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TAKING CARE OF THE RECORD ON APPEAL

Uses and abuses of Rule 5.1

"It's going to take *how long*?!"

The judge has just thrown out a claim that you and your client were sure was headed toward a seven-figure verdict. Undaunted, you tell your client, "It's not over yet. We still have a chance in the court of appeal." Then you break the bad news: the appeal may take several more years. Not surprisingly, your client's waning faith in the legal system is about to vanish completely.

Actually, the news is not all bad. Although the length of an appeal is largely beyond the parties' control, you can minimize or even eliminate the most notorious cause of appellate delay: preparation of the record on appeal.

The key is Rule 5.1 of the California Rules of Court.[1] Adopted in 1980, the rule allows the parties to prepare a major portion of the record on appeal themselves, instead of relying on the vagaries of preparation by the superior court clerk. But despite the clear benefits of this procedure, an informal survey suggests that most appellants do not take advantage of it.[2] More troubling, the survey also suggests that many practitioners do not know how to use the procedure properly.

The record on appeal normally consists of two parts: the reporter's transcript, which is the record of proceedings during the trial; and the clerk's transcript, which consists of documents filed with the trial court. In the traditional method of generating the clerk's transcript, the parties designate what they want and the clerk compiles copies of those materials into bound volumes for delivery to the court of appeal.

This method has at least two shortcomings. First, the appellant has to designate the record right after filing the notice of appeal, long before the careful review of the case that should attend the briefing

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RULE 5.1

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process. The obvious risk of omission frequently leads the appellant to include much more than is necessary. Second, even though the rules nominally require the clerk to prepare the transcript within 30 days,[3] in some court of appeal districts even a short clerk's transcript takes months to prepare.

Rule 5.1 minimizes these problems and presents some additional advantages.

Delay reduction. Since the briefing schedule is ordinarily triggered by the filing of the record on appeal, anything that gets the record completed more quickly will accelerate the briefing and therefore the whole appeal.

An appellant using a Rule 5.1 appendix does not have to wait for the superior court clerk. In fact, if there is no reporter's transcript the appellant does not even have to wait for the court of appeal to order the filing of the opening brief—it is automatically due 70 days after the appellant files the Rule 5.1 election.[4] In this situation, the briefing schedule is completely within the appellant's control. In theory, the notice of appeal and the Rule 5.1 election could be filed right after the entry of judgment, and the opening brief could be filed right after that. A diligent appellant could save the better part of a year.

Of course, most cases do involve a reporter's transcript, and preparation of the reporter's transcript often takes a very long time. But it is still easier to deal with only one source of delay instead of two. And the appendix retains its special timing advantage in cases where the reporter's transcript can be obtained quickly, such as in private judge or judicial reference cases where the parties may have hired a private reporter and therefore have more control over completion of the transcript than with superior court staff reporters.

Controlling the presentation. Rule 5.1 allows the parties to control the content and presentation of the record in a way that will facilitate the appellate court's review of it.

Most important, the parties can be sure the record contains legible copies of everything they need. Superior court clerks are not infallible, and sometimes the clerk's transcript does not include everything the parties designated. The Rules of Court do not provide for trial court corrections of the clerk's transcript in civil cases; at least in theory, an omission requires a motion in the court of appeal to augment the record. Only the First and Second districts have rules that require the superior court clerk to fix errors brought to his or her attention.[5] But neither method is fully satisfactory, if only because the court of appeal will have to deal with an additional transcript volume whose contents may be largely random. Rule 5.1 eliminates this risk.

In addition, the parties can use a more informative index than the superior court clerk would normally prepare; they can ensure the quality of the copies (perhaps even using color copies of color trial exhibits); and they can even separate the trial court filings with tabs to make them easier to work with.

