

Appendixes, Exhibits, and E-Briefs in the Court of Appeal

FIFTEEN YEARS AGO, appendixes were a relatively new tool for practitioners in the California Court of Appeal.¹ Back then, trial courts did not routinely return exhibits to counsel at the end of a trial. Online access to trial court dockets and filings was unheard of. And there were no such things as electronic records and briefs. These changes present both challenges and opportunities for lawyers representing clients in the court of appeal.

One very important aspect of preparing an appendix for the court of appeal has not changed: the need to think about the reader. The big advantage of a party-prepared appendix over a court-prepared Clerk's Transcript is the ability to control the presentation to make it user-friendly. "User" in this context means several different persons:

- The opinion authors—a court of appeal justice working with a judicial attorney—who will read the entire record, coordinate it with the briefs, and work with it in drafting the opinion.
- The other justices assigned to the case, who may need to look at relevant parts of the record as part of their decision-making process.
- The cite checker, who will need to verify quotes from the record and check all dates, numbers, and other details to prepare the final draft of the opinion for filing.

The record must be easy for all of them to use.

Sound obvious? It should. But a recent survey of judicial attorneys in the Second District indicates that many lawyers fail to recognize these basic principles.² Although a number of judicial attorneys said they preferred Clerk's Transcripts, their problem generally was not with appendixes as such but rather with inadequately prepared appendixes. They almost always prefer a well-prepared appendix to a Clerk's Transcript.

Another aspect of the record that has not changed is the benefit of collaborating with opposing counsel in the preparation of an appendix, so that the court can have a single set of volumes. The rules encourage this commonsense approach.³ It should not be all that hard for counsel to agree on the vast majority, if not all, of the documents needed for the appeal. Adversarial posturing in this area accomplishes nothing.

To determine what to include in the appendix, start with Rule 8.124(b) of the California Rules of Court, which in turn incorporates Rule 8.122(b). The latter rule lists the items required for a Clerk's Transcript; Rule 8.124(b)(1) adds the notice of election to proceed with an appendix and the parties' stipulation designating the contents of a joint appendix.

In addition to these required materials, the appendix should always include copies of both the original complaint and the operative complaint. Intervening versions are unnecessary unless they relate to some appellate issue. In an appeal following a trial, it is also a good idea to include all minute orders filed during the course of the trial, in addition to any others that are relevant to the appeal. These provide benchmarks of the trial's progress as well as a quick reference for the status of exhibits offered in evidence and the court's rulings on significant matters.⁴

Equally important are the rules governing what *not* to include in the appendix. A joint appendix "must not" include materials "that are unnecessary for proper consideration of the issues," including "portions of documents."⁵ The most obvious application of this rule is to duplicative materials, such as a 50-page contract that is attached to the complaint and to a series of subsequent motions. The appendix only needs to contain a single copy. The rule also applies to voluminous materials that are irrelevant to the issues on appeal, such as time records submitted in support of a motion for attorney's fees when the only appellate issue is the prevailing party's entitlement to, rather than the amount of, attorney's fees. The rules do not say this, but it is a good practice to note any omissions in the index or on an explanatory page inserted where the document is missing (e.g., "attorneys' time detail intentionally omitted" or "see Exhibit 11 (sales contract) at JA 82-85"). Counsel should include a general explanation of the omissions in a footnote to the first citation to the appendix—for example, "The omission of any materials from the appendix pursuant to Rule 8.124(b)(2) of the California Rules of Court is noted in the index to the appendix and at the point where the omission occurs."

Mechanical Requirements for the Appendix

The starting point for the look and feel of an appendix is Rule 8.144. It specifies the mechanical requirements for a Clerk's Transcript and, under Rule 8.124(d)(1), also governs appendixes. Beyond Rule 8.144's requirements, there are many other things counsel can do to make the appendix easier to use.

Indexes. Include chronological and alphabetical indexes in every volume, instead of just the first volume, and be sure the indexes clearly note volume changes. It is helpful to index the items within a particular filing, such as declarations and exhibits.

