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# Appellant's Opening and Reply Briefs

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## I. OPENING BRIEF

### §12.1 A. Importance and Function of Opening Brief

The principal document for presenting the appellant's case is the opening brief. Its importance cannot be overstated. Even though appellant's counsel will have an opportunity to file a reply brief and to present an oral argument, if the opening brief does not make a significant impact, the prospects of ultimate success are slight. The opening brief warrants a maximum effort, not only to comply with the rules but to function as an effective instrument of appellate advocacy.

Persuasion is part of the litigation process, but it is especially important in an opening brief. At this point, the case has been decided at one level. The inertia factor, buttressed by the limitations on appellate review and the reluctance to require the lower court to reconsider a completed case, tend to support affirmance. It is a formidable challenge to persuade the appellate court to change the status quo and overturn the lower court's decision.

### B. Determining Grounds for Appeal

### §12.2 1. Conduct Initial Evaluation

In the initial evaluation of the case, counsel should reach a general but tentative decision on the grounds to be urged on appeal. See chap 2A. The determination of the points to urge in the brief is essential as a guide to legal research and as an aid in organizing the record. Decisions will have to be made on the following:

- Whether grounds initially viewed as marginal are to be included or dropped; and
- Whether arguments considered central to the appeal require further focus and refinement.

**JUDICIAL PERSPECTIVE™** Generally, it is more effective to focus on one or a few major points. Avoid drowning your best arguments in a sea of minor issues that are not likely to have affected the result in the lower court.

### §12.3 2. Conduct Research to Shape Issues

Researching the issues and reviewing the record will help

- corroborate the choice of some points;
- lead to the abandonment of others; and
- suggest additional arguments not previously considered.

### §12.4 3. Avoid Waiver of Issues Not Raised

The reviewing court is likely to consider waived or abandoned any issue not raised in the appellant's opening brief. *Shaw v Hughes Aircraft Co.* (2000) 83 CA4th 1336, 1345 n6, 100 CR2d 446; *California Recreation Indus. v Kierstead* (1988) 199 CA3d 203, 244 CR 632. It is not appropriate to rely on points not mentioned in the parties' briefs. *Penn v Prestige Stations, Inc*. (2000) 83 CA4th 336, 345 n2, 99 CR2d 602.

**PRACTICE TIP™** Pay particular attention to the possibility of waiver when trying to obtain a reversal of an order entered on alternative grounds. In that circumstance, an appellant must demonstrate that each ground relied on by the trial court is erroneous. Failure to address each ground on appeal will be considered a waiver of any challenge to the trial court's ruling on that ground. See *Hambros Reserve, Ltd. v Faitz* (1992) 9 CA4th 129, 11 CR2d 638, overruled in part on other grounds in *Trope v Katz* (1995) 11 C4th 274, 292, 45 CR2d 241.

### C. Managing Record

### §12.5 1. Read Record

Counsel should personally read the record and not delegate the task to others. The record is ordinarily composed of the clerk's transcript or its equivalent and, if there has been oral testimony, a reporter's transcript and exhibits. On designating the record, see chap 9.

### §12.6 2. Develop Tools to Manage Record

Unless the entire record is extremely short and simple (*e.g.,* if a demurrer to the complaint was sustained without leave to amend at the outset of the case), it is often helpful to reduce the substance of the record to more manageable proportions through digests, summaries, and indexes. A simple chronological digest of the reporter's transcript, indexed according to subject matters pertinent to the appeal, is a more workable tool than the raw record. The extent to which further refinements are warranted depends on the nature and complexity of the record and the issues on appeal. The essential point is that counsel should develop tools to facilitate working with a record that is cumbersome in its raw form.

**JUDICIAL PERSPECTIVE™** Consider obtaining an electronic version of the record. You can search the file for specific issues, find objections, sort the record by issue, and quickly discard material irrelevant to the issues presented for review.

The time spent in developing these aids is offset by the time saved in drafting the opening brief and in expediting counsel's work during the later stages of the appeal (*e.g.,* drafting the reply brief and preparing for oral argument). Beyond the potential for time saving, these measures can be justified on an even more fundamental basis: They give counsel a better grasp of the record; they enhance the presentation's accuracy, precision, and overall quality; and they enable counsel to convey the sense of assurance that flows from a firm command of the record.

**PRACTICE TIP™** Although digests, summaries, and indexes are useful tools in working with the record, each step raises the possibility of inadvertent errors. Counsel should check the record references in the brief for accuracy against the original record.

### §12.7 D. Researching Issues

Before drafting the opening brief, appellant's counsel should have a firm grasp of the facts in the record as well as the applicable legal principles. Authorities pertinent to the issues on appeal should be thoroughly researched, including, *e.g.,* supporting cases, statutes, restatements, treatises. Research results

should be organized as a working guide for preparing the brief. Research should include any contrary authorities that may need to be explained or distinguished.

**PRACTICE TIP™** If research is delegated, researchers should prepare a comprehensive and up-to-date review of authorities. Before beginning the opening brief, counsel should be thoroughly familiar with the research of others.

On researching grounds for appeal, see §§2A.100–2A.121.

### E. Multiple Appellants

#### §12.8 1. Filing Joint Brief or Adopting Another Brief

In cases with multiple appellants, counsel should consider either filing a joint brief or adopting all or part of another party's brief. These practices are expressly permitted by Cal Rules of Ct 8.200(a)(5).

#### §12.9 2. Advantages and Disadvantages

Filing a joint brief or adopting all or part of another party's brief reduces the effort and expense of the appeal and avoids irritating the court with unnecessarily duplicative presentations. If all or part of a co-appellant's brief is adopted, the presentation in the adopted brief can be augmented with a nonrepetitive brief.

However, there may be practical reasons for not filing a joint brief or adopting another brief, *e.g.,* a conflict of interest or a desire to detach a party from a coparty. Additionally, a joint or adoptive approach may deprive appellants of the benefit of variations on a theme, which might be more persuasive than a single presentation.

#### §12.10 3. Referencing Another Brief

Adopting a brief by reference applies only to another brief filed in the appellate court. It is not appropriate to adopt by reference a brief or motion filed in the trial court. *Biljac Assocs. v First Interstate Bank* (1990) 218 CA3d 1410, 1422, 267 CR 819, overruled on other grounds in *Demps v San Francisco Hous. Auth.* (2007) 149 CA4th 564, 578, 57 CR3d 204, and *Reid v Google, Inc.* (2010) 50 C4th 512, 532 n8, 113 CR3d 327; *Balesteri v Holler* (1978) 87 CA3d 717, 721, 151 CR 229.

## II. OVERVIEW OF BRIEF

### §12.11 A. Requirements of Brief

There is no set formula for a brief. The specific format will vary depending on the case. The California Rules of Court establish minimum requirements that must be followed, but considerable room is left for variation.

#### §12.12 1. Basic Parts

The appellant's opening brief generally consists of these basic parts:

- Preliminary sections, including a table of contents and a table of authorities (see Cal Rules of Ct 8.204(a)(1)(A)) and certain preliminary recitals (see §§12.23–12.29); and (unless deferred to a later point in the brief) a short introduction summarizing the general nature and thrust of the appeal (see §§12.30–12.33);
- Statement of the case setting out the nature of the action or proceeding, the relief sought, and the basic facts of the appeal (see Cal Rules of Ct 8.204(a)(2); see also §§12.37–12.50);
- Argument addressing the grounds on which the appeal is premised (see §§12.51–12.79);
- Conclusion tying the brief together and requesting desired relief (see §§12.80–12.84); and
- Attachments (optional; see §§12.85–12.87).

**PRACTICE TIP™** It is neither necessary nor customary to preface the brief with a formal list of "questions presented." But see §22.56 (specification of issues required for petitioner's brief on the merits in the California Supreme Court).

### §12.13 2. Importance of Each Part

Each part of the brief should be viewed as integral to the appellant's objective of persuading the reviewing court to reverse or otherwise alter the trial court decision. It is generally inappropriate to merely incorporate the same arguments raised in a trial brief; the brief should stand on its own. See §§12.51–12.79.

### §12.14 B. Length

Absent permission from the Chief Justice or presiding justice (Cal Rules of Ct 8.204(c)(5)), appellate briefs may not be more than 14,000 words, including footnotes. A combined brief under Cal Rules of Ct 8.216, in which appellant is also a respondent because of a cross-appeal, may not exceed double the lengths specified in Cal Rules of Ct 8.204(c). Cal Rules of Ct 8.204(c)(4).

### §12.15 1. Permission to Exceed Word Limit

When seeking permission to exceed the word limit, counsel are required to show with specificity why additional words are necessary. See *In re S.C.* (2006) 138 CA4th 396, 399, 41 CR3d 453 (practice of presiding justice to accept appellate counsel's declaration that good cause existed to file brief exceeding word limitation).

### §12.16 2. Certificate of Length

The appellant's brief must include a certificate by appellant's counsel or an unrepresented party stating the number of words in the brief; the person certifying may rely on the word count of the computer program used to prepare the brief. Cal Rules of Ct 8.204(c)(1). A brief produced on a typewriter must not exceed 50 pages. Cal Rules of Ct 8.204(c)(2). The tables, the cover information, the certificate on word count, the Certificate of Interested Entities or Persons required under Cal Rules of Ct 8.208, any signature block, and any attachment under Cal Rules of Ct 8.204(d) are excluded from the length limits. Cal Rules of Ct 8.204(c)(3).

### §12.17 3. Benefits of Brevity

Serious practical considerations dictate that the opening brief be true to its name, that is, kept as short as possible and consistent with the needs of the particular case. A lengthy brief may evoke a negative reaction from an overburdened appellate court. The negative reaction will be compounded if the length stems from prolixity rather than from the legitimate needs of the case. See *In re S.C.* (2006) 138 CA4th 396, 399, 41 CR3d 453 (appellant chastised for rambling 202-page brief). Additionally, the same factors that contribute to excessive length (*e.g.,* a rambling style, needless repetition, preoccupation with minutiae) detract from the brief's effectiveness. Finally, an overlong brief is often an unnecessary expense.

### §12.18 4. Balancing Brevity With Thorough Argument

The brief needs to be as short as possible while thoroughly presenting and arguing the issues. Although this balancing issue will arise in a great variety of cases (*e.g.,* length and complexity of the record, number and complexity of issues) and thus precludes any precise formula, the following guidelines may be helpful:

- View the length limits of Cal Rules of Ct 8.204(c) as a true upper limit; most briefs should be well below that limit.
- Subject the tentative draft of the brief to critical scrutiny, segment by segment, to eliminate, consolidate, or condense passages without impairing its integrity or effectiveness; *e.g.,* a commonly accepted proposition should be merely stated, not belabored.

## §12.19 C. Headings

In compliance with the rules of court, headings should be used to designate essential components of the brief, such as "Statement of the Case" (Cal Rules of Ct 8.204(a)(2)), and to delineate points made in the "Argument" (Cal Rules of Ct 8.204(a)(1)(B)). Headings should precede each point in the brief; subheadings may be used if desired. They need not be technical "assignments of error," but should generally be descriptive of the subject matter covered. Cal Rules of Ct 8.204(a)(1)(B).

Beyond these requirements, headings and subheadings may increase the brief's effectiveness by, *e.g.,*

- aiding in understanding and following the general outline of the presentation of facts and in focusing on aspects that need special attention;
- enhancing readability; and
- compelling counsel to assess the various segments in the basic outline and deleting or revising those that do not fit in the structure.

**PRACTICE TIP™** Headings should be full sentences written in the active voice. A reader should derive a basic understanding of the entire brief by reading the headings in the Table of Contents. Cal Rules of Ct 8.204(a)(1)(A).

**JUDICIAL PERSPECTIVE™** Headings should lead the reader to the result sought in the brief.

### D. Writing Style; Footnotes; Nomenclature

### §12.20 1. Refine and Polish Brief

In preparing the opening brief, consider not only the content but also the manner in which the content is presented. The brief should be refined and polished through successive drafts until the end product is clear, concise, readable, and persuasive. For suggestions on stylistic details, see Jessen, California Style Manual: A Handbook of Legal Style for California Courts and Lawyers (4th ed 2000).

**PRACTICE TIP™** To test the brief for readability and clarity and to invite other ideas for improvement, submit a tentative draft to a colleague or other person unfamiliar with the case.

**JUDICIAL PERSPECTIVE™** If any reader, whether colleague, secretary, family member, or friend, thinks any sentence or part of the brief is confusing or poorly written, assume that he or she is right and rewrite or eliminate that portion.

### §12.21 2. Use Footnotes Sparingly

The use of footnotes is controversial. Many justices do not like them. On the other hand, some practitioners advise using a few well-placed footnotes to mention a collateral point, to substantiate an assertion with a quotation from the record, or to quote the precise language of a statute without obstructing the flow of the brief.