The appellate courts welcome appendixes, *if* they are prepared properly. Justice Carl Anderson, who has spearheaded appellate delay reduction efforts in the First District, says that he would like to see "many, many more." He is particularly impressed by the parties' ability to control the contents and presentation of the record. But Rule 5.1 imposes serious responsibilities that counsel cannot take lightly if they want their appendixes to please, rather than anger, the courts.

COUNSEL'S RESPONSIBILITY

Preparation of a good appendix requires cooperation between counsel. Rule 5.1 imposes an explicit duty "to confer and attempt to reach an agreement concerning a possible joint appendix." But even without that duty, common sense dictates that a single, well-organized joint appendix allows both parties to make a better presentation than they could make with a series of separate appendixes that lack consistent organization. Lawyers accustomed only to the combative atmosphere of the trial court should realize that once a case moves to the court of appeal the environment changes dramatically, and there is no way to gain an advantage by refusing to cooperate on matters like the preparation of an appendix.

The courts have not hesitated to criticize a lax approach to preparation of the appendix, particularly where the appellant fails to include documents "essential to the proper consideration of the issues, *including such documents as the appellant should reasonably assume will be relied upon by the respondent* in meeting the issues raised."[6] The court of appeal has broad power to impose sanctions for the misuse of the appendix process.[7] Although there are few reported examples of sanctions,[8] clearly parties who file poor appendixes do not endear themselves to the courts.[9] In a recent aggravated case, the First District made these observations:

> *Appellants elected to file an appendix in lieu of clerk's transcript pursuant to [R]ule 5.1; however, the document submitted is almost unintelligible. Although we have been presented with 6 thick volumes containing over 1,700 pages, appellants have, by and large, included only their own pleadings. They have ignored the vast majority of documents submitted by respondents. Thus, we are left with the daunting task of deciphering the potential effect of oppositions to demurrers without the corresponding moving papers; motions to compel discovery without the respondents' papers in opposition; and incredibly, pleadings resisting motions for summary judgment and summary adjudication without the corresponding moving papers . . . .*
>
> *Appellants bore the responsibility to include in their appendix all documents "essential to the proper consideration of the issues, including such documents as [they] should reasonably assume will be relied upon by the respondent[s] in meeting the issues raised . . . ." (Rule 5.1(b).) We admonish appellants for their failure to do so.*[10]

Lawyers must also recognize that Rule 5.1 is not a license to ignore the fundamental rule of appellate practice that *the record may not include anything that was not before the trial court.* With exceptions so rare they are not worth discussing, the court has no power to consider those materials and it is highly improper to include them.[11]

A final note: many of the tasks described here are the province of paralegals or secretaries. But as in any other case, the final product is the lawyer's responsibility, and nothing substitutes for the lawyer's review of the final product.

HOW TO CREATE A GOOD APPENDIX

Get all the documents. The initial collection should include all of the pleadings in the case, copies of all minute orders from the court file (which many lawyers do not obtain during the course of a lawsuit), all trial exhibits and all jury instructions. From this broad collection you will select a more limited group to include in the appendix, depending on the scope of the appeal—again, remembering that you can only include items that were before the trial court.

Put the documents in a notebook. Collect the materials you are certain you

will need as your starting point. Rule 5.1 has some specific requirements, which are included in the following list.[12]

- Operative pleadings. These include the complaint, answer, cross-complaint, *etc.* The original complaint should be included because it is the starting point of the lawsuit. Beyond that, include only the final versions of the pleadings unless there is an issue relating to amendments.
- Minute orders. Although they may not reflect substantive matters, minute orders are milestones in the progress of a case. Aside from giving the appendix an aura of completeness, they provide a quick record of what happened at each court hearing, both before and during the trial—a day-by-day history that gives the case context.
- Key dispositive materials. You should include the papers on matters you feel are likely to be the subject of the appeal, such as motions (*all* papers filed by *all* parties), jury instructions, *etc.*
- Any pretrial order.[13]
- The judgment.[14]
- Post-trial motions are optional, but a notice of intention to move for a new trial and the ruling on the motion are mandatory.[15] If you do include post-trial motions, include *all* papers filed by *all* parties.
- Notice of entry of judgment.[16]
- The notice of appeal.[17]
- The designation of record. This should include the Rule 5.1 election (you will later add the required stipulation concerning joint appendix).[18]
- Exhibits. You should normally place these at the end. For initial purposes, include everything. As you develop the brief and consult with opposing counsel, you can remove exhibits that will not be relevant to the appeal.

