

California Court of Appeal, First Appellate District Announces a Mandatory Use of the Electronic Filing System (EFS) in Civil Appeals Effective March 17, 2014

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Mandatory e-filing has come to the California Court of Appeal, First Appellate District. The First Appellate District has announced that use of the Electronic Filing System (EFS) is mandatory for all attorneys and voluntary for self-represented litigants, per Local Rule 16. The filings in electronic format shall be in lieu of any paper copies otherwise required under the California Rules of Court and shall constitute the official record of the Court. The e-filing requirement applies to civil appeals, effective March 17, 2014, and criminal and juvenile appeals, effective April 14, 2014. Registration with the EFS system began on March 10, 2014. The Court's website contains Local Rule 16 and information, instructions and training on using the EFS system (<http://www.courts.ca.gov/1dca.htm>).

What does this mean for attorneys that have appeals in the First Appellate District?

In most cases, the work needed to prepare the appellate brief and appendix will remain about the same as electronic submission of the brief and appendix is already required in this district. In some cases, more work may be needed to comply with the new requirements, depending on the type of documents to be included in the record on appeal. Below are some specific provisions of the new EFS filing requirements.

Tentative Opinions: The Chance to Make a Difference in Your Oral Argument

Lawyers can focus on the main issues that the court deems important during oral argument. (p. 3)

Electronic Briefs: Cross-document linking directly to PACER documents

This new option can be used in every case you file in the federal appellate courts. (p. 4)

California Supreme Court: Electronically-Submitted Briefs – New Options

The Court now accepts electronic submissions of briefs and a reduced count of printed briefs. (p. 5)

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Records on Appeal:

Local Rule 16 requires all Reporter's Transcripts, Appendices, Agreed Statements or Settled Statements to be electronically-filed by appellate counsel that are covered by this rule. If the file size exceeds the 25 megabyte limit, it should be filed in multiple parts or on disc. Any appendix, larger than 10 volumes, may be physically transmitted to the Court on disc, "machine readable optical media," in lieu of e-filing.

Redaction required:

Depending on the appellate issues and the type of records included in your appendix, close attention and great care must be paid to any appendix documents that contain confidential or sensitive information.

Social security numbers, driver's license numbers, account numbers and financial information must be redacted from briefs, documents within appendices and transcripts. California Rules of Court, Rule 1.20(b)(3) has required this information to be redacted from publically-filed documents since 2007, but it was often not followed by counsel when preparing a printed appendix

for a physical paper filing. Local Rule 16 mandates redaction of any sensitive or confidential information. This adds to the work required to prepare appendices and transcripts prior to filing. If the account number or sensitive information is necessary to the appeal, the publicly-filed document shall only include the last four digits of the number in question.

Any filing containing medical records, trade secrets or confidential proprietary information must be filed under seal as a manual filing. Similar to the ECF system requirements in the federal courts, a "Notice of Manual Filing" shall be e-filed in addition to the manual submission. Depending on the circumstances of your case, you may also need to file a motion for leave of court to file under seal and provide the court with printed briefs and records in both redacted and non-redacted versions. (See C.R.C. Rules 8.45, 8.46 and 8.47).

Additional costs:

Additional costs will be incurred as Rule 8.130(f) requires attorneys to order, pay for and file with the Court an electronic version of any Reporter's Transcript when filing the designation of record

on appeal. Court reporters have additional fee requirements when electronic versions of the transcripts are ordered. It is unclear when the payment of the additional fee will be required for the electronic transcripts. The appellant's attorney is required to file "a copy of the transcript in computer-readable format" with the Court. Additional costs will also be incurred for electronic filing as the private vendor that operates the system will charge fees for each filing.

Are there any exclusions?

The Court will allow for an excuse from the e-filing requirements and allow for manual filing in certain circumstances, but the party must e-file a manual filing notification setting forth the reason why the document cannot be filed electronically.

How to get it done correctly the first time, every time?

Counsel Press regularly assists attorneys with the preparation of appellate briefs and records for filing. We can assist registered attorneys with their electronic file preparation and electronic filing in any of the United States Circuit Courts of Appeal and any of the California Courts of Appeal. ■

Tentative Opinions in the Appellate Courts and the Chance to Make a Difference in Your Oral Argument

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Division Two of the Fourth District in the California Court of Appeal uses tentative opinions. There is certainly an advantage for appellate lawyers because it allows them to focus on the main issues that the court deems important during oral argument. Most appellate practitioners would agree – the feedback that I’ve received from our clients is largely positive.

On the other hand, the danger is that these tentative opinions are taken as final and may prompt litigants to waive oral argument unnecessarily. There is a California Supreme Court case on point: *People v. Pena*, (2004) 32 Cal. 4th 389. However, the main objection that the Court raised in *Pena* was not to the tentative opinion itself, but to the notice that accompanied the tentative opinion. The Court ruled that the notice was too strongly-worded in discouraging oral argument because it stated

that “oral argument *will not aid* the decision-making process.” 32 Cal. 4th at 402.



