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# Abbreviated justice

## California courts generally decide appeals with written decisions, but memorandum opinions do exist under California law.

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**EXCEPTIONALLY APPEALING**

The big payoff in an appeal is the court's opinion. It's there that the competing positions of the parties are carefully recounted, evaluated, and resolved in a reasoned fashion by wise, neutral Solomons. And if the issues are important or interesting enough, the

opinion may even be published as precedential, thereby weaving the fabric of our common law. Heady stuff! This sort of intellectual excitement may entrance a new lawyer to pursue a life in appellate practice. But then the record (as in LP) slows and scratches, and the realization hits that most appeals do not actually involve cutting-edge questions of law and public policy. Rather, most appeals are simply litigants continuing to fight about pedestrian matters. In such cases, in many courts, there is no big payoff. Instead, there is a summary decision, typically: "Affirmed."

The Federal Rules of Appellate Procedure allow for one-word appellate dispositions, and some courts do this regularly. *E.g.*, Fed Cir. Rule 36 (the court may affirm without opinion if an opinion would have no precedential value). Imagine exhaustively briefing and orally arguing a fascinating multi-issue patent appeal, only to get back a one-word affirmance. No analysis about how right your side was and how wrong the other side was; just a single word. Disappointing, right? And even worse for the losing side, who probably believed that legitimately strong arguments had been made.

Last month the 4rth District Court of Appeal affirmed a major defense verdict -- in a products liability case seeking $80 million for catastrophic personal injuries -- in a one-word order. Of course, that wasn't in California; it was Florida's 4th District. While many states allow for one-word appellate rulings, our Golden State, blessedly, does not.

The California Constitution (article VI, section 14) requires that Supreme Court and Court of Appeal decisions "shall be in writing with reasons stated." Thus, California appeals cannot be resolved by an oral ruling or a one-word order. (This requirement applies to "causes," i.e., appeals, rather than writs -- although writs decided on the merits become causes.) So some written analysis is required. But how much? One delegate at the constitutional convention opined that five pages should suffice to resolve just about any case. *See* *Lewis v. Superior Court*, 19 Cal. 4th 1232, 1261-62 (1999) (citing 3 Debates & Proceedings, Cal. Const. Convention 1878-1879, pp. 1455-1456). But few California appellate decisions are so terse.

Between the full-blown opinion and the single-word ruling lies room for shorter forms of decision. The 9th Circuit resolves the majority of its appeals through unpublished memorandum dispositions, which are typically very brief, yet functional. *See* 9th Circuit General Orders, order 4.3.a. (April 2019) ("Unlike an opinion for publication which is designed to clarify the law of the circuit, a memorandum disposition is designed only to provide the parties and the district court with a concise explanation of this Court's decision. Because the parties and the district court are aware of the facts, procedural events and applicable law underlying the dispute, the disposition need recite only such information crucial to the result."). New York's intermediate appellate courts often issue perfunctory opinions, sometimes as short as a paragraph or two. Such outcomes can be

frustrating and dispiriting. Fortunately for California practitioners, our appellate courts take their constitutional mandate seriously, and almost always decide appeals with written decisions including an introduction, statement of facts, legal analysis, conclusion and disposition. Why "almost always" as opposed to "always"? Because appellate memorandum opinions do exist under California law.

Title 8 of the California Standards of Judicial Administration offers Standards for the Appellate Courts. But it contains only one section, numbered 8.1, dating back to 1970, which is titled Memorandum Opinions, and contains only two sentences: "The Courts of Appeal should dispose of causes that raise no substantial issues of law or fact by memorandum or other abbreviated form of opinion. Such causes could include: (1) An appeal that is determined by a controlling statute which is not challenged for unconstitutionality and does not present any substantial question of interpretation or application; (2) An appeal that is determined by a controlling decision which does not require a reexamination or restatement of its principles or rules; or (3) An appeal raising factual issues that are determined by the substantial evidence rule."

In championing the wider use of memorandum opinions decades ago, Witkin emphasized that the limited resources of our appellate courts would "be better spent producing more appellate *decisions* and fewer and better appellate opinions." B.E. Witkin, Manual on Appellate Court Opinions, Section 131, p. 256 (1977).

