

**- CHAPTER THREE -**

**PRE-BRIEFING RESPONSIBILITIES**

**- RECORD COMPLETION -**

**- EXTENSIONS OF TIME -**

**- RELEASE ON APPEAL -**

**CALIFORNIA CRIMINAL APPELLATE PRACTICE MANUAL**

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**USE OF THIS MATERIAL SUBJECT TO AGREEMENT AT START OF MANUAL**

**PRE-BRIEFING RESPONSIBILITIES:  
RECORD COMPLETION, EXTENSIONS OF TIME, RELEASE ON APPEAL**

I. INTRODUCTION [§ 3.0]

This chapter addresses three critical responsibilities of appellate counsel before the opening brief is filed. First, counsel must ensure the record is complete. Second, when it is not possible to complete research and briefing in the time permitted, counsel must seek one or more extensions. Third, if the client wants and is eligible for bail or other form of release pending appeal, counsel should investigate that possibility and take needed action.<sup>1</sup>

Many of the procedures discussed in this chapter require a motion. ADI provides guidance on this matter in *Motion Practice in the Fourth Appellate District Pertaining to Criminal and Juvenile Cases*.<sup>2</sup>

II. ENSURING AN ADEQUATE RECORD [§ 3.1]

Appellate counsel has the responsibility to ensure a complete record, in order to permit identification of all arguable issues and provide the necessary factual foundation for the issues raised. (*People v. Barton* (1978) 21 Cal.3d 513, 518-520; *People v. Silva* (1978) 20 Cal.3d 489; *People v. Gaston* (1978) 20 Cal.3d 476; *People v. Harris* (1993) 19 Cal.App.4th 709, 714; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 393-394.)

A. Overview [§ 3.2]

California Rules of Court, rule 8.320 describes the “normal record” on appeal in a criminal case – that is, the record to be prepared automatically by the superior court. Rule 8.407 is the juvenile counterpart. The normal record consists of the documents and transcripts of oral proceedings typically needed in the majority of appeals.

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<sup>1</sup>Information about filing and service requirements for documents discussed in this chapter is in chapter 1, “The ABC’s of Panel Membership: Basic Information for Appointed Counsel,” § 1.154, appendix C.

<sup>2</sup>[http://www.adi-sandiego.com/PDFs/Motion\\_Practice\\_2.pdf](http://www.adi-sandiego.com/PDFs/Motion_Practice_2.pdf)

The normal record is not necessarily adequate for every case. Occasionally because of clerical oversight or other problem, the prepared record lacks something that under the rules should be in the normal record. Sometimes the normal record as defined in the rules does not include the material necessary to argue an issue and needs either a pre-certification request for additional record (usually the task of trial counsel) or post-certification augmentation. Sometimes part of a record may have been lost or destroyed. Occasionally the appellate court's personal inspection of an exhibit is needed. When it is important for the court to consider matters occurring outside of the present proceedings, such as past appeals in the case, judicial notice (Cal. Rules of Court, rule 8.252) may be required.<sup>3</sup>

While under California Rules of Court, rule 8.336(h) ensuring prompt preparation of the record is the responsibility of the Court of Appeal rather than counsel, to protect the client counsel should monitor the process and call attention to delays so prolonged as to suggest the case may have slipped through the cracks.

B. Normal Record [§ 3.3]

Under rule 8.320(a) of the California Rules of Court, the normal record in a criminal appeal by the defendant (or in a People's appeal from the granting of a new trial) consists of the clerk's transcript and the reporter's transcripts. The same is true for delinquency appeals. (Rule 8.407.)

1. Normal clerk's transcript [§ 3.4]

The clerk's transcript is a compilation of selected documents in the case. California Rules of Court, rule 8.320(b) specifies the contents of the normal clerk's transcript in a criminal appeal:

**b. Clerk's transcript**

The clerk's transcript must contain:

- (1) The accusatory pleading and any amendment;
- (2) Any demurrer or other plea;
- (3) All court minutes;

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<sup>3</sup>As with all motions, it must be a separately filed document, not part of a brief or petition. (Rule 8.252(a)(1); see also rule 8.54.)