Place all of the documents besides exhibits in chronological order by filing date. Put a numbered tab in front of each document. Ultimately you will number the pages sequentially, but *do not do the numbering now.* The notebook will evolve by the addition and deletion of documents, so page numbering should await the final assembly of the appendix.

All documents in the appendix (besides exhibits) have to show their filing date.[19] You can write the information on the first pages of the documents, but a court file stamp looks better and the court will consider it more reliable.[20] Ask opposing counsel to provide the first pages of documents he or she filed, or get copies of these pages from the superior court.

Begin building the index. Since the appendix will need both a chronological and alphabetical index, the easiest way to build the index is with a simple computer database in which you record the document's full title, its filing date and its tab number (you will add page numbers later). When you have finalized the contents, simple sorting operations will generate both

components of the index. It may be useful to sub-index important components of documents, such as declarations attached to motions. It is also helpful to be able to print the index in small type so as to reduce its overall length.

Use the notebook in drafting the brief. The notebook tab numbers and the existing pagination of the documents provide a simple and reliable form of citation that you can easily convert to a more formal system when you finalize the brief.

If you find you need additional materials, add them to the notebook and to the index; delete unneeded material from both. Just because you do not have to cite a document does not mean you should omit it from the appendix. Aside from your obligation to provide a complete record, it is useful for the appellate court to have a context in which to evaluate the parties' claims. (For example, you may need to discuss only one letter in a lengthy exchange of correspondence offered at the trial. Even if none of the briefs refers to the other letters, if you include them the court will not have to guess at where the key letter fits into the factual history.) It bears repeating that any motion papers should ordinarily include everything filed by both sides.[21]

At this point you should consider ways of eliminating duplication. For example, if a series of voluminous exhibits is attached to several filings, it may be appropriate to include the exhibits only once, and replace them elsewhere with single pages—perhaps colored—containing cross-references. You should explain what you are doing in your brief or in some prominent portion of the appendix. Aside from saving trees, this approach can dramatically reduce the size of the appendix while eliminating the almost certain confusion that results from seeing the same document in many different places.

Consult opposing counsel. As your brief nears completion and you are satisfied that you have included everything you need (as well as materials you think the other side may need to respond to your arguments), you should contact opposing counsel to discuss whether to add anything. The easiest way to approach this task is to provide opposing counsel with the current version of your index and to discuss with him or her the issues you both expect to raise (especially where there is a cross-appeal). This is also the time to address mechanical questions concerning the format of the appendix and your citation conventions.

You and your opponent may balk at giving each other early knowledge of your arguments, but there are few appeals in which either side can gain any real advantage from gamesmanship. The point to remember is that both sides benefit from presenting the appellate court with a single joint appendix, as opposed to two or even three separate appendixes. Multiple appendixes make the record harder to manage, and the court of appeal will probably consider both sides responsible for that difficulty.

A corollary is that even though a joint appendix is not due until the filing of the respondent's brief, it should be as complete as possible by the time you file the opening brief. Adding material later may cost you the benefit of the work that went into organizing the appendix: in order to avoid disrupting the pagination scheme already reflected in the opening brief, additional materials will have to be placed at the end of a joint appendix (out of chronological order) or in a separate respondent's appendix. Both results mean additional work for the court of appeal.

What if your opposing counsel insists on including the kitchen sink? At a minimum, opposing counsel should be willing to bear the cost of copying voluminous additional documents.[22] But regardless of whether you reach a satisfactory agreement, remember that in the end it is better to have an over-long joint appendix than multiple appendixes that may be just as long but are harder for the court of appeal to work with.

