



Appellate Law

On Thin Ice

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Lawyers sometimes make mistakes. Some of these errors crop up in the world of appeals, where innumerable procedural peculiarities can confound even the most diligent among us. Some of them can result in the dismissal of an appeal and the potential loss of your client's rights.

In the 9th U.S. Circuit Court of Appeals, be sure to consult the rules regarding the brief's required components. Fed. R. App. P. 28(a), (b), (c); 9th Cir. R. 28-1(a). These sections are mandatory and noncompliance justifies

dismissal. *In re O'Brien*, 312 F.3d 1135 (9th Cir. 2002). For example, do not forget to cite the appellate standard of review. *N/S Corp. v. Liberty Mutual Insurance Co.*, 127 F.3d 1145 (9th Cir. 1997); 9th Cir. R. 28-2.5. And, it cannot be overstated, cite the appellate record. *Han v. Stanford University*, 210 F.3d 1038 (9th Cir. 2000); 9th Cir. R. 28-2.8. In fact, the 9th Circuit Rules note that the failure to cite the record "particularly" warrants sanctions. 9th

You can be sure to prevent a dismissal on procedural grounds only by carefully reviewing and following the appellate rules.

Cir. R. 28-2 advisory committee's note; *Big Bear Lodging Association v. Snow Summit Inc.*, 182 F.3d 1096 (9th Cir. 1999).

Other than the briefs, also be careful when preparing the 9th Circuit excerpts of record. 9th Cir. R. 30-1. Include all of the required district court documents and make sure those documents are legible. *O'Brien*; 9th Cir. R. 30-1.4. Likewise, where necessary, provide the 9th Circuit with the district court trial transcripts. *Syncom Capital Corp. v. Wade*, 924 F.2d 167, 169 (9th Cir. 1991) (per curiam); Fed. R. App. P. 10(b)(2); 9th Cir. R. 30-1.4(a)(vii), (viii), (ix). Again, noncompliance may invite dismissal.

The state courts have discretion to dismiss appeals on the same grounds as the 9th Circuit. For example, the appellant must submit a proper appendix, and all parties must cite the record in their briefs. *Goehring v. Chapman University*, 121 Cal.App.4th 353 (2004). As in the 9th Circuit, failure to comply with either requirement justifies dismissal. And, again like the 9th Circuit, be sure to include all of the requisite components of the brief and appendix. California Rules of Ct. 8.124(b), 8.204(a). For example, the opening brief must contain a statement of appealability, or else you risk dismissal. *Lester v. Lennane*, 84 Cal.App.4th 536 (2000); California Rules of Court Rule 8.204(a)(2).

In the end, it goes without saying that only by carefully reviewing and following the appellate rules can you be sure to prevent a dismissal on procedural grounds.

Let's assume, however, that despite your best intentions, you've blown a deadline or submitted a brief or record that falls below the procedural minimums. The court dismisses the appeal. What to do then?

In the 9th Circuit, you need to move to reinstate quickly — within 14 days of entry of the dismissal order. The court may waive the 14-day time limit if you can demonstrate “extraordinary and compelling circumstances outside [your] control.” 9th Cir. Gen. Order 2.4. In the motion to reinstate, you must show two things: first, extraordinary and compelling circumstances warranting relief; second, if the appeal was dismissed for lack of prosecution, “how the deficiency has been corrected or explain why correction is impossible.”

Note that if you don't file the reinstatement motion promptly, mandate may issue, which means that the 9th Circuit no longer has jurisdiction over the appeal. In that case, you must also move to recall the mandate. *Perry v. U.S.*, 225 F.2d 724 (9th Cir. 1955) (per curiam).

