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Don't Blow Your Cover

FOCUS COLUMN

By Benjamin G. Shatz

First impressions are lasting. That holds true as much for written material as personal introductions. The expression "don't judge a book by its cover" exists precisely because readers are apt to do exactly that. Accordingly, given that the first thing readers of an appellate brief see is its cover, care should be taken to comply with the relevant rules and avoid silly mistakes that may get things off on the wrong foot. Is there more to an appellate brief cover than making sure it's the right color? Yes. In fact, there is even room for subtle advocacy on the cover.

A user-friendly cover begins with the appellate court docket number at the very top in a nice large font to make it easy for the court clerks. California Rules of Court 8.204(b)(10)(B). In the 2nd Circuit Court of Appeals, such numbers must be in a gigantic font, at least an inch high. 2nd Circuit Rule 32(c). This looks a bit strange, but it definitely gets the point across that this information is essential for the clerks processing the brief. For California and 9th Circuit briefs, a large-sized font works well enough. Centering the number also makes it stand out a bit more; indeed, this is required in federal appeals. Federal Rule of Appellate Procedure 32(a)(2)(A). In the 9th Circuit, if the judges assigned to the case are known (e.g., for filings after oral argument, like a petition for rehearing), then those names must appear immediately below the case number. 9th Circuit Rules 25-4.

Next, the name of the appellate court should appear, and should appear correctly. Rule 8.204(b)(10)(B); Federal Rule of Appellate Procedure 32(a)(2)(B). Oddly, many lawyers find this to be a challenge. Some briefs arrive at the 9th Circuit titled "Ninth Circuit Court of Appeal," instead of "Appeals"; and many briefs arrive at the California Court of Appeal mislabeled as "Court of Appeals." Similarly, briefs occasionally confuse the cardinal and ordinal numbering system of California's appellate districts, and thus have a strange ring to them, e.g., "Appellate District Two, Seventh Division," instead of "Second Appellate District, Division Seven." Such briefs invariably are accepted for filing, but misnaming the court on the cover of the brief (or omitting the division assignment) does not instill confidence. Similarly, many briefs often bear the designation "Division p," but, of course, there is no such division, "p" (or sometimes "a") being the placeholder used by appellate court clerks for pending matters not yet assigned a division. If the division assignment is unknown when the brief is due, and if calling the clerk to learn about a division assignment does not yield a real answer, then simply write "Division ___" - that underscored blank can be filled in by hand later.

Next, of course, is to provide the case caption. Rule 8.204(b)(10)(B); Federal Rule of Appellate Procedure 32(a)(2)(C). Again, this should be really easy, but sometimes leads to problems. If the case has been docketed by the appellate court in a certain way, use that name. Even if the case has been called "Smith and Jones versus Brown" for years in the trial court, if the appellate court has opted to caption it "Jones and Smith versus Brown," then use that listing. Re-ordering the parties in a different way merely causes confusion. Following the court's lead is smoother and wiser. Federal appellate courts in particular can be quite insistent that their "official caption" be used.

Next, get the parties' designations right. It is often useful to indicate the role of the party in the trial court and on appeal, e.g., "plaintiff and appellant." Remember that in federal practice the party responding to the appeal is the "appellee" and in California practice is the "respondent." Sometimes party designations can seem unfamiliar, especially in writ proceedings, which involve a petitioner, respondent and real party in

interest. Difficulties also creep in when an appeal is from a special proceeding in the trial court, like a writ action, where the plaintiff is the petitioner and the defendant is the respondent. This can lead to silly looking captions like "Jon Smith, petitioner and respondent, versus Jane Doe, respondent and appellant." To avoid seemingly bizarre or redundant designations (e.g., "respondent and respondent"), follow the California Style Manual: A "petitioner" in superior court becomes a "plaintiff" for appellate captioning purposes; and a superior court "respondent" becomes a "defendant." California Style Manual Section 6:28 [B]; see Chapter 6 generally for how to properly caption appellate proceedings.

Next, indicate the title of the brief, again correctly. Rule 8.204(b)(10)(A). The first brief on appeal is the "Appellant's Opening Brief" (or "Appellants'" for multiple appellants). It is not necessary to name the appellant or appellants if the brief covers all of them. But if multiple appellants will be filing separate briefs, then it makes sense to title the brief "Joan Roe's Appellant's Opening Brief." This is required in federal appeals. Federal Rule of Appellate Procedure 32(a)(2)(E).