- (4) All instructions submitted in writing, each one indicating the party requesting it;
- (5) Any written communication between the court and the jury or any individual juror;
- (6) Any verdict;
- (7) Any written opinion of the court;
- (8) The judgment or order appealed from and any abstract of judgment or commitment;
- (9) Any motion for new trial, with supporting and opposing memoranda and attachments;
- (10) The notice of appeal and any certificate of probable cause filed under rule 8.304(b);
- (11) Any transcript of a sound or sound-and-video recording furnished to the jury or tendered to the court under rule 2.1040;
- (12) Any application for additional record and any order on the application;
- (13) And, if the appellant is the defendant:
  - (A) Any written defense motion denied in whole or in part, with supporting and opposing memoranda and attachments;
  - (B) If related to a motion under (A), any search warrant and return and the reporter's transcript of any preliminary examination or grand jury hearing;
  - (C) Any document admitted in evidence to prove a prior juvenile adjudication, criminal conviction, or prison term. If a record was closed to public inspection in the trial court because it is required to be kept confidential by law, it must remain closed to public inspection in the reviewing court unless that court orders otherwise; and
  - (D) The probation officer's report.
  - (E) Any court-ordered diagnostic or psychological report required under Penal Code section 1203.03(b) or 1369.

Rule 8.407(a) of the California Rules of Court has analogous provisions for the clerk's transcript in juvenile appeals.

In appeals from orders other than a motion for new trial or a judgment based on a demurrer, a more limited normal clerk's transcript is prescribed. (Cal. Rules of Court, rule 8.320(d).)

2. Normal reporter's transcript [§ 3.5]

The reporter's transcript is a verbatim record of selected oral proceedings in the superior court. California Rules of Court, rule 8.320(c) specifies the contents of the normal reporter's transcript in a criminal appeal:

**c. Reporter's transcript**

The reporter's transcript must contain:

- (1) The oral proceedings on the entry of any plea other than a not guilty plea;
- (2) The oral proceedings on any motion in limine;
- (3) The oral proceedings at trial, but excluding the voir dire examination of jurors and any opening statement;
- (4) All instructions given orally;
- (5) Any oral communication between the court and the jury or any individual juror;
- (6) Any oral opinion of the court;
- (7) The oral proceedings on any motion for new trial;
- (8) The oral proceedings at sentencing, granting or denial of probation, or other dispositional hearing;
- (9) And, if the appellant is the defendant:
  - (A) The oral proceedings on any defense motion denied in whole or in part except motions for disqualification of a judge and motions under Penal Code section 995;
  - (B) The closing arguments; and
  - (C) Any comment on the evidence by the court to the jury.

Rule 8.407(b) of the California Rules of Court has similar provisions for the reporter's transcript in juvenile delinquency appeals.

In appeals from orders other than a motion for new trial or a judgment based on a demurrer, a more limited normal reporter's transcript is prescribed. (Cal. Rules of Court, rule 8.320(d).)

### 3. Exhibits [§ 3.6]

Under California Rules of Court, rule 8.320(e), the record also includes any exhibit admitted in evidence, or refused or lodged; thus counsel may refer to any exhibit in briefing. Unless an exhibit is in the clerk's transcript, however, the court will not have physical access to it. If counsel wants the court to examine an exhibit, it may be transmitted on request under rule 8.224.<sup>4</sup> (See also rule 8.407(f) [delinquency cases].) Detailed guidance is also set forth in *De-Mystifying the Exhibit Review Process in Criminal Cases*.<sup>5</sup>

### 4 Confidential matters in records [§ 3.7]

Some matters of record are to be handled confidentially, by special procedures. These procedures may apply even if the confidential matter is part of the normal record. Counsel should be aware of these matters and the way they are to be handled.<sup>6</sup> Counsel should also guard against disclosure of this material in publicly filed briefs. (See chapter 5, "Effective Written Advocacy: Briefing," § 5.21.)