**JUDICIAL PERSPECTIVE™** There should be as few footnotes as possible. None is even better.

### §12.22 3. Use Party Names, Not Designations

Although the parties to an appeal are formally designated as "appellant" and "respondent" (Cal Rules of Ct 8.10(a)(1)), these abstract designations should be held to a minimum in the brief. In the interest of clarity, use the parties' actual names, suitable abbreviations, or appropriate descriptions (*e.g.,* "the husband").

When party designations are needed, use the trial court designations of "plaintiff" and "defendant." To avoid any misunderstandings, state the parties' designations early in the brief, perhaps in a footnote.

## III. PRELIMINARY PORTIONS OF BRIEF

### A. Table of Contents

### §12.23 1. Nature and Purpose

Every brief must begin with a table of contents. Cal Rules of Ct 8.204(a)(1)(A). The table of contents, in outline form, sets out the various sections and subsections of the brief with appropriate page references. This outline of the general structure enables the court to see what the appeal is about and to focus on aspects of special interest.

**PRACTICE TIP™** Even though preparing the table of contents is a relatively mechanical task, do not neglect it. Because the court's first contact with the brief is the table of contents, review it carefully for its potential impact. Two prime criteria should be considered when reviewing the table of contents: (1) Does it present a succinct, intelligible outline of the appellant's perception of the case?

and (2) Is it likely to capture the court's attention? If either criteria is not satisfied, more work on the headings and subheadings or the underlying structure and content of the brief may be needed.

**JUDICIAL PERSPECTIVE™** I always look first to the table of contents to understand the major points of the appeal. If the headings are poorly done, that usually indicates that the rest of the brief is poorly done, and I may never be able to figure out the issues.

### §12.24 2. Form and Content

The table of contents should list, with page references, all divisions and subdivisions in the brief, including the full headings and subheadings of the argument. The table of contents is the reader's introduction to each part of the brief. In a complex case, it may help to subdivide the statement of facts and create separate headings for each subject. See §12.19. Properly worded, these headings and subheadings can be extracted for the table of contents to lead the reader through the entire story. See sample tables of contents in §§12.25–12.26.

**PRACTICE TIP™** Look for any mechanical errors that may have been made in compiling the table of contents. This factor is especially important because it may so easily be taken for granted. A small but significant error in the index (*e.g.,* omission of a "not") can assume particular prominence.

### 3. Sample Forms: Table of Contents

### §12.25 a. Sample Form: For Simple Brief

**TABLE OF CONTENTS**

***Page***



### §12.26 b. Sample Form: For Complex Brief

**TABLE OF CONTENTS**

*Page*

*Comment:* This sample shows how a subdivided statement of facts prepares the reader for a complex fact situation. It allows the appellant to characterize the facts in a subtly argumentative way to focus the court's attention on the equities favoring the appellant. Complex situations might be handled by including an abbreviated "statement of the case" early in the brief and introducing a more detailed discussion of the facts relevant to a particular issue before the argument on that issue. See §12.48 for sample statement of the case. See also §§12.49 (sample procedural history), 12.72–12.79 (sample argument).

**JUDICIAL PERSPECTIVE™** An abbreviated "statement of the case" or introduction is a good idea. Very briefly state what the case is about and the issues, followed by the statement of facts.

## B. Table of Authorities

### §12.27 1. Nature and Purpose

The primary purpose of the table of authorities is to assist the court in finding the discussion on a particular authority. The table helps the reader assemble materials to refer to while reading and evaluating the arguments.

**PRACTICE TIP™** If the brief is not produced in the office, counsel and the company producing the brief should have a clear understanding of who will be responsible for preparing the table of authorities to avoid a duplication of effort or a last-minute discovery that no table was made. Even if the task is clearly delegated and assumed, counsel is ultimately responsible for meeting the requirements of Cal Rules of Ct 8.204(a)(1)(A), so ensure that the company producing the brief understands and complies with the requirements. Carefully proofread the final product.

## §12.28 2. Form and Content

Every brief must be prefaced by a table of authorities separately listing cases, constitutions, statutes, court rules, and other authorities cited. Cal Rules of Ct 8.204(a)(1)(A). This table is a listing, by categories, of the authorities cited in the brief, showing the pages where each one is cited or discussed.

The authorities within each category (*e.g.,* cases, statutes) are customarily listed in alphabetical order, with multiple sections of the same code or constitutional provisions listed numerically. Although not required by the rules, it is best to use subcategories with subheadings where appropriate (*e.g.,* listing state and federal cases separately rather than all cases together). On headings, see §12.19.

**PRACTICE TIP™** Consider emphasizing authorities of paramount importance (*e.g.,* using boldface type, with a suitable explanation) when the list of authorities is long. Each of the various categories of authorities (*e.g.,* cases, statutes, court rules) must be listed separately. Cal Rules of Ct 8.204(a)(1)(A). There may, of course, be categories other than those specified in Rule 8.204(a)(1)(A).

**NOTE™** Although Rule 8.204(a)(1)(A) might be read as authorizing a single catch-all category of "other authorities," consider specifying additional categories (*e.g.,* "treatises") if important to the appeal. Each category should be preceded by an appropriate heading.

Although it will be one of the last sections completed, the table of authorities, like the table of contents, is placed at the beginning of the brief, directly following the table of contents.

## §12.29 3. Sample Form: Table of Authorities

**TABLE OF AUTHORITIES**

**Cases** ***Page***

***Jones v Smith*** **(2003) xx C4th xx, xx CR2d xx .....**

***Martin v Johnson*** **(2005) xx C4th xx, xx CR2d xx.....**

[*Continue in alphabetic order*]

**Statutes**

**Code of Civil Procedure §123.....**

**Code of Civil Procedure §456.....**

[*Continue in alphanumeric order*]

**Court Rules**

**California Rules of Court 8.147(a).....**

**California Rules of Court 8.224 .....**

[*Continue in numeric order*]

**Other Authorities .....**

**Restatement of Contracts, Section 2.....**

- *Comment:* The accepted nomenclature is "Table of Authorities" rather than "Table of Citations." Cal Rules of Ct 8.204(a)(1)(A). The rules of court do not require any particular citation style for briefs. For consistency in this book, the citation style in this table follows the simplified CEB style for citing cases and statutes. In practice, however, the citation style should follow either Jessen, California Style Manual: A Handbook of Legal Style for California Courts and Lawyers (4th ed 2000) or the most recent edition of the Uniform System of Citation ("Bluebook" published by the Harvard Law Review Association (Cal Rules of Ct 1.200); the preferred practice is to use the California Style Manual.

**JUDICIAL PERSPECTIVE™** The California courts virtually insist on the California Style Manual and do not like the Harvard "Bluebook." The "Bluebook" should be restricted to federal practice.

### C. Introduction

### §12.30 1. Nature and Purpose

The opening brief is most helpful when it begins with a few preliminary recitals indicating the general nature and origin of the appeal. This is particularly helpful to appellate justices and their staffs, who often "triage" the cases assigned each month to divide the workload. Many appellate practitioners believe that the introduction is the most important part of any brief.

The introduction should clarify the parties' relationship. If there are several plaintiffs or defendants, some of whom are parties to the appeal, this fact should be stated. If a cross-complaint might result in confusion of parties at the appellate level, this problem should be clarified.

The introduction should not duplicate a more detailed recitation of procedural facts in the statement of the case, nor should it be used for arguing the merits of the appeal. To avoid such temptations, confine the introduction to a brief paragraph or two, as in the example in §12.33.

**PRACTICE TIP™** An alternative method for introducing the case is to combine the introduction with a brief overview of the facts to lead into the more detailed discussion of the facts and procedural history. This method has the advantage of introducing the brief on as dramatic a note as possible. It is also the *preferred* method of many appellate specialists. See sample introductory statement of the case in §12.48.

### §12.31 2. Form and Content

The introduction should state the following:

- Nature of the action or proceeding in the trial court;
- Nature of the judgment or order appealed from;
- Pertinent chronology if the timeliness of the appeal turns on any motions (*e.g.,* a motion for new trial); and
- Whether the case was tried with or without a jury if the case was tried on its merits.

**PRACTICE TIP™** Be aware of the introduction's potential impact on the court, and include any aspect likely to capture the court's attention. For example, a judgment awarding the plaintiff $5000 in compensatory damages and $5 million in punitive damages should be described in those terms and not simply as "money judgments."

## §12.32 3. Statement of Appealability

The appellant's opening brief must either (Cal Rules of Ct 8.204(a)(2)(B))

- state that the appeal is from a final judgment that disposes of all issues between the parties; or
- explain why the order or nonfinal judgment is appealable.

Failure to comply fully with these requirements may result in the court striking the appellant's opening brief, either on the court's own motion or on motion of a party. A further failure to comply fully may result in dismissal of the appeal for failure to submit a brief in compliance with the rules of court. *Lester v Lennane* (2000) 84 CA4th 536, 557, 101 CR2d 86.

**PRACTICE TIP™** The statement of appealability assures the court that it is dealing with an appealable judgment or order and reminds the appellant not to overlook the threshold issue of appealability. To alleviate at the outset any judicial concern on this score, the requisite recitals should appear early in the brief (although there is no formal requirement about placement). Moreover, counsel should comply with any placement preferences peculiar to the particular district or division. For example, some courts prefer the statement of appealability to be in a separate section of the brief so that it will be included in the table of contents and located more readily.

## §12.33 4. Sample Form: Introduction

**I. INTRODUCTION**

**This case concerns a contractor's claim to collect from a bank on a stop notice. Civil Code section 3162 requires the fulfillment of two prerequisites before a stop notice claim can be effective: (1) there must exist a "construction fund"; and (2) a construction lender is only required to withhold those funds it is otherwise "obligated" to pay or advance to the borrower. Neither of these prerequisites exists here: There was no construction fund and the lender was not obligated to make any advancements to the borrower at the time of the stop notice. The claim of plaintiff and respondent _ _[*Name*]_ _ to enforce its stop notice fails as a matter of law.**

**The trial court relied on *Familian Corp. v Imperial Bank* (1989) 213 CA3d 681 to support its decision. *Familian* is distinguishable from the present case and, in any event, *Familian* has been criticized as poorly reasoned and should not be followed. The judgment should be reversed with directions to enter judgment in favor of defendant and appellant _ _[*Name*]_ _.**

*Comment:* This sample introduction and the remainder of the brief (used throughout this chapter) have not been updated for legal accuracy. It is presented as an example of *form,* not *content,* and should not be presumed accurate with regard to the state of the law.

### D. Summary of Argument

#### §12.34 1. Nature and Purpose

Although not mandated by the rules, a summary of the argument may be useful if the issues are particularly complex. The summary gives the court a capsule view of the appellant's perception of the case, that is, how the lower court went astray and why and how the appellate court should take corrective action.

The summary helps secure the maximum advantage to the appellant from the limited time that can be devoted to the case by the court, enabling it to grasp the essence of the appellant's position quickly. At the same time, it may whet the reader's appetite for the balance of the brief. Including a summary may also aid in the court staff's perception of the case or at least enhance the prospects that any errors in perception will be corrected.

**PRACTICE TIP™** The summary should not merely repeat the table of contents, nor does including a table of contents eliminate the need for a clear and concise statement of the appellant's position. On table of contents, see §§12.23–12.26.

#### 2. Form and Content

#### §12.35 a. Length and Amount of Detail

If a summary is to serve its basic purpose, it should not be a mere restatement of the brief. Such duplication in the guise of a "summary" is counterproductive. Likewise, if the summary is reduced to mere abstract generalities (*e.g.,* "The trial court committed manifest error"), it will probably be useless. Between these extremes, generalization is difficult, but a summary much longer than one page is probably suspect. Compare the length of the summary with the length of the balance of the brief; if the number of summary pages seems excessive compared with the number of pages in the brief, the summary is likely to be ineffective and a burden to the court.

#### §12.36 b. Placement

A summary might be appropriate in one of two logical places in the brief:

- **At the beginning, as part of the introduction**. Placing the summary at the beginning helps the appellant capture the court's attention as soon as possible. The summary will serve as a guide to the argument and statement of the case and will help the reader grasp the significance of key facts.
- **After the statement of the case and at the start of the argument.** This placement orients the reader to the argument after he or she has acquired the facts, and it provides a strong focus and introduction for the argument.

**PRACTICE TIP™** If the summary is placed at the beginning of the brief, include sufficient factual background to place the arguments in context because the reader will presumably not yet have read the statement of the case.

## IV. STATEMENT OF THE CASE: PROCEDURAL AND SUBSTANTIVE FACTS

### §12.37 A. Nature and Importance

The appellant's opening brief must contain a statement of the case concisely setting out the nature of the action or proceeding and the relief sought, a summary of the material facts, and the judgment or ruling of the superior court. Cal Rules of Ct 8.204(a)(2).

