145 (9th Cir. 1997), the appellant's opening brief failed to state the standard of appellate review, contained only a few general record citations and exceeded word limits. The brief also took liberty with the statement of the case and relied on unciteable case authority. The appellant's reply brief omitted the table of contents and table of authorities.

The 9th Circuit admitted that "we have been tolerant of minor breaches of one rule or another. Perhaps we have been too tolerant sometimes. But there are times when our patience runs out." This was such a time. "Enough is enough. We strike the N/S briefs and dismiss the appeal."

Reflecting their fundamental concern for substantial justice, however, the appellate judges noted that "we would feel most uneasy if this were an otherwise meritorious appeal, which cried out for reversal of the district court's decision. ... We have carefully reviewed the district court's rulings, the facts, and the law ... We are satisfied that the district court did not err."

The lesson for the appellate practitioner is clear — read and follow the rules for preparation of the record and the briefs. It is hard enough to win an appeal on the merits. Don't make it any harder than it has to be.

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