#### a. Juvenile records<sup>7</sup> [§ 3.7A]

Welfare and Institutions Code section 827 makes juvenile delinquency and dependency records accessible only to the parties and their attorneys and enumerated others, and section 676 makes court hearings confidential, except in specified circumstances. Rule 8.401 of the California Rules of Court makes records and briefs

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<sup>4</sup>Some courts may prefer other times and methods of transmission; counsel should ask the assigned ADI staff attorney about local variations. Some courts provide a form for requesting exhibits.

<sup>5</sup> <http://www.adi-sandiego.com/PDFs/EXHIBIT%20REVIEW%20UPDATED%202010.PDF>.

<sup>6</sup>The ADI website offers more extensive guidance on this topic:  
[http://www.adi-sandiego.com/confidential\\_records.html](http://www.adi-sandiego.com/confidential_records.html).

<sup>7</sup>[http://www.adi-sandiego.com/confidential\\_records\\_1.html#juvenile](http://www.adi-sandiego.com/confidential_records_1.html#juvenile)

accessible only to the court, parties, appellate projects, and others designated by the court. It also requires additional steps to protect confidentiality, such as the use of first name and last initial, or just initials.

b. Marsden and related transcripts [§ 3.8]

A *Marsden*<sup>8</sup> transcript will be sent initially only to the Court of Appeal and the defendant's counsel. Under California Rules of Court, rule 8.328(b)(4), if the opening brief raises a *Marsden* issue, counsel must file with it a notice stating whether the confidential transcript contains any confidential material not relevant to the issues on appeal. The notice must identify the page and line numbers of the transcript containing any such material. (Rule 8.328(b)(4).) The respondent will get a copy of the transcript, or any relevant parts of it, on filing a written application. (Rule 8.328(b)(5).)

Should counsel forget to file such a statement, the rule has a safeguard: when the respondent files an application to obtain the *Marsden* transcript, counsel has 10 days to oppose on the ground it contains irrelevant confidential material, which must be identified by page and line number. (Rule 8.328(b)(6).)

c. Other confidential records [§ 3.9]

Any party may apply to the superior court for a confidential transcript of an in camera hearing from which a party was excluded or any other item that was withheld from a party. (Cal. Rules of Court, rule 8.328(c)(1).) Examples might be disclosure of a

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<sup>8</sup>*People v. Marsden* (1970) 2 Cal.3d 118 (motion to remove appointed counsel because of failure to provide effective assistance). Court occasionally use *Marsden*-like procedures for similar defense motions requiring protection against premature disclosure of defense material. See examples at [http://www.adi-sandiego.com/confidential\\_records\\_1.html#marsden](http://www.adi-sandiego.com/confidential_records_1.html#marsden) .

confidential informant,<sup>9</sup> defense request for expert funds,<sup>10</sup> or a *Pitchess* motion.<sup>11</sup> If ordered, the transcript will be sent to the reviewing court only. (Rule 8.328(c)(4).)

Only an appellate justice and parties who had access to the transcript in the superior court and their attorneys may examine it. (Rule 8.328(c)(6).) The parties on appeal will receive an index of the proceedings showing the date and persons present, but not the substance of the matter. (Rule 8.328(c)(5).)

Sealed records are governed by rule 8.46.<sup>12</sup>

d. Improper inclusion of identification information and other confidential matters in record [§ 3.10]

Sometimes material that is not supposed to be in the record is inadvertently included. For example, by law the transcripts must not include the names, addresses, or telephone numbers of sworn jurors; jurors must be referred to by an identifying number.<sup>13</sup> (Code Civ. Proc., § 237, subd. (a)(2); Cal. Rules of Court, rule 8.332(b).) Other examples might be confidential juvenile records (see, generally, Welf. & Inst. Code, § 827; rule 8.401) and confidential transcripts (rule 8.328(c)).