The statement of the case must be drafted with the scope of appellate review in mind. For example, if the appeal is from the granting of a nonsuit, the evidence must be viewed in the light most favorable to the appellant. See *Raber v Tumin* (1951) 36 C2d 654, 226 P2d 574. On review of a jury verdict, however, the appellant must state the facts most favorable to the respondent. See *Pick v Santa Ana-Tustin Community Hosp.* (1982) 130 CA3d 970, 978, 182 CR 85. On scope of appellate review, see chap 2A.

The appellate court usually has some knowledge of the relevant propositions of law but no prior knowledge of the facts, so it must look to appellant's counsel to fill this void. Unless counsel fulfills this responsibility, the arguments may be incomprehensible as well as unpersuasive. Moreover, if the appellant fails to provide an adequate statement of the case, the court is obliged to look to the respondent's brief.

**PRACTICE TIP™** If there is a legitimate reason for addressing evidence beyond the appellate court's purview, expressly indicate the special and proper purpose for which it is being done. For example, the appellant need not limit the discussion to the respondent's evidence when arguing that an error was prejudicial. See Cal Const art VI, §13 (court authorized to consider "entire cause").

### §12.38 B. Form and Content

The summary of material facts must include both procedural and substantive facts. Cal Rules of Ct 8.204(a)(2). Except for simple briefs, the procedural facts are often placed under the heading "Statement of the Case" and the substantive facts under the heading "Statement of Facts." Both may be placed under the major heading of "Statement of the Case," and each may be given a subheading. The exact organization is less important than compliance with the substance of Rule 8.204.

**NOTE™** Some of the required elements (*e.g.,* nature of the action, lower court judgment or ruling) are usually covered in the introduction (see §§12.30–12.33), but they may be addressed in more detail in the statement of the case.

### §12.39 1. References to Record

The statement of the case must contain only matters that appear in the record on appeal (Cal Rules of Ct 8.204(a)(2)(C)), aside from the limited matters of which the court may take judicial notice. Evid C §§450–460. See *Johnson v Tago, Inc.* (1986) 188 CA3d 507, 512 n1, 233 CR 503 (court will disregard improper references to events outside record). Each fact recital in the statement of the case should be supported by a reference to the record. See *Green v City of Los Angeles* (1974) 40 CA3d 819, 115 CR 685 (duty of appellant's counsel to refer court to record supporting appellant's position); *Williams v Williams* (1971) 14 CA3d 560, 565, 92 CR 385 (brief failed to cite portion of record supporting each assertion; court of appeal has no independent duty to search record).

### §12.40 2. Practical Reasons for Reference to Record

Reference to the record is mandated by Cal Rules of Ct 8.204(a)(1)(C), and a brief that fails to comply with this rule may be returned by the clerk marked "received but not filed" under Cal Rules of Ct 8.204(e) (noncomplying briefs). However, the following are additional reasons to scrupulously adhere to this practice:

- Reference to the record helps counsel meet the fundamental requirement (reflected in Cal Rules of Ct 8.204(a)(2)(C)) that the statement be accurate and confined to matters in the record on appeal;
- It attests to the credibility of the appellant's presentation and facilitates the court's independent investigation, which is particularly important if the respondent challenges the accuracy of the appellant's account; and
- It requires counsel to read the record carefully to determine that the brief contains what the record actually reveals.

**WARNING™** Inability to find a supporting record reference might mean that a statement should be deleted or reframed.

### §12.41 3. How to Cite to Record

Citations to printed records should be to volume and page number. If any part of the record is in electronic format, then the citation should be made with the same level of specificity as for the printed record. Cal Rules of Ct 8.204(a)(1)(C).

Abbreviations should be succinct, readily comprehensible, and used in a consistent fashion. For example, the clerk's transcript and reporter's transcript are often referred to as follows:

- **Clerk's transcript:** "CT 24:5–10" or "CT 24/5–10" (page number before the colon or slash; line number(s) after);
- **Reporter's transcript:** "RT 44:20" or "RT 44/20" (page number before the colon or slash; line number(s) after);
- **Appendix used in lieu of clerk's transcript** (Cal Rules of Ct 8.124): References to the appendix should be noted in similar fashion to the clerk's and reporter's transcripts.

See, e.g., sample forms in §§12.48–12.49 for examples of citations.

**PRACTICE TIP™** To avoid any confusion about the method used to cite the record, consider putting an explanatory footnote at the beginning of the brief, wherever the first reference is made.

## C. Drafting Effective Statement of the Case

### §12.42 1. Organize According to Needs of Case

There is no required method of organization for presenting the statement of the case. See sample form in §12.48 and accompanying text for illustration and discussion of the ways in which organization might vary. The precise organization must follow the needs of the particular case.

**PRACTICE TIP™** Examine well-written appellate opinions in the same area as the appellant's appeal to gain insights into structures that have received tacit judicial approval. On statement of facts, see Moskovitz, Winning an Appeal §4.3 (4th ed 2007).

### §12.43 a. Formulate Outline

Before writing a first draft, decide on a logical presentation sequence and draft a suitable outline, with the principal points serving as subheadings in the presentation.

In formulating the outline, bear in mind that the case must ordinarily be presented from two intertwined perspectives: one addressed to the underlying facts, the other to the proceedings in the litigation. If the sole focus is on the underlying facts, the appellate court will not be clear on how the legal issues in the case arose. Focusing heavily on the chronology of the lawsuit itself (*e.g.,* a witness-by-witness account of the trial testimony) may result in excessive detail that fails to convey the essential story. In other words, avoid a fact summary that is merely a sequential recitation of the testimony as it was presented at trial.

### §12.44 b. Present in Chronological Order

Most appellants decide to use a chronological narrative. Although such a presentation should refer to the salient aspects of the lower court's proceeding, the underlying facts should usually be presented in terms of their own logical development. Direct quotations from the record, although they do lend credibility to the fact summary, should be used only when counsel needs to capture the precise flavor of the testimony, and then they should be as brief as possible.

If the facts are extremely complex, it may be necessary to organize them by subject matter, in conjunction with a chronological or other suitable presentation of the facts pertinent to each subject.

### §12.45 c. Manage Complex Facts

Complex briefs with extensive facts require special treatment. An Introductory Statement of Facts as a separate heading can be useful in telling a general story of what happened, with a note that the particular facts pertaining to each issue will be presented separately when that issue is discussed.

Each issue would include the following:

- Statement of facts relating the evidence pertinent to that issue; and
- Legal argument showing the error.

Complex facts may also be managed by subdividing the statement of facts, using headings and subheadings, which can then be extracted to create a forceful table of contents. See illustration in §12.50. Separating the undisputed facts from the disputed facts is helpful to emphasize that the appellant's claims of error are grounded on matters not in dispute.

### §12.46 2. Emphasize Most Relevant Facts

Decide which of the underlying facts and which portions of the trial court proceedings are particularly relevant to the issues on appeal, and focus the account on those aspects. Include a summary account of

other matters to acquaint the appellate court with the factual background of the case, but when addressing aspects of the case not germane to the issues on appeal, avoid any unnecessary details.

Avoid a narrow concept of relevancy. When there is a potential issue of whether the errors were prejudicial (*e.g.,* in an appeal from judgment after trial), the appellant's statement of the case should summarize portions of the evidence as a basis for contending that the case was a close one. Point out procedural aspects bearing on the possibility of prejudice (*e.g.,* the jury arrived at a 9-to-3 verdict after lengthy deliberation). On facts affecting determination of prejudice, see §§2A.85–2A.94. Also, consider the desirability of persuading the appellate court that the lower court's result was unjust. Facts that assist in this endeavor are relevant.

**PRACTICE TIP™** The appellant should present unfavorable aspects of the case as appropriate. The presentation of relevant unfavorable facts can afford counsel some room for advocacy; that is, counsel may be able to soften and preempt the impact of adverse facts by pointing out mitigating factors. For example, counsel may weaken the impact of adverse testimony by showing that it came from an untrustworthy source.

### §12.47 3. Be Fair

Tactical considerations and professional ethics dictate that the appellant state the case fairly and accurately. See Cal Rules of Ct 8.204(a)(2); Cal Rules of Prof Cond 5–200. If appellant's counsel misstates the facts or presents a distorted picture by ignoring facts adverse to the appellant's position, the opponent will likely call such distortions to the court's attention—or the court may discover them on its own. At that point, counsel's credibility is destroyed, and the court may become distrustful even of well-founded assertions. Indeed, if the appellant asserts a lack of substantial evidence as a ground for appeal and then fails to state the evidence fairly, presenting only the facts and inferences most favorable to its side, the court can waive the argument. *Handy v Shiells* (1987) 190 CA3d 512, 519, 235 CR 543; *Oliver v Board of Trustees of Eisenhower Med. Ctr.* (1986) 181 CA3d 824, 832, 227 CR 1; *Wickham v Southland Corp*. (1985) 168 CA3d 49, 54, 213 CR 825.

**PRACTICE TIP™** Although the concept of fairness clearly covers the substantive presentation (*i.e.,* avoiding misstatements, overstatements, omissions of relevant adverse facts, and half-truths), it also encompasses matters of tone, style, and the appearance of fairness. Scrupulously avoid pejorative language, epithets, sarcasm, or ridicule. Any disrespectful or contemptuous reference to the trial judge is likely to be received negatively by the appellate court. Without neglecting the obligation of advocacy, counsel's need for a dispassionate tone is particularly acute in the statement of the case because that tone itself will convey an aura of fairness, enhancing the credibility of the factual recitals.

## D. Sample Forms

### §12.48 1. Sample Form: Statement of the Case

**II. STATEMENT OF THE CASE**

**The present action has its origin in a cover-up by which Defendant ABC Insurance Company, along with numerous doctors and employees of a hospital it insured, sought to avoid paying the**

**proper amount of damages to the family of one Jane Smith. She had died as a result of a major incident of serious medical malpractice. The cover-up included a scheme, described with great specificity in the complaint, to arrange to have a copy of the ABC claim file on the case, which contained calculated misinformation, given to an inexperienced attorney, with whom ABC intended to settle the case for far less than its true value. The participants in the cover-up also agreed that they would take certain steps to ruin anyone who might frustrate their scheme or be involved in bringing it to light. Particularly, they agreed to falsely assert, if necessary, that the claim file had been stolen. In this way, they hoped to conceal their attempt to cover up the malpractice and to cause anyone involved in the Smith action who ultimately got in their way to be indicted for a crime.**

**Plaintiff and appellant John Jones had the misfortune to be employed by the law firm that was the recipient of the ABC claim file. He successfully settled the Smith malpractice case for substantially more than ABC had hoped to pay. He then became the victim of the defendants' conspiracy when they led the police and the prosecuting authorities to believe that the claim file had been stolen.**

**Appellant was therefore indicted and tried for receiving and concealing stolen property. He was acquitted because the jury found that, in fact, the claim file had not been stolen. Appellant then brought the present action against those involved in the conspiracy that led to his indictment and trial.**

**The trial court dismissed the action after sustaining all of defendants' demurrers to every cause of action in appellant's complaint without granting him leave to amend, ostensibly on the ground that defendants' conduct was privileged. The issue before this court is whether, on the facts alleged in the complaint, appellant could state a cause of action on any legal theory.**

**Appellant will establish that if the allegations of the complaint are true, as they must be presumed to be on this appeal, the judgment must be reversed. There can be no question that appellant has stated all the elements of a cause of action for malicious prosecution. Privilege is not a defense to a cause of action for malicious prosecution. Thus, appellant certainly should have been allowed to go to trial on this theory. Appellant will also show that the trial court was in error in sustaining the demurrers to the other causes of action on the ground of privilege. Last, appellant will show that there is no other theory on which the demurrers could have been sustained.**

*Comment:* The drafter of this brief has chosen to present a statement of the case that functions as an introduction and to follow it up with sections detailing the procedural history and the facts. Another commonly used format is to lead with an introduction and then present the facts and procedural history in subsections under the heading Statement of the Case. In a simpler brief, all these sections might be combined in one section titled Statement of the Case. The precise format may vary, depending on the needs of the particular case, as long as the requirements of Cal Rules of Ct 8.204 are met. Those requirements include either (1) a statement that the appeal is from a judgment finally disposing of all issues between the parties or (2) an explanation of why the order or nonfinal judgment is appealable.