Ultimately, the Court praised the program, but not the notice component: “We applaud innovations, such as the tentative opinion program adopted... here, that are initiated to maintain the quality and integrity of

the judicial process in spite of these obstacles. We simply conclude... that [this particular waiver notice] is not a proper streamlining device.” 32 Cal. 4th at 404.

Despite the validation from the California Supreme Court, there is only one other California appellate court which offers tentatives. The Second District, Division Eight offers tentatives, but they are oral and issued from the bench at the onset of oral argument. The idea is to make oral argument more relevant to the core issues without having to invest in a written draft opinion.

This seems like a good compromise between issuing fully fleshed-out tentative opinions versus no tentative at all. This has also been well-received and I believe tentative opinions will be used more frequently to aid the justices as well as the appellate attorneys. ■

Electronic Briefs: CP eBriefs now offer cross-document linking directly to PACER documents

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Counsel Press is now enhancing federal appellate CM/ECF e-filings with powerful hyperlinks directly to the underlying record or appendix contained within the PACER system. CP's eBrief team has been working with hyperlink technology before e-filing was even an option and now offers a powerful new way to present your argument and control costs. While a CP eBrief is still the most complete and effective way to present every bit of briefing and relevant material to the Court, this new option can be used in every case you file in the federal appellate courts.

All hyperlinks are not the same. To oversimplify, a hyperlink is a bit of code associated with some text contained in the brief that, when you click on it, takes you somewhere else. Most firms will be familiar with internal document hyperlinks. Those links take you somewhere else in the document. I see them used most frequently on tables of contents entries in briefs

where we add the links so the reader can jump to a particular argument or other heading from the table of contents. These have the advantage of being self-contained, work on any platform and are quick and inexpensive to create. Also, if you have a statutory addendum, we can link statutory cites in a brief directly to those pages. We can even take advantage of the attachment features in a pdf to add other separate documents, which are attached to the main file, that can also be linked. These internal hyperlinks are useful, but, in some cases, bookmarks give you a better result for something like a table of contents link. Internal hyperlinks have the disadvantage of moving the judge off the argument being read and further into the pdf documents. There is a better method that we call cross-document hyperlinking.

Cross-document hyperlinks are those that go outside the



document. We use them in federal filings on the PACER system to link brief citations directly to the cited document within the district court file. We can usually set those links to open to the pinpoint cites, or exact page of the document you are citing. Even better, these links can be set to open the referenced document in a window next to the brief (like our eBrief links.) The judges can read your brief with the referenced authority open at the same time, rather than being pulled into a different document altogether. For cases using a deferred appendix or in those where the appellant has already filed the appendix, we can create links that open the appendix

directly to the cited page, for any party, especially the appellee. Links to other briefs, filed within the PACER system, also open those briefs. These cross-document links leverage existing technology in new ways to help you guide the reader directly to the material you want them to view, when you want them to view it. The judge will not have to hunt for the cited material in the underlying record or flip through an appendix to find the referenced page. Similarly, we can create cross-document hyperlinks for citations to case law found on some of the reporting services.

There are some limitations to cross-document hyperlinks working correctly on certain operating systems and there might be a layer of costs associated with accessing the information from wherever it resides, if your reader must pay PACER document fees. (For example, PACER does charge a firm to access a document before it will open a link, but federal court personnel, including judges, do not pay fees to view PACER documents.) The benefits and limited costs associated with our cross-document hyperlinked brief give litigants a very powerful presentation

tool that meets most budgets.

Our client firms depend on our staff counsel and appellate support staff to stay on top of technologies that keep their briefs and appendices looking and functioning as good as they read. We are constantly looking for better ways to present a firm's appendix or supporting material to the Court to ensure that the judges have easy access to the information the firms want them to view. I will follow-up with some other exciting ways for you to get the most of electronic filings. Look for upcoming articles on the "Electronic Briefs" topic. ■

Electronically-Submitted Briefs in the California Supreme Court – New Options

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Effective January 13, 2014, the California Supreme Court now accepts electronic submissions of briefs and a reduced count of printed briefs for filing in matters pending before the Court. The e-submitted brief is not a replacement for the printed briefs. An original printed brief and eight copies are

required as the official filing when an electronic brief is also e-submitted to the Court.

There are specific file preparation requirements and procedures for e-submitted briefs. Information regarding which types of briefs may be e-submitted to the Supreme Court may be found on

the Court's website. (Link is available in the electronic version of this article. To view, visit Counsel Press' Blog.)

California Rules of Court, Rule 8.44 was recently amended to allow the Supreme Court to provide by local Rule the procedure for acceptance of e-submitted briefs. ■

“Web Links to Nowhere” in SCOTUS Decisions: How to Ensure that Cited Material Remains Available for Years to Come

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According to a recent article in *The New York Times*¹, half of the hyperlinks in Supreme Court opinions no longer link to the information originally cited. Even at this level, creating a link directly to a website can be risky business. Websites expire or change owners, while web pages are relocated or archived. The question arises, how do you take control of slippery online material when citing to a web source directly?