In the late 1990s Chief Justice Ron George assembled an Appellate Process Task Force to consider how California's appellate courts could more efficiently handle rapidly rising caseloads "without adding significant new resources" (i.e., more justices or research attorneys). Report of the Appellate Process Task Force, p. 2 (Aug. 2000). The Task Force noted that Witkin "long advocated" for "shorter opinions, including memorandum opinions," and had devoted two entire chapters to the topic in his Manual. *Id.* at 45. The Task Force also noted that the Standards of Judicial Administration encouraged memorandum opinions. *Id.* But the Task Force concluded that memorandum opinions were "unlikely to become common" without a Rule of Court advocating them and providing them with "greater legitimacy" beyond the existing Standard. *Id.* at 48. Thus, the Task Force recommended a new Rule of Court "to encourage the use of memorandum opinions when an appeal or an issue within an appeal raises no substantial points of law or fact." *Id.* at 5.

Despite the recommendation, no such rule was created. Indeed, no rule governs the form of opinions at all. Instead, there is a conspicuous gap between rule 8.256 ("Oral argument and submission of the cause") and rule 8.264 ("Filing, finality, and modification of decision"). A placeholder exists for phantom "rule 8.260" (titled "Opinions") but it has no content and is simply "[Reserved]" for possible future text.

So without a rule, how has all of this played out? A seminal 5th District case, *People v. Garcia*, 97 Cal. App. 4th 847, 850 (2002), defines a memorandum opinion as one "with little or no reference to the evidence or the procedural history of the action and with an abbreviated discussion of the relevant legal issues and authorities." *Garcia* outlines basic principles for when such opinions are warranted. Indeed, the opening paragraph in *Garcia* explains that the purpose of its publication is to "confirm the propriety of memorandum opinions in unpublished cases and to signal the bar that it will likely see an increase in the frequency of such opinions, civil and criminal, from this court." *Id.*

Having fired a warning to "the bar" about memorandum opinions in 2002, the 5th District did not follow through. From 2000 to 2009, there were only about 60 memorandum opinions, of which only a third (24) came from the 5th District. The spread of the remainder across the state, was 15 from the 1st, 14 from the 2nd, six from the 6th, two from the 4th, and one from the 3rd.

Over the next decade, 2010 to 2019, there were about 170 memorandum opinions, of which the 2nd, 4th and 6th Districts each issued one. *See Ryers v. City of Los Angeles* (B283517, Jan. 3, 2019); *People v. Ciggs* (E064606, Feb. 21, 2017); *In re K.C.* (H038794, May 9, 2013). The remaining 160 or so all came from a single district. Yet that district, which has so embraced memorandum opinions, was not the 5th, but instead was the 1st. Thus, the idea from Fresno took hold in San Francisco.

The vast majority of these 1st District memorandum opinions (nearly 90) come from Division One. (For a recent example, see (A153365, April 23, 2019).) The ratio is 2:1, civil to criminal. Most name an authoring Justice, but a few are per curiam opinions. All are unpublished. Courts invoking their memorandum opinion power do so in different ways. Some specifically title their decisions as memorandum opinions, while others note the fact in an initial footnote.

As the figures show, memorandum opinions are rare, especially outside the 1st District. And even in the 1st District, the odds of getting a memorandum opinion are only about 2 percent. The 1st District is currently "updating" its local rules with new rules scheduled to take effect this summer. *See* Proposed Local Rules. Proposed Local Rule 19, titled "Abbreviated Opinions," reiterates that memorandum opinions "may be issued" in accord with Standard 8.1. Perhaps this local rule will encourage other divisions and even other districts to issue more memorandum opinions. But for now, such opinions remain exceptional.

**Retrospective Riposte.** Thanks for reaching the end of this month's column. Ever wonder what other sorts of people read Exceptionally Appealing? Here's a sliver of insight: Last month's column referenced the Roman Goddess Minerva on the California State Seal. One perspicacious reader responded that the seal actually features the Greek

goddess Athena, based on the shape of her shield (round, like a Greek hoplite, rather than rectangular, as used by Roman Legionnaires after the Marian reforms of 107 BCE) and the shape of her spearhead (again, a Greek sarisa, rather than a Roman pilum). Um, OK, thanks. And, yes, those observations do seem accurate. Perhaps the state has an artistic-malpractice action against the seal's graphic designer, given that Government Code Section 405 specifically calls for a depiction of Minerva. Is there a lawyer in the house? Keep those cards and letters coming!

*Exceptional research provided by Manatt associate Mario R. Cardona.*

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## Attachments

- Ryers v. City of Los Angeles
- Report of the Appellate Process Task Force
- Proposed Local Rules
- People v. Ciggs
- Lerner v. 180 Properties LLC
- In re K.C.
- Florida 4th District Opinion
- 9th Circuit General Orders