The final item for the joint appendix is a stipulation designating its contents.[23] The easiest way to prepare one is to excerpt the list of documents from the index you have already created.

Finalize the appendix. Reorganize the notebook into the final document sequence. This should almost always be strictly chronological, although there might be some cases where a deviation would be helpful to the reviewing court.[24] If you need to re-sequence the documents, preserve the tab numbers you used in drafting the brief. Your database can help you create a concordance of old and new tab numbers to assist you in the next step.

Update tab numbers as necessary in the brief.

Review the notebook to be sure each page is legible and complete (including the filing date).

Number the pages from beginning to end. (Doing this properly is not as easy as it sounds.) Add the page numbers to the database-index.

Divide the notebook into volumes. Rule 9(e) permits "volumes of not more than 300 pages, if typewritten, or 400 pages, if printed," but volumes longer than 250 pages tend to be unwieldy. Try to avoid dividing a document.

Go back through the brief and conform your citations to whatever conventions you and your opposing counsel have agreed on. While there is no required form, the basic units of citation are sequential page numbers and line numbers. If you have a lengthy appendix you should probably cite the volume as well. If you decide to use tabs, you do not necessarily have to cite the tab numbers; doing so may create long, hard-to-read citations. On the other hand, tab references to key documents may be helpful. Tailor the citation form to the needs of the particular case.

Typical abbreviations are JA (Joint Appendix), AA (Appellant's Appendix), RA (Respondent's Appendix) and ARA (Appellant's Reply Appendix). A citation might look like this: JA 675:1-10, meaning "Joint Appendix, page 675, lines 1-10." If there is a reason to provide more information (particularly with a lengthy record), you might use this: 3 JA 675:1-10 (Tab 70), meaning "Volume 3 of the Joint Appendix, Tab 70, page 675, lines 1 through 10."

Prepare your final indexes, double-checking to be sure the page references are correct. Make the necessary copies and assemble the finished product in binders. In a multi-volume appendix, label the spine of each binder with at least its volume number and the page numbers included in the binder. You might also want to include the tab numbers—for example, 3 JA 550-800 (Tabs 60-75).

MECHANICAL CONSIDERATIONS

The most frequent criticisms of Rule 5.1 in response to our survey concerned the ways in which poorly prepared appendixes make life harder for the reviewing court. A difficult-to-use appendix wastes the court's time—and diverts energy from the analysis of the parties' arguments. Your guiding principle should be, in the words of one survey respondent, "If counsel wants us to see something, make it easy to find." Here are some ways to help the court instead of hindering it.

Compliance with the rules. Review Rules 5.1 and 9 before you start. Review them again before you finish.

Copy quality. Be sure every page is as readable as you can make it. If a trial exhibit was a tenth-generation copy and you have a better (and otherwise identical) version, use it. Be sure nothing goes wrong in the photocopying process itself—pages askew, portions cut off, and the like.

Binding. Use something strong and permanent that will not fall apart with heavy use. Thicker volumes tend to be less durable. Consider what will happen if the binding breaks—if it requires special equipment to fix, the court of appeal probably will not be able to fix it.

Readable numbering. The apparently simple task of numbering pages turns out to be amazingly difficult to accomplish properly. Typically someone rushes through the process using a poorly inked automatic ("Bates") stamper, leaving faint numbers that become illegible after photocopying. Result: the court cannot find your citations. If the papers were already number-stamped in the trial court, then the problem is compounded by the multiple numbers on each page.

Use a stamper that produces heavy,

dark numbers, perhaps with a different number of digits than any previous numbering; be sure the stamper is properly inked; and review the numbered version for mistakes. Faint numbers should be re-stamped or darkened by hand. An even better approach, although more time-consuming and expensive, is to use computer-generated number stickers with a distinctive type style. The numbers will be uniformly dark and legible, and you can easily make them look different from any existing numbering scheme. Yet another option is to use a commercial copy service that generates sequential numbers as part of the copying process.