Labels. If the binding method permits (typically VeloBinding or tape-and-paste binding), indicate the volume number and page range on the spine of each volume. Neatly written pen-and-ink numbers are better than labels, which can come off. Whether or not the spine is labeled, it is helpful to use large lettering for volume numbers on the cover.

Pagination. The appendix must be sequentially paginated from beginning to end.⁶ But documents often already have multiple numbers on them, such as production numbers, deposition exhibit numbers, and trial exhibit numbers. Use a distinctive typeface, preferably a large one, so that the appendix's page numbering is clear—and make sure the numbers are legible. It is easiest to print the numbers during the duplication process. Most modern office equipment does this, as can any copy service. Do not put numbered stickers on each page, at least not on the copy that goes to the court; the corner of the volume with the stickers will swell to double the size of the rest

Joseph Lane is the clerk of the court of the California Court of Appeal for the Second Appellate District. Laura Geffen is a judicial attorney with the Second District. Robin Meadow is a partner with the appellate law firm Greines, Martin, Stein & Richland LLP.

of the volume.

Filing dates. The filing date must appear on certain items.⁷ The rules are permissive as to other documents,⁸ but including the date is better practice. Court-conformed copies are best, but getting them from the other side or the court can be difficult. It is fine to write the date by hand on the document. Dates must be legible. Remember that the cite checker will have to verify every filing date referred to in the opinion.

Transcripts. Although trial testimony can never appear in an appendix,⁹ motions frequently include transcripts of depositions or court proceedings. If at all possible, do not present these in the four-on-a-page or “four-up” format that lawyers sometimes use to cut down the number of pages. This format can be extremely hard to read, even illegible. If the transcripts were presented four-up in the trial court, the appendix should include those pages, but it can also include full-sized copies. If so, there should be an explanatory note somewhere. While technically the result will not exactly duplicate the trial-court filing, the reader’s gratitude will certainly outweigh any concerns he or she might have about the difference.

Volume size. Rule 8.144(c)(1) requires volumes of “no more than 300 sheets.” But limiting the volumes to about 250 sheets makes them easier to handle, and for VeloBound documents lessens the risk that the binding will break. If the record is relatively short, consider using 200-page volumes.

Avoid splitting documents. This is one of those areas in which an appendix can always improve on a Clerk’s Transcript. Standard procedure for superior court clerks is to prepare volumes of exactly 300 pages, even if that means dividing a document in the middle. This makes the reader work with two volumes instead of one. Instead of splitting the document, counsel should adjust the volume sizes. If putting the entire document in Volume III would make that volume too long, just make the volume shorter and put the entire document in Volume IV. And while documents over 300 pages will have to be split (assuming that it is not possible to omit portions under Rule 8.124(b)(2)), try to split them at some logical break in the document, ideally keeping all the key portions of the document in one volume.

Binding. The appendix is not just read once, like a book. It will receive heavy use throughout the opinion-writing process. For that reason, the two most important features for a binding are the ability to lie open on a desk—so the reader can work directly from it—and durability.

The vast majority of appendixes use VeloBinding. The judicial attorneys surveyed complain that VeloBinding on large volumes

frequently breaks. In fact, the Second District’s main use for its internal VeloBinding machine is to repair broken bindings. Less common is plastic comb binding. It allows the volumes to lie flat, but the teeth can come out of the holes as the volume is used. The Second District also has a machine to replace these.

Much better is the tape-and-paste system that the superior court generally uses. It rarely breaks, and volumes can lie flat.

Spiral binding is actually the most user-friendly binding. It is secure, the volumes lie flat, and it is pretty hard to rip out a page.¹⁰ Spiral binding has limitations, however. For one thing, there is no way to write volume and page numbers on the spine. And not every court welcomes them—in fact, the Fourth District, Division Three, will reject them. So while the Second District is enthusiastic about spiral bindings, check with any other court in advance before trying to file this kind of appendix.

Nor should the limitations of VeloBinding mean that lawyers should abandon that technique. VeloBinding is mainly a problem for large volumes, because it is not sturdy enough. It works well enough for shorter volumes, from 200 to 250 pages.