There is scant 9th Circuit authority on what else the reinstatement motion should say. 9th Circuit rulings on motions to dismiss appeals, however, are instructive. For

example, inform the court that you made a “good-faith attempt to comply with the rules of appellate procedure.” *Han*. Explain why the “procedural violations were not so egregious as to prevent [appellee] from meaningfully responding to the appeal.” *Ward v. Circus Circus Casinos, Inc.*, 473 F.3d 994 (9th Cir. 2007). Show that you have attempted to cure any procedural errors. *Nathan Kimmel Inc. v. DowElanco*, 275 F.3d 1199, (9th Cir. 2002). And, identify all of the procedural rules you have complied with on appeal. This is important because dismissal is the “ultimate sanction” reserved for the most “egregious cases of noncompliance.” *Big Bear*.

Finally, and perhaps most importantly, explain why the appeal is meritorious. The 9th Circuit is much less likely to dismiss appeals that “[cry] out for the reversal of the district court's decisions.” *N/S Corp.* And, if all else fails (if possible), blame the other guy — i.e., the previous lawyer handling the appeal. *Perry*.

In the state court of appeal, defaulting parties have some breathing room — they need only file the motion to vacate within a “reasonable time” (but no longer than six months) after a dismissal order. Code of Civil Procedure Section 473(b); *Stout v. Farwell*, 111 Cal.App. 31 (1931).

Here are the other rules: Attach an attorney's good cause affidavit to the motion. Code of Civil Procedure Section 473(b); *Sanders v. Warden*, 106 Cal.App.2d 707 (1951). Specifically, you must identify the “mistake, inadvertence, surprise, or excusable neglect” giving rise to the default. If you are willing to accept blame for the default, identify the underlying “mistake, inadvertence, surprise, or neglect” — whether that neglect is excusable or not. In addition, explain that the appeal is taken in good faith, that the trial court's decision is wrong, and that you have diligently prosecuted the appeal. *Hagar v. Mead*, 25 Cal. 598 (1864). If the court dismissed for failure to file a complying brief, attach a corrected brief as well. Code of Civil Procedure Section 473(b).

If you file the motion after issuance of the remittitur, you must also move to recall the remittitur because remittitur (like mandate in the 9th Circuit) divests the appellate court of jurisdiction. Or, if

the remittitur will issue shortly, move to stay issuance of the remittitur to give the court time to rule on your motion. *Krug v. Meehan*, 108 Cal.App.2d 416 (1951) (per curiam).

Similar to the 9th Circuit, state courts do not tell practitioners what to argue in their motions to vacate, but rulings on motions to dismiss are helpful guides. As an initial matter, remind the appellate court that the trend is to strike the defective brief first, and to dismiss the appeal only if the party later fails to correct the identified error. *Berger v. Godden*, 163 Cal.App.3d 1113 (1985); California Rule of Court Rule 8.204(e). Then, explain why the court should exercise its discretion to disregard any procedural errors and address the appeal's merits. *Red Mountain LLC v. Fallbrook Public Utility District*, 143 Cal.App.4th 333 (2006). Emphasize that this state's policy is to “hear all appeals on their merits, if it is reasonably possible to do so.” *Lundy v. Lakin*, 89 Cal.App.2d 849 (1949). Identify the important issues raised in the appeal. *Nguyen v. Proton Technology Corp.*, 69 Cal.App.4th 140 (1999). And, explain that the brief's arguments are “reasonably clear.” *In re Briggs*, 139 Cal.App.2d 802 (1956). Show that the procedural errors are merely technical not warranting the “drastic sanction” of dismissal. *Wershba v. Apple Computer Inc.*, 91 Cal.App.4th 224 (2001). Similarly, explain that the opposing party has not been prejudiced by any error or delay. *Lundy*. And detail any extenuating circumstances underlying the missed deadline or submission of the noncomplying brief or appendix. Finally, if possible, it never hurts to blame someone else for the earlier procedural blunder.

As should be obvious by now, there are lots of appellate procedural minefields to dodge. A meticulous review of the rules will hopefully be enough to save you from any disasters. If not, remember that by acting quickly and marshalling the arguments outlined above, you may be able to snatch your client's appeal from the jaws of defeat. Or you could avoid these issues altogether by associating an appellate specialist at an early time.