Consider using tabs to separate the documents. Respondents to the survey said that tabs are "good," "great" and even "wonderful." However, their usefulness will vary from case to case. In deciding whether and how to use tabs, put yourself in the position of someone reviewing the case for the first time, without the deep familiarity you have developed. Will tabs get them to the important documents more quickly, or just get in the way? Also consider sub-dividing important documents within a single tab (such as declarations attached to a motion), either with sub-tabs or colored paper.

Exhibits. The court of appeal does not receive the actual trial exhibits until a matter is set for hearing and counsel asks the superior court clerk to transmit the exhibits.[25] Yet exhibits can bring a case alive for the reviewing court, and there is no reason why it should not have the benefit of the exhibits while it is working up the case. One advantage of an appendix is that you can include things that would otherwise have to await delivery because the superior court clerk has no way to include them in a clerk's transcript. For instance, if a blowup was used at trial without a reduced copy being marked, you could include a reduced copy in the appendix. Similarly, instead of being limited to black-and-white photocopies of color photographs used at trial, you could include color photocopies or perhaps even duplicate prints.

However, this is not necessarily a time for vigorous creativity. You should solicit opposing counsel's consent to anything unusual, and you should explain what you have done to the court of appeal either in the briefs or in the appendix itself. And again, always remember that the appendix cannot include anything that was not before the trial court.

Indexes. According to the survey, indexing is another sore point with court of appeal staff. One respondent observed that "bad indexing makes life miserable"; another warned that "when you are working on a deadline, a lousy index is *very* irritating."

The rules require both alphabetical and chronological indexes. The first volume must include the complete index,[26] but the entire index should be included in each volume, so that if the court is looking for a particular document there will always be a ready reference to its location. Consider sub-indexing components of large documents and listing each item's volume number as well as its page reference.

FRONT OF THE LINE

These details may seem annoyingly trivial, but it is much better for the lawyers to be annoyed than the court of appeal. Almost every negative comment in response to our survey focused on problems that could easily have been avoided with a little more attention to the purpose of the appendix and the details of its preparation.

Rule 5.1 is not a panacea for clients' understandable dissatisfaction with the law's delay. But using an appendix can put you much closer to the front of the line in the appellate process, while helping you to minimize clerical frustrations and focus the court's attention as directly as possible on the portions of the record that are important to your case. The goals are well worth the effort you will invest in using Rule 5.1. ◆

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[1] All rule citations are to the CAL. R. OF CT.

[2] We submitted a questionnaire to research attorneys in various districts of the court of appeal. While the replies do not represent any official views, they contain a wealth of commentary and practical advice that has been incorporated into this article.

[3] Rule 5(d).

[4] Rule 16. The Rule 5.1 election itself must be filed within the deadline for designating the record, *i.e.*, within 10 days after filing a notice of appeal. Rule 5.1.

[5] FIRST DISTRICT LOCAL R. 6(a); SECOND DISTRICT LOCAL R. 2(a). Rule 35(e) provides this remedy for criminal appeals.

[6] Rule 5.1(b) (emphasis added).

[7] Subdivision (i) provides:

(i) (Filing as Certification; Sanctions for Nonconforming Copies or for Substantial Underinclusion)

(1) Filing an appendix constitutes a representation by counsel that the appendix consisits of true and correct copies of the papers in the superior court file. Willful or grossly negligent filing of an appendix containing nonconforming copies is an unlawful interference with the proceedings of the reviewing court, and subjects the counsel filing the brief, and the party represented, to monetary and any other appropriate sanctions.

(2) If an appellant's appendix is so inadequate that justice cannot be done withouit requiring inclusion of documents in the respondent's appendix which should have been in the appellant's appendix, or without the court's independent examination of portions of the original record which should have been in the appellant's appendix, the court may impose monetary sanctions.