## §12.49 2. Sample Form: Procedural History

### A. Procedural History

**Appellant John Jones filed a complaint pleading a first and primary cause of action for malicious prosecution and conspiracy to commit malicious prosecution. (CT 4–22.) The remaining causes of action are other legal theories, with some additional facts, on which Jones sought to recover damages relating to the same general circumstances giving rise to the malicious prosecution. (CT 23–52.) These facts are all related to the series of events that led to Jones being indicted, tried, and acquitted of stealing and concealing the Smith claim file. Defendants responded to the complaint by demurring and moving to strike portions of the complaint. (CT 53–124.)**

**After argument, the trial court sustained all demurrers without leave to amend as to all causes of action on the ground that all theories of the complaint were barred because defendants' conduct was privileged. (CT 552–553, 556.) The trial court's minute order reflects that the basis for its ruling was the decision in *Pettitt v Levy* (1972) 28 CA3d 484. The trial court took the motions to strike off calendar.**

**Judgment of dismissal was filed on June 15, 2009. (CT 557.) This appeal is taken from that judgment, which finally disposed of all issues between the parties. Jones filed a timely notice of appeal on July 7, 2009. (CT 559.)**

*Comment:* The procedural history is presented before the facts in this brief because it is appropriate to focus the court's attention at the outset on the fact that this is an appeal from a demurrer. The order of procedural history and statement of facts will vary, depending on the material issues in the case. Procedural histories should always include the jurisdictional basis for the appeal. Other contents will vary from brief to brief, depending on the issues presented.

## §12.50 3. Sample Form: Statement of Facts

### B. Statement of Facts

#### 1. Introduction

**Because this appeal arose from the trial court's sustaining a demurrer to the complaint without leave to amend, the issue is whether Jones has stated, or could state, a cause of action under any possible legal theory. For such purposes, all material facts pleaded in the complaint, and those that arise by reasonable implication, must be considered true. (*Pollack v Lytle* (1981) 120 CA3d 931, 936, fn. 2, disapproved on other grounds as stated in *Beck v Wecht* (2002) 28 C4th 289, 298, 121 CR2d 384.)**

**Defendant ABC Insurance Company (ABC) requested the trial court to take judicial notice of numerous materials relating to the litigation underlying appellant's complaint. (CT 67–68, 218-340.) The order sustaining the demurrer does not reflect whether the trial court did so. Jones will show that it would have been error for the trial court to have taken judicial notice of these materials. The following statement of facts, therefore, is taken solely from the allegations of the**

**complaint. The purported additional facts that ABC sought to place before the court through its request for judicial notice will be discussed separately in connection with that legal issue.**

### 2. Jones Was an Attorney Whose Practice Emphasized the Prosecution of Medical Malpractice Actions

**Jones is an attorney whose practice emphasized medical malpractice actions. (CT 7:2–6.) In September 2003 he was employed by the law firm of Brown & Black to help them handle a medical malpractice action they had filed titled *Smith v County Hosp.* (CT 17:13–16.) As a result of his involvement in the *Smith* action, Jones was tried and acquitted of receiving and concealing stolen property. It is thus important for an understanding of his complaint to detail the facts alleged concerning the *Smith* litigation.**

### 3. ABC Was Aware That Medical Malpractice Had Been Committed on Jane Smith

**In October 2002 Jane Smith was admitted for minor surgery at a hospital operated by defendant County Hospital. Anesthesia was negligently administered to her. As a result she became comatose and eventually died. (CT 9:11–19.) Defendant George Thomas, M.D. was the Chief of Anesthesiology at County Hospital. (CT 8:19–21.)**

**The doctors directly involved in the incident admitted to Thomas that gross negligence had occurred. Thomas passed this information on to ABC through defendant Richard Johnson (hereafter "Johnson"), who was a claims manager for ABC. (CT 7:24–26, 9:20–26.)**

### 4. Defendants Entered Into an Elaborate Scheme to Conceal the Medical Malpractice

**It was apparent that ABC, County Hospital, Thomas, and others all had substantial exposure in medical malpractice actions brought by Smith for her injuries and by her family for wrongful death after she died. Defendants therefore entered into an elaborate scheme to conceal the true cause of Smith's condition and to pretend that she had simply suffered a heart attack during surgery. (CT 11:6–21.) To carry out this conspiracy, defendants undertook the following conduct.**

### 5. Defendants Falsified ABC's Claim File and Arranged to Place It in the Hands of Inexperienced Attorneys

**Defendants' first strategy was to take steps to assure that any medical malpractice action that might arise would be handled by an inexperienced attorney, with whom a settlement for far less than the true value of the case could be reached. (CT 11:22–24, 12:2–7, 17:24.) They planned to accomplish this result in the following manner: It was the common practice of ABC, and other insurance companies, through their claims managers, to establish an approximate value for a case, known as "the reserve," and to record the reserve in the company's claim file, which is kept on the case. (CT 10:14–18.)**

**The reasonable value of the Smith case exceeded $4 million. (CT 10:12–13.) In furtherance of their conspiracy, ABC vastly understated the amount of the reserve in its claim file as being only $150,000. (CT 16:19–20.) Defendants then arranged to have Johnson provide a copy of the ABC**

**claim file to the law offices of Brown & Black, who had become the Smiths' attorneys, before they retained Jones to assist them. (CT 16:21–24.) It was common practice for insurance companies to give discretion and authority to their claims managers, either expressly or impliedly, to give a copy of the claim file, including the amount of the reserve, to prospective litigants or their attorneys. (CT 10:21–27.)**

### 6. Jones Frustrated Defendants' Attempt to Settle the Smith Case Cheaply

**Defendants' plan began to unravel when Brown & Black rejected defendants' attempt to settle the Smith case for $125,000. (CT 17:8–10.) Instead, Jones came to work for Brown & Black. (CT 17:13–16.) In 2004 he obtained a structured settlement for the Smiths, which was substantially higher than ABC's original offer. (CT 17:17–19.) On February 1, 2005, Jones left the employ of Brown & Black. (CT 17:20–21.)**

### 7. As Part of Their Original Conspiracy, Defendants Had Agreed to Ruin Anyone Who Got in Their Way

**That was not the last that Jones was to hear of the Smith case. As part of their conspiracy, defendants had also agreed that if any of their scheme should start to come to light, they would all deny that they (1) were aware that medical malpractice had been perpetrated on Smith, (2) had falsified the reserve in the claim file, and (3) had voluntarily arranged to deliver a copy of the ABC claim file to anyone. Johnson had agreed with defendants that if he was indicted, or otherwise charged with a criminal offense relating to his having been the one who provided a copy of the claim file to Brown & Black, he would not contest the charges but would plead nolo contendere. (CT 14:18–23, 15:21–23.) Defendants further specifically agreed to cause damage to anyone who might actively participate in the prosecution of the Smith medical malpractice claim rather than accept the defendants' version. (CT 16:1–4.)**

### 8. Defendants Were Instrumental in Causing Jones to Be Indicted and Tried for Receiving and Concealing a "Stolen" ABC Claim File

**Against this background, several years after the Smith case was settled, the fallout from the conspiracy unfolded in the following manner, which led to Jones' indictment and trial: On February 5, 2005, the Los Angeles County Police were conducting a search of the Brown & Black law offices for purposes not related to the Smith case. They came across the copy of the ABC claim file in the Smith case that Johnson had long ago delivered to Brown & Black. (CT 17:25–18:1.) The police then asked ABC, and its attorneys, officers, and employees, what they knew about the presence of the ABC claim file in the Brown & Black office. (CT 18:2–5.)**

**Defendants led the police, and a grand jury, to believe that the copy of the claim file had been stolen. (CT 18:6–19:3.) They did not tell the authorities about their conspiracy to cover up the medical malpractice that had caused Smith's death or how the copy of the claim file came to be in Brown & Black's office as part of defendants' cover-up conspiracy. (CT 18:6–19:3.)**

**Defendants knew that they were not telling the truth and that they did not have probable cause to make any accusation that appellant had been involved in the commission of a crime. They**

**made false statements in furtherance of their design to cause trouble for appellant, who had successfully represented the Smiths in the medical malpractice action, "knowing full well and intending that he would be accused of a crime based upon their deceitful statements." (CT 19:4–11.)**

**Jones was indicted for receiving and concealing stolen property, namely, the claim file. (CT 19:12–21.) Jones was eventually tried for these alleged crimes. (CT 20:2–8.)**

### 9. Jones Was Acquitted Because the Jury Found That the Claim File Had Not Been Stolen

**On October 12, 2009, a jury found Jones not guilty *because it concluded that the claim file had, in fact, not been stolen.* (CT 20:912.)**

### 10. Jones Suffered Substantial Damages As a Result of Defendants' Intentional and Malicious Conduct

**Reports of Jones' indictment were carried in most of the newspapers and publications that are read by attorneys. It was broadcast on radio and television. (CT 20:1–22.) He became unable to prepare and try his cases properly. (CT 20:1–17.) He suffered substantial losses in his law practice, which was tremendously adversely affected. (CT 20:17–19.) Jones also incurred approximately $75,000 in attorney fees to defend against the criminal charges. (CT 20:2–24.) In addition, he suffered severe emotional distress as a result of defendants' conduct. (CT 20:1–16.)**

**Jones alleged that defendants' acts were done maliciously, deliberately, intentionally, and in conscious disregard of his rights. He further alleged that the acts were done, in part, for the purpose of discrediting him as an attorney and ruining his business so that he would no longer be in a position to prosecute actions against any other insureds of ABC or any other insurance carriers. Jones therefore sought punitive damages. (CT 21:1–8.)**

*Comment:*

**Introduction:** The introduction to this statement sets the stage for the facts that follow by stating the proper rule for appellate review of the facts. See §12.32. Because the appeal arose from a demurrer, the facts underlying the action are taken from the allegations of the complaint. This technique is more effective than beginning each sentence with "The allegations of the complaint show…."

The second paragraph of the introduction illustrates how facts not strictly before the court on review may be called to the court's attention for a limited purpose. It also demonstrates how facts relevant to a particular issue may be treated separately to avoid cluttering up and interrupting the flow of the statement of facts.

**Order:** This statement presents the facts in chronological order, which is the usual organization for a statement of facts. It illustrates the technique of subdividing a complex fact situation to draw the court's attention to the most important points. See §§12.53–12.55. For a sample complex table of contents, see §12.26.

## V. ARGUMENT

### A. Nature and Format

### §12.51 1. Purpose of Legal Argument

A legal argument must do the following three things:

(1) State the broad legal principles and refine those principles to develop the precise legal theory on which the argument rests;

(2) Demonstrate the relevance of that theory to the material facts of the specific case; and

(3) Show that the error resulted in prejudice to the appellant.

**NOTE™** When the brief must include a discussion of prejudice, it usually follows the development of the theory and its application to the facts. For example, one might argue that the error was highly prejudicial by showing how the error was vital to the central issue of the case or that the evidence was so close that the error tipped the balance in the respondent's favor. For illustrations of prejudice, see §§2A.79–2A.97.

### §12.52 2. General Organization

The argument portion of the brief consists of the various points and subpoints being urged as grounds for reversal or modification of the judgment or order being reviewed. For the brief to be persuasive, the argument should be designed to convince the court of the validity of the specific grounds of error complained of, rather than serving only as a descriptive treatise or encyclopedic summary of the law.

**PRACTICE TIP™** If the prejudicial nature of the error complained of is not obvious, demonstrate that it was prejudicial to the appellant and resulted in a miscarriage of justice. Cal Const art VI, §13. See §2A.92.

### §12.53 3. Headings and Subheadings

Each point must be given an appropriate heading. Cal Rules of Ct 8.204(a)(1)(B). Failure to do so may lead the court to conclude that no claim of error is based on the point. *Live Oak Publ'g Co. v Cohagan* (1991) 234 CA3d 1277, 1291, 286 CR 198. Depending on the complexity of the point, subheadings corresponding to subpoints in the analysis are often helpful. Under Cal Rules of Ct 8.204(a)(1)(B), each heading or subheading should summarize the point, which should be supported by argument and, if possible, citation of authority.

### §12.54 a. Use Active Statements

Statements actively asserting the propositions being urged are generally more effective than mere descriptive titles. Headings should be so framed that reversal will be compelled if the arguments are well made. *Lowery v Robinson* (1965) 238 CA2d 36, 42, 47 CR 495. For example, if the proposition being urged is that the action was barred by limitations, a heading reading "Plaintiff Filed a Timely Complaint" is preferable to one reading simply "Statute of Limitations." The headings should state, even if in abbreviated form, the conclusion of the appellant's particular argument.

### §12.55 b. Make Headings Specific, Not Abstract

Headings should usually be framed in terms of the specific case rather than in abstract principles of law, although the latter may be appropriate as subpoints in developing the argument. The statement "The Statute of Limitations Is Tolled Until the Injury Is Discovered" may be appropriate as a subhead, but the main heading should include a reference to the specific case, *e.g.,* "Plaintiff Filed a Timely Complaint."

**PRACTICE TIP™** Headings and subheadings should be short and concise. A single brief sentence usually suffices. Carefully choose each word and phrase so that they accurately reflect the subject matter and draw the reader toward the concluding inference.

