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## Writers Blocked

### FOCUS COLUMN

By Jens B. Koepke

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Although it hasn't been verified by any scientific study, both the 9th U.S. Circuit Court of Appeals and the California appellate courts appear to be losing patience with sloppy briefs that violate court rules. Historically, appellate courts were loathe to dismiss an appeal or to refuse to consider the merits of a party's arguments, even if the appellant's brief violated the courts' rules. But the tide seems to be turning. Recent cases from the 9th Circuit and the state Court of Appeal show that the courts are putting more teeth in their rules by striking briefs, dismissing appeals, refusing to consider arguments and sanctioning attorneys and parties. This should give practitioners added urgency to ensure that they follow all the rules regarding the contents of appellate briefs.

#### 9th Circuit

In *Sekiya v. Gates*, 508 F.3d 1198 (9th Cir. 2007), the 9th Circuit broadcast its agenda with unflinching clarity: "We publish this opinion as a reminder that material breaches of our rules undermine the administration of justice and cannot be tolerated." Sekiya appealed a summary judgment for her employer in a disability discrimination case. The 9th Circuit, under Circuit Rule 28-1, dismissed Sekiya's appeal because her "opening brief is so deficient."

The court explained to practitioners that Federal Rule of Appellate Procedure, Rule 28 and Circuit Court Rules 28-1 to 28-4 "clearly outline the mandatory components of a brief on appeal." Those components include a corporate disclosure statement, if applicable; tables of contents and authorities; a jurisdictional statement; a statement of issues presented; a statement of the case; a statement of material facts "with appropriate references to the record"; a summary argument; an argument containing the party's "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"; "a concise statement of the applicable standard of review"; a conclusion "stating the precise relief sought"; and a certificate of compliance.

Sekiya managed to violate most of these requirements, failing to provide the standard of review, making "virtually no legal arguments," failing to include tables of contents and authorities, and failing to provide legal citations or "accurate citations to the record." In striking her brief and dismissing the appeal, the court said it was "mindful of the harshness of this rule" but pointed out that these rules exist for good reason: "In order to give fair consideration to those who call upon us for justice, we must insist that parties not clog the system by presenting us with a slubby mass of words rather than a true brief."

This sentiment was echoed in an earlier 9th Circuit decision: "The 'rules of practice and procedure were not whimsically created by judges who derive some sort of pleasure from the policing functions that the existence of such local rules necessarily entails.' These rules serve a critical function in that they maximize ever more scarce judicial resources. ... An enormous amount of time is wasted when attorneys fail to provide proper briefs and excerpts of record that should have supplied the court with the materials relevant to the appeal." *In re O'Brien*, 312 F.3d 1135 (9th Cir. 2002). In *O'Brien*, the opening brief lacked a corporate disclosure statement, jurisdictional statement, record references, argument summary or statement of applicable standards of review. In handing out the ultimate sanction, the 9th Circuit scolded the appellant: "In short, the appellant, a bank, which is able to obtain the most competent counsel, has seen fit to ignore the Federal Rules of Appellate Procedure and 9th Circuit rules, and essentially tossed this bankruptcy case in our laps, leaving it to us to figure out the relevant facts and law. We decline to do so. We dismiss the appeal."

Practitioners should be forewarned that the 9th Circuit takes a decidedly different tone when it comes to pro se appellants. In *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696 (9th Cir. 1990), the defendant

argued that the appellant had waived her appeal by failing to comply with the formal requirements for brief writing. The court labeled the defendant's contention as "completely meritless," because "[t]his court recognizes that it has a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements."

### California Courts

California's rules regarding appellate briefs - Rules of Court 8.204 and 8.208 - lay out specific requirements that are similar to their federal counterparts. As to noncomplying briefs, Rule 8.204 allows the court clerk to refuse to file the brief and allows the appellate court to (a) order the brief returned for corrections, (b) strike the brief with leave to file a new one or (c) disregard the noncompliance.

In practice, however, California appellate courts also have used forfeiture and waiver principles, as well as monetary sanctions, to punish violators. *In re S.C.*, 138 Cal.App.4th 396 (2006), involved "an appeal run amok. ... [T]he opening brief is a textbook example of what an appellate brief should not be." Not only did the oversized brief fail to provide a summary of the significant facts in the record, but it also "ignore[d] standards of review; misrepresent[ed] the record; base[d] arguments on matters not in the record on appeal; [and] fail[ed] to support arguments with any meaningful analysis and citation to authority." These violations of the rules led the Court of Appeal to "simply deem the [appellant's] contention to lack foundation and, thus, to be forfeited." The court explained that, when parties fail to support their arguments, "an appellate court need not search through the record in an effort to discover the point purportedly made." The court stated the principle even more forthrightly later in the opinion: "We reemphasize that it is not the role of an appellate court to carry appellate counsel's burden."

Similarly, in *Benach v. County of Los Angeles*, 149 Cal.App.4th 836 (2007), the Court of Appeal refused to consider one of the appellant's arguments, because his "opening brief fails to support his assertion by citation to argument or authority. This conclusory presentation, without pertinent argument or an attempt to apply the law to the circumstances of this case, is inadequate." The court ruled that, "[w]hen an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."

The other hammer California courts use is a monetary sanction. In awarding sanctions against the appellants and their attorney, the Court of Appeal announced: "We publish this opinion because this case presents a prime example of a frivolous appeal and of flagrant violations of the rules pertaining to appeals." *Evans v. Centerstone Development Co.*, 134 Cal.App.4th 151, 154 (2005). The court detailed appellants' defalcations and colorfully summarized that their "briefs are cornucopias of such violations" of the appellate rules of court. In fact, the court's discussion of these violations should be required reading for all practitioners in the state appellate courts. As punishment for the wholesale violations, the court granted the respondents' motion for sanctions under Rule 8.276(e), directing the trial court to *double* the attorney fee award that respondents were entitled to on remand under the arbitration agreement at issue.

Violating court rules is, of course, never a good idea when filing an appellate brief. It is bad advocacy, because the rules are there largely to make it easier for the appellate court to understand your case and your client's positions. Indeed, even if you have meritorious arguments, repeated flouting of court rules will undoubtedly undermine your credibility with the court and possibly turn a winning argument into a losing one. But these recent cases show that violating rules could have an even more drastic impact on your appeal: The 9th Circuit could dismiss your appeal, and the California appellate courts could refuse even to consider your arguments or could hit you with a substantial sanction award. However, if you represent a responding party and try to capitalize on this more punitive trend by asking an appellate court to strike an appellant's brief or dismiss an appeal, you should be aware that both state and federal appellate courts likely will remain much more lenient toward rule violations by a pro se appellant.

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