[8] *E.g.*, In re Marriage of Green, 159 Cal. App. 3d 1163 (1984); Warfield v. Peninsula Golf and Country Club, 214 Cal. App. 3d 646, 652 n. 3 (1989).

[9] *E.g.*, Cox v. County of San Diego, 233 Cal. App. 3d 300, 312-13 (1991); Peterson Development Co., Inc. v. Torrey Pines Bank, 233 Cal. App. 3d 103, 112 n. 8 (1991); Ladd v. Dart Equipment Corp., 230 Cal. App. 3d 1088, 1093 (1991); Herman Feil, Inc. v. Design Center of Los Angeles, 204 Cal. App. 3d 1406, 1410 (1988).

[10] Committee to Defend Reproductive Rights v. A Free Pregnancy Center, 229 Cal.App.3d 633, 637-38 (1991).

[11] *See generally* 9 WITKIN, CALIFORNIA PROCEDURE, Appeal §§466-67, at 457-58, §§649 *et seq.*, at 631 *et seq.*

[12] The relevant portions of the rule are as follows:

(b) (Contents of Appellant's or Joint Appendix) An appendix prepared by the appellant or jointly by the parties to the appeal shall contain copies of (1) Those documents listed as items (1) through (5) in subdivision (d) of Rule 5; (2) Such other documents listed in subdivision (d) of Rule 5 as are essential to the proper consideration of the issues, including such documents as the appellant should reasonably assume will be relied upon by the respondent in meeting the issues raised; (3) The appellant's notice of election to proceed under the provisions of this rule; (4) Any motion opposed to proceeding under this rule, documents filed in connection with the motion, and the court's ruling thereon; (5) In the case of a joint appendix, the stipulation designating its contents; and (6) Required indices.

Items (1) through (5) of Rule 5(d) are:

The following, whether designated in the notices of the parties or not: (1) the notice of appeal; (2) the notices or stipulations to prepare the clerk's transcript and the reporter's transcript, if any, and the notices or stipulations for the preparation of a settled statement or agreed statement, if any; (3) the judgment appealed from, with an endorsement by the clerk showing the date notice of entry was mailed by the clerk or served by a party; (4) the pre-trial order, if any, whenever the judgment roll or any part has been designated by the parties; (5) any notice of intention to move for a new trial or motion to vacate the judgment, and the ruling thereon, if any.

[13] Rule 5(d) (4).

[14] Rule 5(d) (3).

[15] Rule 5(d) (5).

[16] Rule 5(d).

[17] Rule 5(d) (1).

[18] Rules 5(d) (2), 5.1(b) (3).

[19] Rule 5.1(c) (1).

[20] In Butt v. California, 4 Cal. 4th 668, ___ n. 1 (1992), the supreme court seemed skeptical about an appendix that did not include file-stamped first pages and proofs of service; but the court relied on the portion of Rule 5.1 that provides that filing an appendix constitutes a representation that the copies are accurate and on the fact that no one challenged the accuracy of the appendix.

[21] A repeated complaint in our survey was that appendixes often do not include enough material (although this is also a problem that can arise with a clerk's transcript, since it only contains what the parties designate). The appellate courts sometimes exercise their power to obtain documents directly from the superior court (*e.g.*, Daon Corporation v. Place Homeowners Association, 207 Cal. App. 3d 1449, 1452 n. 2 (1989)), but no sane appellant or respondent would want to put the court to that task.

[22] Although it is not a great threat, you might remind opposing counsel that under Rule 5.1(h), the party responsible for including unnecessary material may not be able to recover the cost of doing so, even if he or she prevails.

[23] Rule 5.1(b) (5).

[24] For instance, an appeal from rulings on concurrent motions could involve two completely distinct sets of papers, which might be easier for the court to study if they are grouped separately.

[25] Rule 10.

[26] Rules 5.1(c), 9(d).

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