Tabs. With few exceptions, judicial attorneys are very enthusiastic about tabs. Indeed, the availability of tabs is one of the reasons that some judicial attorneys prefer an appendix, assuming it is otherwise well prepared. The basic approach is to have a sequentially numbered tab for each separate trial-court filing, and to number the documents in the index to correspond with the tabs. The tabs make individual documents easy to find and refer back to.

Tabs appear at the bottom in trial-court filings because documents are bound at the top. Court of appeal volumes are bound at the left and are shelved like books, so put the tabs on the right. Otherwise, they are inconvenient to use, will interfere with shelving the documents, and may well end up being destroyed.

In addition, consider using colored paper dividers within individual filings that have multiple parts, such as declarations and exhibits. There is no quick way to find a declaration or exhibit or deposition excerpt in the hundreds of pages of undifferentiated documents filed in support of a motion. To make the appendix even easier to use, list these subparts in the index. (Do not use tabs for the subparts, however; the resulting forest of tabs would do more harm than good.)

It is a judgment call whether to include tab numbers in record citations. Some judicial attorneys find this useful, others do not. Since there is no way to know who will be reading the appendix, it is probably best to include the tab numbers. What matters most is user-friendliness, so the citation should be easily understandable. (In any event, citations must include

both the volume and page numbers.¹¹) If the brief is relatively short, spell out the full citation: “Volume 3, Tab 32, p. 575.” For a brief near the word limit, consider something more concise: “3 AA 32/575.” Explain any citation conventions that are not obvious in a footnote to the first appendix citation—for example, “3AA 32/575” means volume 3, tab 32, page 575.” (Citing line numbers is optional; those judicial attorneys who commented on the practice said they did not find it particularly useful.) And never forget that the single most important aspect of record citations is not their form but their accuracy.

Exhibits

The survey of judicial attorneys revealed that trial exhibits are a particular problem area in appellate records. All exhibits admitted, refused, or lodged are deemed part of the record on appeal.¹² But exhibits do not magically appear at the court of appeal. Too frequently the court has already set oral argument for a case and is preparing a calendar memorandum when it learns that it does not have the exhibits cited in the briefs. Hence, the call from the clerk’s office directing counsel to deliver exhibits to the court “by noon tomorrow.” No one is well served by this scenario.

It is now the general practice for trial courts to return exhibits to the parties at the conclusion of proceedings. Thus, in compiling the appellate record, counsel must first locate the exhibits that will bear on the appeal. If the appellant does not have them, appellate counsel may need to obtain them from trial counsel or from other parties. When the parties are using a Clerk’s Transcript and exhibits have been returned to a party, “the party in possession of the exhibit must promptly deliver it to the superior court clerk on receipt of the designation.”¹³ This creates an opportunity for the exhibits to be lost. It is better to control the process by using an appendix.

Rule 8.124(c) sets out procedures to obtain copies of exhibits in the possession of another party for use in an appendix. Here, too, the rules express an expectation of good behavior between counsel: “All parties should reasonably cooperate with such requests.”¹⁴ If the exhibits cannot be located, counsel should attempt to reach a stipulation to use copies, including a verification of the copies’ accuracy.

Make sure the copies are legible. It may be impossible to read the fine print in a fourth-generation copy of an insurance contract. If an exhibit is difficult to read, consider providing an additional, magnified copy for the court’s convenience. And if an exhibit is oversized, such as a photographic blow-up, consider including a letter-sized copy for ease of use. As with full-sized copies of transcripts, explain what has been done so there is no

question about authenticity.

Exhibits should always show the trial court's identifying number. This generally is not a problem with the originals or copies of the originals, except when the exhibit sticker is on the back of the exhibit. In that case, be sure to copy the back of the page.

If there are only a few exhibits, it may be convenient to include them in the appendix. Parties typically place them at the end of the appendix, but they could also appear chronologically when they were identified at trial, or at some other logical point that will be helpful to the court. When there are numerous exhibits relevant to the issues on appeal, put them in separate volumes, organized by exhibit number. An index listing each exhibit by number should be included in every volume; adding a brief description of each exhibit will further aid the court's review. It may be helpful to include additional exhibits that provide necessary context, even though they are not directly relevant to the issues on appeal. For original exhibits, use a binder with clear plastic pocket pages to hold the exhibits.

