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Holy, Holey Rules!

Our appellate rules are pretty darn good. But they're not perfect and can't account for every bizarre situation.

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EXCEPTIONALLY APPEALING

The primal myth runs thusly: In the beginning chaos blanketed the universe of California appeals. Papers were filed whenever, in whatever format, and the whims of lawyers and

caprices of judges reigned. Then came the revered savior Bernie (that's Witkin, not Sanders) to impose order on anarchy (circa 1942). He createth the Rules of Court to guide wandering souls lost in the wasteland of adjudication.

The very start of these numbered rules (1 through 979) governed appeals. Was that a recognition that appeals are the "best" and "highest" form of practice, and so should, as a matter of right, come first? Or was it because appellate practice was most direly in need of organization? In any event, since the rules started with appeals, the appellate rules had the lowest numbers. Old-timers recall with wistful reverence "the Rule 17 grace period," which sounds so much more genteel than "the default period under Rule 8.220(a)." Of course prehistoric practitioners croak about the long lost days when "we didn't need no stinkin' rules" and common sense prevailed.

After about six decades laboring under the Old Testament, there came the Great Reformation (circa 2002)! A brave new world of revised rules arrived, now available in plain English! A more logical and chronological structure was designed. No longer in the prime spot of honor at the outset of the rules, the new "Appellate Rules" were relegated near the end, in Title Eight (of 10 titles). Adhering to the natural order of litigation, because appeals come at the end of a case, those rules (Rules 8.1 to 8.1125) belonged at the back of the pack.

Thus roughly runneth the legend, and so here we are today, seeking daily succor and deliverance in our holy rules. Lo, the rules answereth many a query and provideth much direction unto salvation. And verily are we blessed with many an appellate form (Judicial Council Forms App-001 to App-151). Again, in days of yore, the crotchety appellate practitioner sneered with disdain on those feeble souls seeking the true path of righteousness via mere governmental form. ("I can draft my own blooming record designation, thank you very much.") But in our modern world, the forms are so perfected that the signs have been reversed: Today's forms are the much preferred route, and today's appellate specialist peers down her proboscis at those who would needlessly bother to draft simple documents from scratch. Modern practice has many excellent forms, including local forms, and many mandatory forms. We've come to love Big Brother and heap deserved praise on the great Council Judicial for its thoughtful benevolence.

Truly we are fortunate to practice in a contemporary time that is much more orderly, efficient and litigant friendly. We live and love our holy rules. (And we fear the wrathful vengeance visited upon backsliders who wantonly disobey them! *See, e.g.*, Rules 8.276(a)(4), 8.492, 8.544, threatening sanctions for any "unreasonable violation of these rules.") They serve us well through our ordinary toil. Yet no construct by mere mortal

minds can answer every vexing question. Practice a while and our holy rules can seem more like holey rules, with unexpected gaps.

For instance, Rule 8.54 covers motions and oppositions thereto, but says nothing about a movant's reply to an opposition. Your typical litigator will insist on having the last word, and rightly so. Yet the rules provide no guidance whatsoever on replies. Consequently, this situation transports us to the primeval practices of using common sense, evaluating whether there is good cause to reply, seeking leave to do so, and proffering a reply that is actually useful (i.e., direct, concise and helpful to resolution). In practice, good replies are generally accepted and bad replies are rejected.

Another example: In the beginning, briefs had no length limits. Then in the early Rules Age, we had page limits. Our current cyberian world has word limits. We are now so used to word count restrictions that we feel queasy when we stumble upon freedom. What is the word limit for an amicus brief on the merits in the California Supreme Court? Don't bother trying to look it up: The rules don't say. Of course that doesn't mean amici can impudently file voluminous tomes. All such briefs are filed at the discretion of the Chief Justice (Rule 8.520(f)), and you better believe she won't look kindly on a morbidly obese brief crying out for gastric bypass surgery. Listen to Jiminy Cricket and let your conscience and common sense be your guide.

Apart from issues that the rules simply don't address, there are sometimes gaps arising from assumptions made in the rules. The drafters assumed that appeals would proceed along the normal, expected course. But not all appeals are cookie-cutter affairs. For instance, Rule 8.212(a)(3) says that an appellant may file a reply brief 20 days after the "respondent files its brief." The assumption is that there is only one respondent. But what if there are two or more respondents and each files its own brief at different times? Can, or must, the appellant file separate reply briefs each due on a different 20-day schedule? Or can the appellant file a consolidated reply brief triggered from the filing of the last respondent's brief? (The same situation crops up for a respondent if there are multiple appellants who file separate opening briefs on different dates.) The courts probably prefer consolidated briefing, and the clerks generally calendar the due date for such briefs from the last-filed triggering brief. But the Rules don't address this situation, leaving it in the hands of capable and reasonable lawyers and courts to sort out.

A final example. Returning to amicus briefs, Rule 8.200(c)(1) says that an amicus brief may be filed in the Court of Appeal 14 days after the last reply brief is filed -- or if no reply brief is actually filed, then the date when it "could have been filed." That last bit shows that the rule was drafted to account for the rare situation where an appellant forgoes a reply brief. That's good thinking to account for an exceptional situation. But

what about the really, really exceptional scenario: What if the respondent elects not to file a brief? Then there is no reply brief or even a hypothetical backup date for when a reply brief "could have been filed." Yes, this really happens. Envision a case where a trial judge makes a bad decision on an important question of widespread impact, appellant appeals, respondent sees no point in trying to defend (or is not directly affected by the outcome and doesn't care, or is pro per, and doesn't file anything), and an amicus group wants to weigh in. Turning to the rules, the amicus realizes, "I can't figure out when my brief is due!" Even without specific guidance from the rules, we can all muddle through using common sense: Presumably the court accept an amicus brief filed within some reasonable period of time after the due date for the respondent's brief that was never filed.

One easy fix to this particular oversight in the rules comes to mind: Perhaps the deadline should be 14 days after the court clerk notes on the docket that the appeal is deemed "fully briefed."

Our rules are pretty darn good. But they're not perfect and can't account for every bizarre situation. When encountering a gap in the rules -- and after exclaiming, "Holey rules, Batman!" -- the Exceptional Lawyer exercises common sense to take the wisest course of action, and hopes that the courts will similarly act reasonably even without holy writ to follow. The truly Exceptional Lawyer goes a step further upon finding a gap or hole in the rules by taking steps to fix the problem or plug the crevasse. As an individual, or under the auspices of an appellate bar group, feel free to submit a proposed solution to the Judicial Council. Play your part in improving our justice system, even if just by tweaking a rule.