## 4. Pattern and Elements of Argument

### §12.56 a. Use Inferential Scheme, Not Syllogisms

Novice drafters of appellate briefs sometimes attempt to wrestle their legal arguments into a syllogism:

**_A_ is _B_.**
**_C_ is _A_.**
**Therefore _C_ is _B_.**

The conclusion of a legal argument does not necessarily follow from the premise as it does in a syllogism. Legal arguments exemplify an inferential scheme of propositional logic:

**If _P,_ then _Q_.**
**_P,_**
**therefore _Q_.**

As applied to an appellate argument, this can be expressed as follows:

**If _X_ is the set of facts and _Y_ is the law applicable to those facts, then the lower court's judgment or ruling is erroneous.**
**(If _P,_ then _Q_.)**

**_X_ is the case as shown by the record,**
**and _Y_ is the law as shown by the cited authorities,**
**(_P,_)**

**therefore the lower court judgment or ruling is erroneous. (_therefore Q_.)**

The actual shape of a legal argument develops less formally than in this illustration. The heading of the argument asserts the appellant's claim (the conclusion of the argument) in a concise fashion. (On argument headings, see §§12.53–12.55.) The text of the argument then sets out the appellant's claim more fully, together with the data supporting it (*i.e.,* factual items in the record), and bridges the data and the claim with legal propositions backed by supporting authority. If the court assents to the inference, it will convert a conditional proposition to a legal judgment.

### §12.57 b. Make Inferences Persuasive

In a legal argument, the premises (unlike premises of a syllogism) are controverted; hence, the attorney must convince the court to accept the premises to persuade it to make the inference to the conclusion sought.

**NOTE™** Judges are sometimes reluctant to draw an inference, even when convinced of the premises, unless they are also convinced that the result will be fair and reasonable.

**PRACTICE TIP™** When there is rebutting legal or factual data, the conclusion of a legal argument may not be inferred, even though the premises are assented to. If there is potentially rebutting data, appellant's counsel should consider the need to negate it.

On pattern of arguments, see Toulmin, The Uses of Argument, chap 3 (rev ed 2003).

## B. Drafting Effective Argument

### 1. Determine Argument Sequence

### §12.58 a. Develop Tentative Outline

Before writing a first draft, develop a tentative outline that lists the issues and subissues. This will provide the skeleton for drafting headings and subheadings. Each issue will later be developed by stating the relevant propositions of law, discussing supporting authorities, and tying the propositions and authorities to the facts of the case.

### §12.59 b. Determine Presentation Sequence: Most Important Points First

Discard weak points before beginning the drafting process. The most important points should be presented first, although this approach can vary according to the needs of the case. This is generally advisable because of the limited amount of time the court can devote to the brief, the significance of first impressions, and the likelihood that the court will assume that the initial arguments presented are the best the appellant has to offer. Likewise, reserve the greatest amount of argument for the most important legal issues.

Sometimes a relatively straightforward presentation sequence will suffice (*e.g.,* statement of proposition of law, citation and discussion of supporting authorities, comparison of facts with the proposition and authorities). In other instances, development of the argument may require a step-by-step intertwining of facts and law through a series of subpoints.

### §12.60 c. Develop Logical Argument

Whatever sequence is used, the following guidelines are helpful for keeping the argument focused:

- Proceed toward a fixed objective in a logical sequence; do not meander aimlessly among the facts and the law.
- Make sure the presentation sequence will be apparent not only to the attorney author but also to the judicial reader.

**PRACTICE TIP™** Provide the court with suitable road maps, such as a preliminary paragraph indicating the theme of the argument to come or subheadings (and sub-subheadings) to chart the course of the argument.

### §12.61 d. Indicate When Issues Were Preserved for Appeal

If not otherwise obvious, indicate the manner in which a point was preserved for appeal (*e.g.,* an objection to evidence under Evid C §353(a)), with an appropriate record reference.

### §12.62 2. Use Authorities Selectively

In providing supporting authority for a given proposition, one or two citations will usually suffice. Lengthy, cumulative string citations add nothing, impede the flow, and serve only to irritate busy judicial readers.

**PRACTICE TIP™** When the inclusion of many authorities is justified—as when cases on point are in conflict and counsel seeks to show that the cases supporting the appellant's position represent the weight or trend of authority—explain why, in this particular instance, the number of citations is legitimate.

The limited number of authorities should be selected carefully. Referring to a leading case on point is preferable to citing cases that merely follow it uncritically. Other factors being equal, a recent case is preferable to an earlier one, and a case from the same division (or district) as the one to which your appeal is assigned is preferable to a case from another division or district. When the leading case itself is relatively old, accompany it with a recent case that follows it, to allay any concerns about the continuing vitality of the doctrine.

**PRACTICE TIP™** Although it is proper to cite such generally recognized works as the restatements, encyclopedias, and compilations, view them primarily as research tools and not as authorities in their own right.

On weight given cases from other jurisdictions, see §§2A.105–2A.106, 2A.117. On using legal authorities, see §§2A.102–2A.109.

### §12.63 a. Specific Cases

In choosing the most suitable cases, examine facts and holdings as well as propositions cited. A factually similar case is likely to carry more weight than one that is factually remote. A case that turned on a cited proposition will be more persuasive than one that merely paid lip service to the point. For maximum benefits from such factual parallels and holdings, discuss the cases rather than merely citing them.

**PRACTICE TIP™** When focusing on a particular segment of an opinion, cite the specific page or pages where the issue appears.

### §12.64 b. Quotations

In developing the argument, appellant's counsel may wish to quote pertinent language from the authorities relied on. Within limits, this practice is both proper and persuasive. However, avoid miring the argument in page after page of quotations that serve no real purpose and might annoy a busy reader. In drafting and editing the brief, carefully assess each quotation to ascertain the following:

- Does the quotation add to the argument, or is it unnecessarily cumulative?
- Is all the language quoted necessary for a fair and effective presentation?
- Will judicious deletions from long quotations improve the flow?

### §12.65 3. Handle Adverse Authorities

One of the most difficult questions facing counsel is what approach to take with adverse authorities. The most appropriate course, consistent with professional responsibility and sound tactics, is a combination of candor and advocacy. In essence, point out the adverse authorities and explain why they should not be considered controlling in the present case (*e.g.,* they are factually distinguishable or represent mere dicta, or the principles they embody should not to be applied to the case at hand). Also consider arguing that the previously adopted doctrine should be reexamined and rejected, if such an approach is not precluded under the stare decisis principles of such cases as *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 20 CR 321.

If counsel cannot effectively distinguish adverse authority or make an argument for adopting a new rule of law, the point should be reevaluated and, if necessary, abandoned. On evaluating adverse authority, see §§2A.110–2A.115.

### §12.66 4. Address Novel Questions

At times, the point being urged by the appellant may be relatively novel, or one of first impression, at least in California. Acknowledge that the question is still open (which in itself may arouse the court's interest), and then explain why it should be resolved in the appellant's favor. Counsel may draw on such means as

- analogies to established doctrines in other areas and their underlying policies;
- precedents from other jurisdictions;
- views from treatises or law review articles; and
- the consequences of adopting or rejecting the position in question.

On factors influencing appellate courts to adopt a new rule of law, see §§2A.118–2A.119.

**PRACTICE TIP™** Before urging that a point is novel, be reasonably certain that it is in fact novel and not the result of flawed research. Even then, qualify the assertion of novelty to avoid any inadvertent oversight, saying, *e.g.,* "Our research has not disclosed any reported California appellate case on point" rather than "There are no California cases on point."

### §12.67 5. Apply Facts

In presenting the arguments, point out how the cited authorities apply to the facts of the case at hand. The argument portion of the brief requires a treatment of the facts as well as of the law.

### §12.68 a. Avoid Duplication

Although the facts covered in the argument will necessarily have been discussed as part of the statement of the case, avoid duplication as far as practicable. Consider dealing with relevant facts in a summary fashion in the argument, with cross-references to the pertinent portions of the statement of the case. Alternatively, address the point in broad outline in the statement of the case, and defer to the argument for a more expansive treatment. Even when some duplication is inevitable, varying the language helps avoid a sense of repetition.

### §12.69 b. Support Argument With Record

When discussing facts in the argument, basic principles of presentation should not be disregarded. See §§12.38–12.47. Confine the presentation to matters of record, supported by suitable record references. When factual matters are argued, counsel still needs scrupulous accuracy and due regard for the principles of appellate review.

### §12.70 c. Use Thoughtful and Serious Tone

Although the argument portion of the brief may show an advocate's tone more readily than the statement of the case, that tone should be thoughtful and serious, not strident or bellicose. Never use pejoratives or epithets.

### §12.71 6. Advocate, But Avoid Overstatement

In arguing the principles of law, as in addressing the facts, present the case fairly. Although the argument should be convincing, do not overstate the case. For example, arguing that a principle is a matter of established law when in fact it is unsettled will undermine counsel's credibility. Conversely, a candid recognition of the true state of the authorities on adverse points will evoke a more receptive response from the reviewing court.

Try to convey a sense of injustice sufficient to convince the appellate court that the judgment ought not to stand. Merely claiming injustice, however, will not satisfy the burden of proving unfairness and, if unsupported, may even be counterproductive. Address arguments to the essential injustice of the trial court's actions or their consequences; that injustice need not be confined to the substantive aspects of the case but may stem from procedural deficiencies as well.

### 7. Sample Forms: Argument

### §12.72 a. Sample Form: Summary of Argument

**III. ARGUMENT**

**A. Summary of the Argument**

**All defendants demurred on numerous different grounds to all of Jones' causes of action. In his memorandum in opposition to the demurrers, Jones analyzed every ground raised by defendants and showed them all to be erroneous. (CT 393–485.) The trial court sustained all the demurrers without leave to amend on the sole ground that defendants' conduct alleged in the complaint was privileged. (CT 552–553, 556.)**

**The major theory on which Jones based his complaint, however, was contained in his first cause of action for malicious prosecution. Jones will analyze that theory first and show that privilege is not even arguably a defense to a cause of action for malicious prosecution. He will then show why none of the other grounds asserted in the demurrers has any merit either.**

*Comment:* An introduction to or summary of the argument is not required but is sometimes a useful technique for focusing the court's attention. Note that the appellant will lead the argument portion of the brief with the major contention and devote significantly less attention later on to lesser points.

## §12.73 b. Sample Form: Assignment of Error

**B. Jones Stated a Valid Claim for Malicious Prosecution and Conspiracy to Commit Malicious Prosecution**

**1. The Complaint Alleged All Elements of Malicious Prosecution**

*Comment:* In the argument, assignments of error are stated and developed. State each assertion of error as a separate issue with appropriate headings and subheadings. Frame the headings in terms of the specific case rather than in abstract principles of law. An example of an abstract and passive way of stating the subheading is "1. Elements of Malicious Prosecution."

## §12.74 c. Sample Form: Broad Legal Principle

**The elements of a cause of action for malicious prosecution are (a) instigation of legal proceedings, (b) lack of probable cause, (c) malice, and (d) favorable termination of the prior proceedings. (See 5 Witkin, California Procedure, *Pleading* §751 (5th ed 2008.))**

*Comment:* This paragraph states the broad legal principle supporting the appellant's claim of error. Subsequent paragraphs define this principle and apply it to the facts.

## §12.75 d. Sample Form: Narrow Legal Principle

**As Witkin also states:**

> **One who procures a third person to institute a malicious criminal prosecution is liable, to the same extent as if he or she instituted it. The test is whether the defendant was *actively instrumental* in causing the prosecution. (10 Witkin, Summary of California Law, *Torts* §476 (10th ed 2005) [italics added]).**

**Even someone who had no part in initiating an action, but who later participated in it, can be held liable for malicious prosecution on an aiding and abetting theory. (*Lujan v Gordon* (1977) 70 Cal.App.3d 260, 264). Moreover, if there is a conspiracy to commit a tort, such as malicious prosecution, the acts of each conspirator are imputed to all other conspirators. (*Wyatt v Union Mortgage Co.* (1979) 24 Cal.3d 773, 784.) In *Rupp v Summerfield* (1958) 161 Cal.App.2d 657, the Court of Appeal affirmed a judgment in plaintiff's favor in a malicious prosecution action, upholding an instruction that anyone who knowingly testifies falsely at a preliminary hearing may be held liable for malicious prosecution. It rejected defendant's argument that the initiation of a criminal proceeding is required, instead approving language from Prosser:**

> **It is not true, as suggested by appellant, that the sole basic element of an action for malicious prosecution is the initiation of a criminal proceeding, for which he cites Prosser, Torts, §860 (1941). Dean Prosser continues at page 865 in his text on torts, and on which appellant remains silent: "*on the other hand if he advises or assists another person to begin the proceeding, ratifies it when it has begun on his behalf, or takes any active part in directing or aiding the conduct of the case he will be responsible,"* and makes it clear, at page 66, that knowingly giving false information to the police constitutes assisting another to begin the proceeding. (161 Cal App 2d at p. 663, italics added.]**

*Comment:* The paragraphs above narrow the broad legal principle stated at the beginning of the argument and serve as a bridge between the broad principle and the specific facts of the case. Cases that are generally supportive of a legal principle are cited without additional detail. A case more directly on point, such as *Rupp v Summerfield, supra,* is described in detail.