The next brief in California appeals is the "Respondent's Brief" - not the "Respondents Opening Brief" (as if the respondent would have another brief to file) , or the "Respondent's Answering Brief," and definitely not "Appellee's Brief" (as if the respondent were in federal court). The last brief is "Appellant's Reply Brief." E.g., Rule 8.360(c).

Beneath the brief's title, in addition to indicating (and correctly naming) the trial court and providing the trial court docket number, it is useful to indicate the sort of proceeding giving rise to the matter, e.g., "On Appeal From A Judgment Of the Superior Court of California, Orange County Superior Court No. ABC1234." Or "On Appeal From A Post-Judgment Order Awarding Attorneys' Fees," etc. Providing this additional detail helps set the procedural context for the brief. Without it, the reader has no idea what the case is about or how it got to the court. Indicating "On Appeal From A Summary Judgment" on the cover may immediately invoke a variety of responses from the reader, i.e., "oh, the standard of review here will be de novo," or perhaps - in the case of an anti-SLAPP ruling - "ugh, another one of these sorts of appeals."

Next, name the trial court judge. Rule 8.204(b)(10)(C). The best format for this is "The Honorable John Q. Public." Ordinarily there is no need or point to appending anything else, such as "Judge Presiding." What might be useful *for appellants*, however, is considering appending accurate designations that might possibly send a subtle message that perhaps this judge's rulings may deserve special scrutiny because the judge is not the typical superior court judge, such as "(retired)," "pro tem," "Commissioner," or "Referee." Although Rule 8.204(b)(10)(C) says to include the "names of ... each participating judge," it makes no sense to include the names of judges whose rulings are not being contested. See California Style Manual Section 5:28.

In addition to including the lawyers' names, address and telephone numbers, state bar numbers are required in California courts. Rule 8.204(b)(10)(D); Federal Rule of Appellate Procedure 32(a)(2)(F). Fax numbers are not required, but are nice to include anyway. In federal courts bar numbers are not required, but certainly allowed. When using bar numbers in a federal appellate court be sure to indicate the state, as such courts have jurisdiction over multiple states. In the recent unpublished decision of *Sayre v. Selznick*, No. B203507, 2009 Cal.App.Unpub.LEXIS 6269 (Aug. 4, 2009, 2d Dist. Div. 3), the Court of Appeal dropped a footnote taking appellant's counsel to task for listing an incorrect bar number on the cover, and also for having the brief signed by a lawyer whose name and information did not appear on the cover.

Last, include the name of the party that each attorney on the brief represents at the bottom. Rule 8.204(b)(10)(E). And oh yes, get the cover color right too. In California, Rule 8.40 sets forth the colors for various briefs. Briefs filed with the wrong colored cover generally will be filed - at least for a first offense. But get it wrong again and the court may return it for correction. Rule 8.40(b)(3). Be thoughtful in picking a shade of color. If the rule says "red," then use red, not something that's really pink or magenta. Also don't use hues so dark that they interfere with legibility, or so pale as to appear anemic. See Federal Rules of Appellate Procedure 28.1(d) and 32(a)(2) for colors in federal court. Never use a plastic or clear acetate cover on a brief, as this will prevent the clerk from stamping it. The 4th District Court of Appeal is especially strict about proper covers and submissions with incorrect covers or plastic overlays will not be filed. 4th District Local Rule 2.

For appendix materials, the cover must include the information described above, as well as state the

volume number and the inclusive page numbers of that volume, e.g., "Volume 2 of 4, pages 301-601". Rule 8.144(c)(2). Other miscellaneous rules may also affect the contents of a cover: Amicus brief covers must indicate the party that the brief is supporting, according to Rule 8.200(c)(4); and if a nonparty public officer or agency must be served under Rule 8.23(c), then the brief's cover must indicate such service and identify the statute or Rule 8.29(b). Also, if a stay is requested, this must be prominently displayed on the cover, along with the nature and date of proceedings to be stayed. Rule 8.116(a). Also, to comply with Rule 8.116(b), include the department designation and phone number of the judge.

This should be obvious, but avoid spelling errors on brief covers. Briefs have been filed for "appelants" and "appelles" and even "respindents"; and sometimes even clients' names are spelled incorrectly. Silly mistakes like this happen because in the context of drafting an appellate brief, creating the cover is probably the easiest bit. This means, however, that it receives the least attention to detail. This is a mistake, because while the cover may be the last concern of a brief writer, it is the first thing the recipient will see. Sure, an appellant gets to file a reply brief, but there's never a second chance to make a great first impression.

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