In an ideal world, it would be easiest to copy a web path directly into your link command, but what happens five years from now? What happens in ten years when that website is no longer valid or even in existence? It's important to understand that you have no control over that pinpoint material. Therefore, you are at the website's mercy and the one at risk when referencing online material.

1. The article titled “In Supreme Court Opinions, Web Links to Nowhere”, written by Adam Liptak, published September 23, 2013.

Counsel Press' eBrief team has extensive experience and deep expertise in hyperlink technology. We have assisted thousands of attorneys with enhancing their briefs, from basic hyperlinking to conversion of video and audio exhibits. Over the years, we have developed a number of techniques for combating website link rot, and we wanted to share a few of these in this article.

The easiest and most reliable way to prevent link rot is to do a simple conversion: create an image file of the website you are viewing. By converting a web page to a PDF, you have locked that web page material down as an image, permanently. You can then link directly to that image file. Whether you choose to link externally, internally, or as an attachment file, it is up to you and a subject best left for another article.

Video files are especially tricky. *The New York Times* article notes



one hyperlink in an opinion about violent video games by Justice Samuel A. Alito, Jr. The hyperlink takes users to an error page that reads: “Aren't you glad you didn't cite to this Web page?” So, how do you avoid the video link rot in your legal document?

It's always best to try to utilize the exhibit material that you have available directly to you, e.g., deposition, surveillance, animations, etc. If you have to use an online video, I would ask for permission to use it directly from the source. Once you have the video files in place, you will need to check

the size. If the size is large, the best solution is converting video files into a standard file format, e.g., mpeg, mp4, etc. This will ensure that all operating systems are able to (dis)play the video file. If the file size is more manageable, *embedding* video files directly into PDF can be another nice option. For example, at Counsel Press, we have uploaded many appellate filings into the PACER/ECF database that contain video material embedded directly into the brief and/or record.

When linking to citation material online, like statutes and case law in LexisNexis and Westlaw, you also have the capacity to create links that search for the relevant material rather than simply directing the command to that web page. In other words, the link will find the specified document rather than look for a web page directly.

Sometimes, the answer can be a combination of things. What about two links? One link might lead directly to the web page

and the other to an *image* of the web page. However you decide to proceed, if you do have to reference something directly online, make sure that it's from a reputable source. Avoid URL shorteners as they are prone to rot. One last thing: check your links often!

There is no easy answer for linking directly to web sources, but, with a few techniques, you can ensure that your cited material will remain available and relevant for years to come. ■

Appellate Forum: LinkedIn Group Powered by Counsel Press – Why You Should Join and Participate

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About three months ago, Counsel Press launched a new group on LinkedIn named Appellate Forum. More than 2,400 appellate practitioners joined the group since then,

and the Forum keeps adding members on a daily basis. If you still have not joined, below is a quick overview of why you should do so today.

LinkedIn Groups: What They Offer

While you may already have a LinkedIn profile, you may not be fully aware of all the great features this popular site offers, and you may be missing out

on the main benefits. One of the best ways to build stronger relationships within LinkedIn is through groups.

Lawyer LinkedIn groups provide a way to stay abreast of legal trends around the country in your area of practice, as well as giving you a way of getting to know attorneys who you would otherwise probably never meet. You have an opportunity

to draw on the knowledge of other members and it may not show up in an earnings report, but posting a question to a group of seasoned law practitioners can save time, money and frustration.

Appellate Forum: Why Join This Group

The Appellate Forum group focuses exclusively on rules, practices and procedures of U.S. federal and state appellate courts. This group serves as an expansive sounding board – to air questions and exchange information relating to appellate practice. Appellate Forum is powered by Counsel Press, with the commitment to answer all posted questions in all appellate matters nationwide.

What does this all mean for you? It means that you will have access to an exceptional appellate practice resource – *i.e.*, fresh articles on the procedural aspects of appellate practice; strategies and best practices; updates in the appellate courts; announcements for appellate events (e.g., summits, seminars, CLE courses, etc.). You will be able to engage with your industry peers on important

topics pertinent to this area of practice and will expand your professional network. You will also be able to draw on the knowledge of Counsel Press' appellate experts – our appellate counsel and paralegals who annually prepare and file over 8,000 appeals. Just post a question and we will take it from there.

How Do You Join and Participate?

If you have a LinkedIn profile, joining Appellate Forum is simple. When you are logged into your account, find Appellate Forum by typing the name in the search field at the top of the LinkedIn home page; then simply hit "Join Group" button.

Once you join Appellate Forum, discussions will come directly to your email and you can quickly see what is being discussed and decide if you want to participate. You can also start a discussion which will allow you to lead.

Appellate Forum is an excellent resource that helps appellate practitioners across the country to connect and exchange important information. Join Appellate Forum today! ■



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Counsel Press has always provided attorneys with research and writing assistance for appellate briefs. Through its award-winning CP Legal Research Group, the company is now assisting attorneys with trial court pleadings, motion practice and memoranda.