**PRACTICE TIP™** Although long quotations should generally be avoided (see §12.64), the second quotation reproduced here was chosen because it was directly dispositive of the respondent's principal argument. If a long quotation is used, emphasize the pertinent parts to focus the reader's attention.

### §12.76 e. Sample Form: Tie Principles to Facts of Case

**The complaint in the present case alleged sufficient facts to satisfy every element of a cause of action for malicious prosecution as described above, because the gist of Jones' claim is as follows:**

**All defendants originally conspired to conceal the medical malpractice that caused Jane Smith's death. In that conspiracy, defendants agreed to do various things, including giving a copy of the ABC claim file, with a deliberately understated value of the Smith family's claim, to an inexperienced attorney in order to settle the wrongful death action cheaply.**

**Defendants further agreed that if any part of their conspiracy should start to come to light, they would take whatever steps were necessary to make it appear that the claim file had been stolen and to cause damage to anyone, such as plaintiff, who might actively participate in the prosecution of the Smiths' medical malpractice case instead of accepting defendants' story.**

**When it came to the attention of law enforcement personnel in another connection that a copy of ABC's claim file on the Smith case was in the Brown & Black office, ABC was questioned about it. In keeping with the conspiracy, ABC lied and stated that the claim file had been stolen, even**

**though it well knew that it actually had been delivered to the Brown & Black office by the ABC claims manager, defendant Johnson, as part of the conspiracy to defraud the Smiths.**

**The above acts were instrumental in causing the grand jury to indict Jones. They were done maliciously, with the dual intent to (1) conceal the malpractice and other fraud that had been perpetrated on the Smiths and (2) injure appellant directly. Defendants could have no probable cause to mislead the authorities into thinking that the claim file had been stolen, because they, more than anyone, knew that it had not been stolen. See, e*.g., Bertero v National General. Corp.* (1974) 13 C3d 43, 55 [lack of probable cause established when defendant knew claim was groundless even though a reasonable person might have believed it was meritorious].**

**If the truth about the initial conspiracy to defraud the Smiths had been told, Jones would never have been damaged. For if it had been revealed to the authorities that, as part of defendants' conspiracy, the claim file was provided to the Brown & Black office, then the truth would have been known to the grand jury, and the indictment against appellant would never have been returned. Thus, Jones more than adequately alleged how he was damaged. When Jones was found not guilty by the jury, a favorable termination of the prior proceedings was established.**

*Comment:* These paragraphs tie the legal principles to the facts of the case, which are developed in such a way that each principle set out in the first paragraph of the argument reappears here, coupled with the supporting facts.

**NOTE™** This brief demonstrates the technique for developing facts without a trial transcript. The technique for developing an argument after a trial is similar: Instead of facts alleged in the complaint, the facts supporting the application of the legal principles to the case would be either undisputed evidence or evidence favoring the respondent, taken from the record.

### §12.77 f. Sample Form: Summarize Argument

**On the basis of the foregoing, Jones adequately pleaded a classic cause of action for malicious prosecution. His conspiracy allegations link the defendants to each other sufficiently to make each defendant responsible for the actual acts committed by any other defendant.**

*Comment:* The final paragraph sums up the argument concisely and prepares the reader for the next subhead.

### §12.78 g. Sample Form: Address Trial Court's Theories

#### 2. There Is No Privilege to Perpetrate a Malicious Prosecution

**2.1. Although hundreds of pages were filed in support of the various demurrers, not a single defendant asserted that Jones' first cause of action for malicious prosecution was barred by any privilege. Indeed, the Hospital and Thomas acknowledged that privilege does not bar an action for malicious prosecution. (CT 157:9–10.) That the trial court was confused and erroneously sustained the demurrer to that cause of action on the ground of privilege can be seen from the citation in its minute order to *Pettitt v Levy, supra.* 28 CA3d 484. (CT 556.)**

**2.2. *Pettitt* involved former Civil Code section 47(2) (now Civil Code, §47, subd. (b)), which affords an absolute privilege to statements made in any legislative, judicial, or other official proceeding authorized by law. *Pettitt,* however, was *not* an action for malicious prosecution. It was an action for fraud, negligent misrepresentation, negligence, and intentional infliction of emotional distress. It was based on a conspiracy by defendants to wrongfully deprive plaintiffs of the use of certain property by, among other things, submitting false or forged building permits to the City of Fresno. 28 CA3d at 487. The court of appeal held that the absolute privilege of former Civil Code section 47(2) protected this conduct. (28 Cal.App.3d at pp. 488, 492.) The decision, however, stated as follows:**

> **Although the application thereof [*i.e.,* former Civil Code §47(2)] usually arises in the context of a defamation action, it is equally applicable to other actions, with the sole exception of an action for malicious prosecution. (28 Cal.App.3d at p. 489.)**

**2.3. The *Pettitt* court was following established law when it noted that the privilege does not apply to a cause of action for malicious prosecution. For that proposition, it relied on the controlling Supreme Court authority of *Albertson v Raboff* (1956) 46 C2d 375, 382 (superseded by statute as stated in *Palmer v Zaklama* (2003) 109 Cal.App.4th 1367, 1379), which stated:**

> **It may be noted at the outset that the fact that a communication may be absolutely privileged for the purposes of a defamation action does not prevent its being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied.**

**In *Albertson,* the plaintiff had sued for both slander of title and malicious prosecution regarding earlier litigation in which allegedly false statements in support of a lis pendens had been filed. The *Albertson* court held that the lis pendens filing was absolutely privileged against a claim for slander. It reversed the judgment, however, in its holding that the plaintiff could not state a cause of action for malicious prosecution. 46 Cal.2d at p. 382. The Supreme Court held that the privilege does not extend to bar an action for malicious prosecution simply because the false statements are made in the course of a judicial proceeding.**

**2.4. A moment's reflection shows why this must be the case. The elements of a cause of action for malicious prosecution include (1) favorable termination of a prior judicial proceeding and (2) proof that it was instituted or instigated without probable cause and for an improper motive. The very gravamen of a malicious prosecution cause of action, therefore, relates to something that defendant did or said in connection with a prior judicial proceeding. If the privilege were applicable to an action for malicious prosecution, it would necessarily wipe out the tort.**

**2.5. The trial court was therefore incorrect in sustaining the demurrer to appellant's cause of action for malicious prosecution on the ground of privilege, regardless of whether the privilege bars any other of his causes of action. The judgment of dismissal must be reversed, and appellant should be allowed to go to trial on his cause of action for malicious prosecution.**

*Comment:*

**2.1.** This portion of the argument illustrates how an appellant should treat theories raised in the trial court that were presumably relied on by the trial judge. Because the appellate court considers results and not reasons (see §§2A.21–2A.24), that the trial court sustained the demurrer on grounds of privilege is not controlling. Nevertheless, the appellant must (1) anticipate that the respondent will raise this issue or that the confusion in the record will raise questions in the court of appeal and (2) take a strong stand against the argument in the opening brief. Although the appellate court will examine this issue anew, the citation to the trial court minute order and discussion of its reliance on *Pettitt v Levy* (1972) 28 CA3d 484, 104 CR 650, is proper to show that the trial court was confused or misconceived the law. See *People v Van Gorden* (1964) 226 CA2d 634, 640, 38 CR 265 (trial court opinion showed judge misconceived burden of proof); *Canepa v Sun Pac., Inc.* (1954) 126 CA2d 706, 710, 272 P2d 860 (trial court opinion showed judge used erroneous measure of damages).

**2.2.** This detailed discussion of *Pettitt v Levy, supra,* is necessary because of the trial court's apparent reliance on it. Extensive discussion of case authority is desirable when a case is either so favorable or so unfavorable to a party's position that it is likely to assume a central position in the appellate court's decision.

**2.3.** Note how the sequence of this argument differs from that of the preceding argument. Although the underlying legal principles are stated at the beginning of the earlier argument, paragraph 2.3 is the first statement of the legal principle supporting the appellant's position on this argument. The sequence of an argument may vary, depending on the posture in which the argument arose in the lower court. Counsel's chosen sequence answers the implicit question of why counsel is addressing the argument, and it primes the appellate court to view the argument with disfavor because of the erroneous reliance on *Pettitt v Levy*.

**2.4.** Do not overlook the value of logic and common sense in arguing the appellant's position. See §2A.120.

## §12.79 h. Sample Form: Address Respondent's Arguments

**3. The Doctrine of "Independent Investigation" Cannot Insulate Defendants, Because Jones Pleaded That Their Misstatements and Omissions Defrauded the Investigators**

**3.1. Defendants ABC and Johnson contended that they could not be held responsible for malicious prosecution, because appellant's indictment was returned as the result of an "independent investigation." (CT 71:22–26, 196:13–17.) They relied on *Werner v. Hearst Publications, Inc.* (1944) 65 CA2d 667, for their "independent investigation" defense. (CT 72:1, 196:17.) There, the Court of Appeal explained the independent investigation defense with the following quote from California Jurisprudence, page 673:**

> **Where the prosecuting officer acts on an independent investigation of his own instead of on the statement of facts by the party making the complaint, the latter has not caused the prosecution and cannot be held liable in an action for malicious prosecution.**

**3.2. According to the allegations in the complaint, there was no investigation here that led to Jones' indictment, except for defendants' false statements. Initially there was an independent investigation of the Brown & Black office for matters unrelated to the copy of the claim file. (CT 17:2S 26.) When the authorities came across the claim file, they asked ABC what it knew. ABC led the authorities to believe that it had been stolen. (CT 18:28–19:3.) This is what started the events**

**that culminated in Jones' indictment and trial. Any investigation that led to Jones' indictment was therefore premised on misinformation provided by ABC in keeping with its conspiracy.**

**If anyone involved had simply come forward and told the truth about how the copy of the claim file came to be in the Brown & Black office, no amount of "independent investigation" on behalf of the district attorney would have resulted in Jones' indictment. In any event, this is a matter that defendants should have been required to raise as an affirmative defense in their answers and that should have been the subject of proof at trial.**

*Comment:*

**3.1.** Whether an independent investigation was made in this case is a question of fact that would ordinarily not be before the court on appeal from the sustaining of a demurrer. In this case, however, the respondents argued that the issue was properly before the court because the court could take judicial notice of the documents proving the investigation. In a portion of the brief not reproduced here, the appellant argued that judicial notice was inappropriate. Here, the appellant addresses the question of whether an independent investigation can ever be a defense under the facts and circumstances pleaded in the complaint. Note how counsel for the appellant uses the factual allegations of the complaint throughout the remainder of the argument to show how the doctrine is inapplicable.

**3.2.** The remainder of this argument (which deals with (1) the applicability of the independent investigation defense when false information is given and (2) another issue about the effect of probable cause on a malicious prosecution claim) is not reproduced here.

## VI. CLOSING PORTIONS OF BRIEF

### §12.80 A. Nature and Content of Conclusion

Although the rules do not require it, most briefs contain a conclusion. The conclusion should state the precise relief requested of the court (see samples in §12.84). The requested relief might be a reversal with directions or a modification. See also chap 17.

### §12.81 1. Keep It Short

A conclusion longer than a page is disfavored by the courts; one paragraph (or at most a few) should suffice. If the brief is lengthy and the issues complex, counsel may prefer to write a more extensive conclusion, pointing out in a general way the destination at which the appellant wants the court to arrive. Briefly set out the appellant's overall perception of the trial court decision and what should be done to correct it.

### §12.82 2. Consider Reference to Theme

A short reference to the theme used at the outset of the brief may be helpful in tying the brief together, but this is not the place to duplicate earlier material.

### §12.83 3. Conclude Respectfully

The brief is customarily concluded with a suitable deferential phrase, such as "Respectfully submitted," followed by the names of counsel for the appellant and their designation as such. A signature is not required. Cal Rules of Ct 8.204(b)(9).

### §12.84 B. Form: Conclusion of Brief

**IV. CONCLUSION**

[*Select one of the following alternatives*]

[*Alternative 1: Request for reversal*]

**It is requested that for the reasons stated the judgment be reversed.**

[*Alternative 2: Request for reversal and specific judgment*]

**The judgment should be reversed, and a judgment of specific performance should be ordered for appellants.**

[*Continue*]

**Date: _ _ _ _ _ _**

**Respectfully submitted,**

_ _[*Typed name*]_ _
**Attorney for Appellant**

### §12.85 C. Attachments

To facilitate the court's consideration of a crucial portion of the record, counsel should attach to the brief copies of exhibits or other materials in the record or copies of relevant local, state, or federal regulations or rules, out-of-state statutes, or other similar citable materials that may not be readily accessible. See Cal Rules of Ct 8.204(d).