Tabs (on the side of the page, not the bottom) marked with the exhibit numbers may make the exhibit volumes easier to handle. It is also helpful to include a sheet before each exhibit that specifies the exhibit number, identifies the exhibit, and states the pages in the reporter's transcript where the exhibit was offered and where it was received or refused.

Rule 8.224 governs the procedure if the appendix does not contain copies of the exhibits, or if for any reason the court might need original exhibits. Although that rule contemplates a process for obtaining the exhibits that begins with the filing of the last respondent's brief and involves the superior court, it is better to try to cooperate with opposing counsel to lodge the exhibits with the court at the time the respondent's brief is due. Otherwise, delays in the formal process may mean that the court does not have the exhibits when it is working up the case. Be aware of the court's storage limitations. If there are boxes of exhibits, or oversized exhibits, do not deliver them until they are due—but do not forget to have them delivered!

Finally, note that counsel are responsible for retrieving any lodged exhibits once the appeal is complete. The clerk's office will notify counsel to pick up the exhibits; otherwise they will be discarded.

Electronic Briefs and Records

In a case with a large record—say, anything more than 10 volumes total—consider filing an electronic brief, or e-brief. This is a collection of digital files, typically submitted on a CD-ROM, that includes fully searchable

electronic copies of the briefs, the record, and all cited authorities, with each document hyperlinked to the others. Justices and judicial attorneys who have had the opportunity to use e-briefs are uniformly enthusiastic about them. The cost of preparing e-briefs has declined to a point where their benefits make the cost easily justifiable in any substantial case. There are specific protocols for filing e-briefs in the Second District and the First and Third Divisions of the Fourth District, and these instructions appear on those courts' Web sites along with lists of vendors who prepare e-briefs.¹⁵ (Note, however, that the courts disclaim any endorsement of these vendors.)

If an e-brief seems like overkill or is too expensive, consider something simpler: separate electronic copies of the briefs and/or record, without hyperlinking. Also, be aware that courts sometimes ask the parties to submit electronic copies of briefs and record materials. The protocols of the Second District and of the Fourth District, Division One, already contemplate these filings.

Careful attention to appendixes and exhibits can make readers' lives much easier. That is part of the job of an appellate advocate. Use these tips to ease the way. ■

¹ Robin Meadow & Laura Geffen, *Taking Care of the Record on Appeal*, LOS ANGELES LAWYER, Mar. 1993, at 21, available at <http://www.gmsr.com/docs/appendix.cfm>.

² In a written survey, the authors asked appellate judicial attorneys at the Second District Court of Appeal their views on "the best (and worst) ways in which a party can prepare the record on appeal." The survey topics ranged from physical features of the appendix to inclusion of exhibits and the use of electronic records. The responses are not available to the public.

³ "The parties may prepare separate appendixes, but are encouraged to stipulate to a joint appendix." CAL. R. CT. 8.124(a)(3).

⁴ For administrative proceedings, the California Rules of Court now provide explicitly for the delivery of the administrative record directly to the court of appeal. Thus the record is not included in the appendix. CAL. R. CT. 8.123.

⁵ CAL. R. CT. 8.124(b)(2).

⁶ CAL. R. CT. 8.144(a)(1)(D).

⁷ CAL. R. CT. 8.122(b)(2).

⁸ Advisory Committee cmt., CAL. R. CT. 8.124(d).

⁹ See CAL. R. CT. 8.124(b)(2)(B).

¹⁰ Spiral binding should not be confused with metal comb binding. Spiral binding is a single piece of metal screwed through a series of holes. Metal comb binding is similar to plastic comb binding, except that it is sturdier. However, it is not as secure as spiral binding.

¹¹ CAL. R. CT. 8.204(a)(1)(C).

¹² CAL. R. CT. 8.122(a)(3) (Clerk's Transcript); CAL. R. CT. 8.124(b)(3) (appendix).

¹³ CAL. R. CT. 8.122(a)(3).

¹⁴ CAL. R. CT. 8.124(c)(1).

¹⁵ Second District, at <http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/efile.htm>; Fourth District, Division 1, at <http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv1/efiling.htm>; Fourth District, Division 3, at <http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv3/efiling.htm>.