Attachments may also enhance the effectiveness of the appellant's opening brief by, for example, serving as a convenient way to present a tabulation or a chart to emphasize a key aspect of the appellant's case without interrupting the flow of the brief (*e.g.,* to compare or contrast the salient aspects of two documents).

**NOTE™** Use of attachments should not be viewed as an excuse for ignoring the general proscription against referring to matters outside the record.

### §12.86 1. Length

Attachments may not exceed a total of ten pages, unless the presiding judge on application and for good cause permits a longer attachment. Cal Rules of Ct 8.204(d). A copy of an opinion required to be attached to the brief under Cal Rules of Ct 8.1115(c) does not count toward the ten-page limit. An

attachment does not count toward the length of the brief in applying the applicable word or page limits. Cal Rules of Ct 8.204(c)(3).

### §12.87 2. Local Practice

Except when proceeding under Cal Rules of Ct 8.204(d), consult local practice as to any proposed attachments. Some appellate districts may follow the practice of not accepting any briefs with "extraneous material," including attachments. If attachments are desired, confirm with the clerk's office where the brief will be filed that they will be accepted.

## VII. PROCEDURAL CONSIDERATIONS

### A. Format

### §12.88 1. Paper

The paper must be white or unbleached, recycled, 8½ by 11 inches, and of at least 20-pound weight. Cal Rules of Ct 8.204(b)(1), 1.6, 1.22, 2.3(2), 2.131 (defining "recycled").

### §12.89 2. Typeface

Any conventional typeface may be used, either proportionally spaced or monospaced. Cal Rules of Ct 8.204(b)(2).

The type style must be roman; but for emphasis, italics or boldface may be used, or text may be underscored. Case names must be italicized or underscored. Headings may be in uppercase letters. Cal Rules of Ct 8.204(b)(3).

Except as provided in Cal Rules of Ct 8.204(b)(11) (typewritten briefs), the type size, including footnotes, must not be smaller than 13-point; both sides of the paper may be used. Cal Rules of Ct 8.204(b)(4).

### §12.90 3. Line Spacing and Margins

The lines of text must be unnumbered and at least 1½-spaced. Headings and footnotes may be single-spaced. Quotations may be block-indented and single-spaced. "Single-spaced" means six lines to a vertical inch. Cal Rules of Ct 8.204(b)(5).

The margins must be at least 1½ inches on the left and right and 1 inch on the top and bottom. Cal Rules of Ct 8.204(b)(6).

### §12.91 4. Page Numbering and Binding

The pages must be consecutively numbered. The tables and the body of the brief may have different numbering systems. Cal Rules of Ct 8.204(b)(7).

The brief must be bound on the left. If the brief is stapled, the bound edge and staples must be covered with tape. Cal Rules of Ct 8.204(b)(8).

On cover requirements, see §§12.94–12.97. On duplication methods, see §§12.99–12.104.

### §12.92 5. Signature Requirements

The brief need not be signed. Cal Rules of Ct 8.204(b)(9).

### §12.93 6. Typewritten Briefs

The format requirements of typewritten briefs are discussed in Cal Rules of Ct 8.204(b)(11).

## B. Cover

### §12.94 1. Required Information

The cover must state the following (Cal Rules of Ct 8.29(b), 8.204(b)(10)):

- The title of the brief;
- The title, trial court number, and court of appeal case number;
- The names of the trial court and each participating trial judge;
- The name, address, telephone number, and State Bar number of each attorney filing or joining in the brief (the cover need not state the bar number of any supervisor of the attorney responsible for the brief);
- The name of the party that each attorney on the brief represents; and
- When by statute or rule service is required on a nonparty public officer or agency, a statement that identifies the statute or rule requiring such service.

### §12.95 2. Titles

California Rules of Court 8.200–8.204(a) refer to the parties on appeal as "appellant" and "respondent." The titles of the briefs should be kept very simple (Cal Rules of Ct 8.200(a)):

- Appellant's first brief is designated Appellant's Opening Brief;
- Respondent's brief is designated Respondent's Brief; and
- Appellant's reply brief is designated Appellant's Reply Brief.

### §12.96 3. Colors

Covers of briefs should be in certain prescribed colors (Cal Rules of Ct 8.40(b)(1)–(2)):

- Green for appellant's opening brief;
- Yellow for respondent's brief;
- Tan for appellant's reply brief;
- Yellow for combined appellant's opening brief and respondent's brief (Cal Rules of Ct 8.216); and
- Tan for combined reply brief and respondent's brief (Cal Rules of Ct 8.216).

A brief not conforming to the color code will be accepted for filing, but if repeated violations occur, the court may proceed under Cal Rules of Ct 8.204(e)(2) (noncomplying briefs). Cal Rules of Ct 8.40(b)(3).

**NOTE™** Plastic or acetate covers are expressly prohibited in the fourth appellate district. 4th App Dist R 2.

## §12.97 4. Form: Cover

**No. _ _ _ _ _ _**

**COURT OF APPEAL OF THE STATE OF CALIFORNIA**
**_ _[*NUMBER*]_ _ APPELLATE DISTRICT,**
**DIVISION _ _[*NUMBER*]_ _**

| | |
|---|---|
| **_ _[*Name*]_ _, Plaintiff and Appellant** | **Court of Appeal No. _ _ _ _ _ _** |
| **v** | |
| **_ _[*Name*]_ _, Defendant and Respondent** | |

**APPELLANT'S OPENING BRIEF**

**Appeal From the Judgment of the**
**Superior Court of California, County of _ _[*name*]_ _.**
**Trial Court Case No. _ _ _ _ _ _**
**Honorable _ _[*name*]_ _, Judge**

_ _[*Attorney's name, address,*
*telephone number, fax number, and*
*State Bar number*]_ _
**Attorney for Plaintiff and Appellant**
_ _[*names of parties*]_ _

## §12.98 C. Certificate of Interested Entities or Persons

Every party must file a Certificate of Interested Entities or Persons (Judicial Council Form APP-008) with its principal brief or its first application or opposition. Cal Rules of Ct 8.208(d). Failure to comply may subject that party to sanctions, including striking the document, dismissing the appeal, or deciding the appeal on the basis of the record or the appellant's filings. Cal Rules of Ct 8.208(d). The certificate must list entities or persons interested in the proceedings. Cal Rules of Ct 8.208(e). Each party has a continuing duty to update the information by way of a supplemental filing. Cal Rules of Ct 8.208(f).

### D. Duplication Methods

### §12.99 1. Printing

A brief may be reproduced by any process that produces a clear, black image of letter quality. Cal Rules of Ct 8.204(b)(1). For length limitations, see Cal Rules of Ct 8.204(c); see also §§12.14–12.18.

### §12.100 a. Office Printing

Most briefs are produced using word processed documents printed on a printer at the attorney's office. Briefs prepared this way can look as good as a formally printed brief. This method has obvious advantages in terms of expense, although it may have hidden costs, including duplication expenses and time spent by office staff. Office production also may be useful in saving time. For example, if a brief must be produced over a weekend and filed on a Monday, using a commercial producer may not be feasible.

**PRACTICE TIP™** Depending on counsel's office resources, office duplication may create a risk that the ultimate product falls short of the optimum. If any doubt exists about the ability to produce a handsome and legible product, contract out the printing.

### §12.101 b. Professional Printing

In some cases, counsel may desire to have the brief printed by a professional printer, which is an acceptable method of duplication under Cal Rules of Ct 8.204(b)(1). When using a professional printer, be sure to select one who is familiar with court conventions and requirements; this will help ensure a product that appears professional and will save office time because the printer can attend to such matters as preparing the table of authorities. If additional copies are needed, order them at the outset to avoid any additional expense of reprinting.

### §12.102 2. Other Processes

Briefs can be produced by commercial organizations that specialize in briefs and perform substantially the same services as printers, or they can be reproduced in the office. The effectiveness of other duplication processes depends on the quality of the particular method; given the available range of technologies, generalization is difficult.

Professional duplication services attuned to the requirements of appellate practice can create an attractive product as well as perform ancillary services, such as preparing the table of authorities, as a knowledgeable printer would.

### §12.103 3. Typewritten Original Ribbon or Carbon Copies

Typewritten original ribbon copies and carbon copies are permitted only by special permission of the Chief Justice or presiding justice. Such permission is usually granted only to parties without counsel who are proceeding in forma pauperis. All other typewritten briefs must be filed as photocopies. Cal Rules of Ct 8.204(b)(11).

### §12.104 4. Considerations in Choosing Method of Reproduction

The major consideration in selecting the method of duplication is whether it will enhance or detract from the effectiveness of the brief. The relative cost of the various methods of duplication may also be an important consideration, depending on the nature of the case or the appellant's financial situation. Printing is generally more costly than some of the alternative duplication methods, and if cost considerations are paramount, this factor may militate in favor of the latter.

## VIII. TIME LIMITATIONS; SERVICE; FILING

### A. Time Limitations

### §12.105 1. Time Limit

The time for serving and filing the appellant's opening brief depends on the nature of the record. Cal Rules of Ct 8.212(a)(1). If an appellant fails to timely file its opening brief, the court clerk must promptly notify the appellant by mail that the brief must be filed within 15 days of the notice's mailing and that failure to do so may result in dismissal of the appeal. Cal Rules of Ct 8.220(a).

### §12.106 a. Clerk's Transcript

If the traditional clerk's transcript is used (*i.e.,* absent an election by the appellant to proceed by appendix under Cal Rules of Ct 8.124), the appellant's opening brief must be served and filed within 40 days after the record is filed in the reviewing court. (On filing the record, see §§9.67–9.73.) Cal Rules of Ct 8.212(a)(1)(A).

### §12.107 b. Appendix and Reporter's Transcript

If the appellant proceeds under Cal Rules of Ct 8.124 (*i.e.,* by appendix in lieu of a clerk's transcript) and has a reporter's transcript prepared, a similar computation method is used, except that the 40-day period begins when the reporter's transcript is filed. Cal Rules of Ct 8.212(a)(1)(A).

### §12.108 c. Appendix Only

If the appellant proceeds under Cal Rules of Ct 8.124 but does not have a reporter's transcript prepared, the appellant must serve and file the opening brief within 70 days after filing the notice of election under Cal Rules of Ct 8.124. Cal Rules of Ct 8.212(a)(1)(B).

### 2. Extensions

### §12.109 a. By Stipulation or Leave of Court

The basic time limitations may be extended for up to 60 days by one or more stipulations filed in the appellate court. Cal Rules of Ct 8.212(b)(1). The stipulation must be filed with the appellate court before the period sought to be extended has expired. Cal Rules of Ct 8.212(b)(3). The stipulated extension may not exceed 60 days beyond the date the brief would otherwise be due. Cal Rules of Ct 8.212(b)(1).

**PRACTICE TIP™** If more time is needed, the stipulation should be sought at the outset to avoid an unnecessary application to the court.

If a stipulation is sought and refused, or if an extension is sought beyond the 60-day maximum permitted by stipulation, application must be made to the presiding justice on a showing of good cause. Cal Rules of Ct 8.212(b)(3). On format of applications, see Cal Rules of Ct 8.50. See also Cal Rules of Ct 8.60(b)–(c), 8.63 (policies and factors governing time extensions). On application for extension of time, see §§11.20–11.26.

**NOTE™** If additional time for filing the brief is sought by stipulation or application, counsel must deliver to his or her client a copy of the stipulation or application and attach evidence of such delivery to the stipulation or application or certify in the stipulation or application that counsel has done so. Cal Rules of Ct 8.60(f).

### §12.110 b. By Prehearing Conference

The basic time periods for filing the appellant's opening brief may also be tolled by a prehearing conference. If such a conference is ordered under Cal Rules of Ct 8.248(a) before the date the appellant's opening brief is due to be filed, the period for filing the brief is tolled from the date the court of appeal mails notice of the conference until the date it mails notice that the conference is concluded. Cal Rules of Ct 8.248(d).

### §12.111 c. Form: Stipulation Extending Time to File Opening Brief; Order

_ _[*Name, State Bar number, address, telephone*]_ _
**Attorney for** _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

**STIPULATION EXTENDING TIME TO FILE OPENING BRIEF;** _ _[*ORDER*]_ _

**IT IS STIPULATED between the parties by their respective counsel of record that the time within which appellant** _ _[*name*]_ _ **may file appellant's opening brief shall be extended to, and including,** _ _[*date*]_ _**.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for plaintiff and appellant**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for defendant and respondent**

[*If appropriate, include the following*]

**IT IS SO ORDERED.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Presiding Justice**

*Copies:* Original and one copy to be filed with the court (Cal Rules of Ct 8.44(b)(7)); one copy for each party or group of parties represented by separate counsel of record; office and client copies.

*Comment:* Although Cal Rules of Ct 8.212(b)(2) states that the stipulation is effective on filing, consult the appellate court clerk on whether local practice requires that an order be obtained. If so, include the word "ORDER" in the title and include the order language as shown.

## B. Service

### §12.112 1. Parties

The appellant's opening brief must be served on all other parties to the appeal. Service may be made in any manner (*e.g.,* by mail) permitted by the laws generally governing service of litigation documents. See Cal Rules of Ct 8.25(a)(1) (requiring proof of service "by any method permitted by the Code of Civil Procedure"); CCP §§1010–1020 (permissible service methods).

**PRACTICE TIP™** Serve at least two copies of the brief on each counsel to facilitate working with the brief or transmitting a copy to the client.

### §12.113 2. Superior Court

Deposit one copy of the brief with the clerk of the superior court for delivery to the trial judge. Cal Rules of Ct 8.212(c)(1).

### §12.114 3. Supreme Court

Serve one electronic copy or four copies of the brief on the California Supreme Court. Cal Rules of Ct 8.212(c)(2). If the court of appeal has ordered the brief sealed, then the four copies of the brief must be placed in a sealed envelope with a cover sheet that contains the information required by Cal Rules of Ct 8.204(b)(10) and labels the contents as "CONDITIONALLY UNDER SEAL." Cal Rules of Ct 8.212(c)(2)(B). If an electronic copy of the brief is ordered to be sealed when filed, then the first page must include a cover sheet that contains the information required by Cal Rules of Ct 8.204(b)(10) and labels the contents as "CONDITIONALLY UNDER SEAL." Cal Rules of Ct 8.212(c)(2)(A)(ii). In the absence of any notice from the clerk of the court of appeal of an order unsealing the brief, the supreme court clerk must keep all copies of the brief under seal. Cal Rules of Ct 8.212(c)(2)(A)(ii), (B).

### §12.115 4. Attorney General

Serve the brief on the Attorney General when the brief (Cal Rules of Ct 8.29(c))

- questions the constitutionality of a state statute; or

- is filed on behalf of the state, a county, or an officer whom the Attorney General may lawfully represent in a case in which the state or a state officer (in his or her official capacity) is a party, or a county is a party, unless the county's interest conflicts with that of the state or a state officer.

See also Cal Rules of Ct 8.212(c)(3).

### C. Filing

### §12.116 1. Number of Copies

The appellant must file an original, four copies, and proof of delivery of four copies to the California Supreme Court. Cal Rules of Ct 8.44(b)(1).

### §12.117 2. Proof of Service

When the brief is filed in the court of appeal, proof must be submitted that the service requirements have been met and paper copies delivered to the clerk of the supreme court. Cal Rules of Ct 8.25(a)(2). The requisite proof normally consists of a proof of service attached to the original brief. The appellant can use the Judicial Council's optional proof of service form. See Proof of Service (Court of Appeal) (Judicial Council Form APP-009).

### §12.118 3. Date of Filing

The "date of filing" of the opening brief is the date of delivery to the clerk's office during normal business hours. Cal Rules of Ct 8.25(b)(1). A brief is timely if the time for its filing has not expired on the date of its mailing by priority or express mail, as shown on the postal receipt or postmark, or the date of its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt. Cal Rules of Ct 8.25(b)(3).

### §12.119 4. Failure to File Opening Brief

If the appellant fails to file an opening brief within the required time period, the appellate court clerk mails a warning notice to the parties that if the brief is not filed within 15 days after the notice was mailed, the appeal may be dismissed. Cal Rules of Ct 8.220(a)(1). If the appellant files the brief within that 15-day grace period, the appeal will proceed in the normal course.

The appellant may also take advantage of the 15-day period by making a sufficient written showing of excuse to justify additional time, in which event the presiding justice may grant it. Relief may be granted on suitable conditions. Cal Rules of Ct 8.220(d). On required notice to party represented of application for additional time to file brief, see §11.20.

If no brief is filed within the 15-day period and no extension is obtained, or if an extension is obtained and the brief still is not timely filed, the appeal may be dismissed on the appellate court's own motion.

**NOTE™** Although Cal Rules of Ct 8.220(a) is directed specifically to late filings, relief from default might also be sought under the general relief provisions of Cal Rules of Ct 8.60(d). See §11.61 for sample application and order extending time to file brief. If counsel fails to file the brief within the allotted

time and the appeal is dismissed, the sole remedy may be to move the court for relief from the default. See §§11.61–11.62.

## §12.120 IX. DEFECTIVE BRIEFS

Under Cal Rules of Ct 8.18, the clerk must refuse to accept for filing any brief that fails to comply with the rules, except as the rules otherwise provide (for exceptions, see, *e.g.,* Cal Rules of Ct 8.40(b)(3)).

### §12.121 A. Actions Against Defective Briefs

If a brief does not comply with the requirements of Cal Rules of Ct 8.204 (contents and form of briefs), either of the following may occur (Cal Rules of Ct 8.204(e)):

- The reviewing court clerk may decline to file it but must mark it "received but not filed" and return it to the party; or
- If the brief is filed, the reviewing court may, on its own or a party's motion, with or without notice
  - order the brief returned for corrections and refiling within a specified time;
  - strike the brief with leave to file a new brief within a specified time; or
  - disregard the noncompliance.

In choosing from this range of alternatives, the court presumably considers the nature and seriousness of the deficiency, the extent to which it impairs the normal processes of appellate review, and the feasibility of corrective methods. If the defect consists of an omission of record references, the brief might be returned for appropriate interlineation. If the deficiency is more pervasive (*e.g.,* failure to include a statement of the case), a new brief may be called for. Minor departures from the rules (*e.g.,* wrong margin widths), which do not seriously impair readability but are costly to correct, *might* be disregarded.

### §12.122 B. Consequences of Failure to Comply With Rules

Failure to comply with the letter and spirit of the rules may have further adverse consequences:

- The appellate court may treat a point not adequately dealt with in the appellant's opening brief as abandoned or unworthy of consideration. See, *e.g., Huntington Landmark Adult Community Ass'n v Ross* (1989) 213 CA3d 1012, 1021, 261 CR 875.
- Failure to present a fair and meaningful statement of the pertinent portions of the evidence, with appropriate record references, may lead the court to refuse to consider a claim of error premised on the alleged state of that evidence. See, *e.g., Margott v Gem Props.* (1973) 34 CA3d 849, 111 CR 1.
- Failure to file-stamp or conform numerous documents in the joint appendix and failure to contain accurate and complete statements of fact and appropriate citations to the record in a brief may not warrant the "drastic sanction" of dismissal, and the court may proceed to the merits. *Wershba v Apple Computer, Inc*. (2001) 91 CA4th 224, 237, 110 CR2d 145.
- Persistent failure to comply with the rules may have particularly serious consequences, including dismissal of the appeal. See *Berger v Godden* (1985) 163 CA3d 1113, 210 CR 109.

## X. REPLY BRIEF

### §12.123 A. Reply Recommended

Unlike an opening brief, the filing of a reply brief is permissive, not mandatory. Cal Rules of Ct 8.200(a)(3). However, it is almost always a good idea to take the opportunity to do so. Even if the appellant believes that the points raised in the response are not persuasive, there is no guarantee that the appellate court shares that view. Given the appellant's overall burden of persuasion (see §2A.27) and the variety of purposes a reply may serve (see §§12.124–12.127), it is a rare case in which the appellant can safely "leave it to the court" to see that the respondent's brief has no merit.

The appellate court will prepare a proposed opinion of some sort before oral argument. Thus, the appellant's reply brief is the last submission the court receives before making its decision, even if the decision is only "tentative."

### B. Purpose of Reply

#### §12.124 1. Reestablish Factual Premise for Appeal

The appellant's prospects of success hinge on both the abstract merit of the legal issues raised and the validity of the factual premises on which those arguments are based. The reply brief presents an opportunity to set matters straight to the extent that the respondent's brief undermines the factual premises in the appellant's opening brief by directly challenging the appellant's account of the record through blurring key facts or asserting additional facts that appear to weaken the appellant's case.

**PRACTICE TIP™** It may be helpful to *briefly* summarize the appellant's arguments on appeal at the beginning of the reply brief and then concentrate on the most important points in the respondent's brief.

#### §12.125 2. Counter Respondent's Legal Arguments

To the extent the opening brief did not anticipate the respondent's arguments, the reply brief presents an opportunity to do so. Arguments lightly made in the opening may require further attention if the respondent's brief deals with them extensively and persuasively. If the respondent misstates the law or ignores relevant exceptions to or limitations on cited legal principles, bring these matters to the court's attention. Distinguish any authorities central to the respondent's legal arguments.

**PRACTICE TIP™** Do not hold back issues in the opening brief for address in the reply brief to preclude the respondent from answering them in his or her brief. In addition, do not raise new affirmative issues in the reply brief. See *Reichardt v Hoffman* (1997) 52 CA4th 754, 764, 60 CR2d 770; *Dixon v Board of Trustees* (1989) 216 CA3d 1269, 1286 n26, 265 CR 511. Absent justification for failing to present an argument earlier, the court will not consider an issue raised for the first time in a reply brief. *Save Sunset Strip Coalition v City of W. Hollywood* (2001) 87 CA4th 1172, 1181 n3, 105 CR2d 172.

### §12.126 3. Restore Focus of Appeal

The reply brief is a vehicle for redirecting the court's focus back to the appellant's perspective. For example, if the appeal deals with complex issues or facts, a reply brief can restate the issues and facts in a simple fashion and provide a final summary. If the respondent portrays the appeal as a mere attempt to reargue the facts, the reply can point out the legal (as opposed to the factual) nature of the issues. Even the sequence of the arguments may help to restore the appellant's perspective of the appeal.

### §12.127 4. Augment Appellant's Authorities

When appropriate, the appellant may cite new cases in answer to arguments made by the respondent. The appellant may also cite any cases in support of the arguments in the opening brief that were decided after the opening brief was filed.

**NOTE™** The court will ignore portions of a reply brief that refer to news articles and other documents that are not a part of the record and are irrelevant. *Connecticut Indem. Co. v Superior Court* (2000) 23 C4th 807, 813 n2, 98 CR2d 221.

## §12.128 C. Strategy and Tactics

Many of the guidelines that apply to the opening brief apply to the reply brief. See §§12.1–12.99. However, some strategic and tactical considerations are especially pertinent to the reply brief.

### §12.129 1. Be Selective

The reply brief should emphasize only the important issues. It is neither necessary nor appropriate to deal with every assertion made or every case cited in the respondent's brief; rather, counter the arguments and distinguish the authorities that, at least at first, seem to undermine the appellant's position.

**PRACTICE TIP™** When selecting issues to address, obtain the impressions of a lawyer not intimately involved in the case. If, on reading the opening brief and the respondent's brief, that lawyer is troubled by an argument urged or a case cited by the respondent, it is safe to assume that the court may react similarly. Draft the reply with a view to putting to rest those concerns as well as any others perceived by counsel.

### §12.130 2. Keep Reply Short

Although conciseness and brevity are advisable in the opening brief, they are even more important in the reply brief. Apart from trying the court's patience, it would obviously be inconsistent to contend that the respondent's arguments lack merit and then struggle laboriously to answer each one, however meritless. That approach misses the opportunity to give the court a concise picture of the case as drawn by the appellant.

### D. Procedural Guidelines

### §12.131 1. Comply With General Rules Governing Briefs

The various rules governing the appellant's opening brief generally govern the reply brief:

- Rules on the physical specifications of the brief (see §§12.11–12.18;
- Rules on cover color coding (tan for reply brief) (see §12.96);
- Rules on starting with a table of contents and a table of authorities (see §§12.23–12.29);
- Rules on the use of headings (see §12.19);
- Rules on service and filing (see §§12.112–12.119); and
- Rules on support of factual recitals by record references (see §§12.37–12.50).

### §12.132 2. Length

The reply brief is governed by the general limits on length of briefs. Cal Rules of Ct 8.204(c). Although a reply of 14,000 words or, if typewritten, 50 pages is therefore permitted, a properly drafted reply will generally be far shorter. See Cal Rules of Ct 8.204(c). See also §12.14. But see §22.56 (California Supreme Court sets shorter page limit for reply briefs).

### §12.133 3. Time Limits

The reply brief must be served and filed within 20 days after the respondent's brief is filed, unless a cross-appeal is filed. Cal Rules of Ct 8.212(a)(3). On time for filing the reply brief in an appeal in which a cross-appeal has been filed, see §8.42.

**NOTE™** There is no need to notify the appellate court clerk if the appellant decides not to file a reply brief.

The time to file a reply brief may be extended by stipulation or court order (see §§11.20–11.26, 12.109). Submit stipulations to extend time or requests for the court to extend time to file a reply brief before the 20-day filing period expires. Unlike the opening brief (and the respondent's brief), there is no 15-day "grace period" for a reply brief.