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<sup>9</sup>[http://www.adi-sandiego.com/confidential\\_records\\_1.html#motions](http://www.adi-sandiego.com/confidential_records_1.html#motions)

<sup>10</sup>[http://www.adi-sandiego.com/confidential\\_records\\_1.html#defense](http://www.adi-sandiego.com/confidential_records_1.html#defense)

<sup>11</sup>*Pitchess v. Superior Court* (1974) 11 Cal.3d 531: defense motion for disclosure of complaints of misconduct made against an officer, when potentially relevant to the defense. (Evid. Code, § § 1043-1047; Pen. Code, § § 832.5, 832.7, 832.8; see *People v. Mooc* (2001) 26 Cal.4th 1216, 1227; [http://www.adi-sandiego.com/confidential\\_records\\_1.html#pitchess](http://www.adi-sandiego.com/confidential_records_1.html#pitchess)

<sup>12</sup>[http://www.adi-sandiego.com/confidential\\_records\\_1.html#sealed](http://www.adi-sandiego.com/confidential_records_1.html#sealed)

<sup>13</sup>The information for unsworn jurors (such as those excused) must not be sealed unless the court finds compelling reason to do so (Code Civ. Proc., § 237, subd. (a)(1); rule 8.332(c)), but by policy unsworn jurors should be identified only by first name and initial.

If access to juror identification information is required to handle the case, counsel may apply to the trial court under Code of Civil Procedure section 237, subdivisions (b)-(d).

Upon discovering material that counsel may not be entitled to see, counsel should stop reading that part of the transcript immediately and notify the Court of Appeal and ADI. The court may order return of the records, redaction, or other corrective action. Under no circumstances should counsel send such material to clients or other persons without specific authorization from the court or ADI.

C. Request for Additions to Record Before It Is Filed in Reviewing Court [§ 3.11]

Rule 8.324 of the California Rules of Court prescribes procedures for requesting materials not in the normal record, if the record has not yet been certified and transmitted to the reviewing court.<sup>14</sup> Ordinarily, trial counsel should make such a request in the superior court when filing a notice of appeal or as soon thereafter as possible, but in practice trial counsel seldom do so.

California Rules of Court, rule 8.324(b) provides:

Either the People or the defendant may apply to the superior court for inclusion in the record of any of the following items:

- (1) In the clerk's transcript: any written defense motion granted in whole or in part or any written motion by the People, with supporting and opposing memoranda and attachments;
- (2) In the reporter's transcript:
  - (A) The voir dire examination of jurors;
  - (B) Any opening statement; and
  - (C) The oral proceedings on motions other than those listed in rule 8.320(c).

Rule 8.407(c) of the California Rules of Court has analogous provisions for requesting additional records in the juvenile court before the record is filed in delinquency appeals.

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<sup>14</sup>California Rules of Court, rule 8.340 prescribes procedures for changes to the record after it is filed in the reviewing court. (See § 3.12 et seq., *post*, on corrections and augmentations, and § 3.25, *post*, on exhibits.)

D. Correcting/Completing and Augmenting Record After It Is Filed in Reviewing Court [§ 3.12]

Counsel has the responsibility for reviewing all relevant parts of the filed record and ensuring the record is adequate to support all issues raised. If the record delivered to counsel is inadequate in any respects, counsel must take action either to correct or augment it for the needed materials. “Correction” or “completion” is used when parts of the normal record are missing from the filed record. “Augmentation” is used when counsel needs material that is not a prescribed part of the normal record.

1. Correcting omissions from normal record [§ 3.13]

Appellate counsel in reviewing the record may notice that matters required by California Rules of Court, rule 8.320(b) or (c) are not included. Rule 8.340(b) provides in relevant part:

If, after the record is certified, the superior court clerk or the reporter learns that the record omits a document or transcript that any rule or order requires included, the clerk must promptly copy and certify the document or the reporter must promptly prepare and certify the transcript. Without the need for a court order, the clerk must promptly send the document or transcript — as an augmentation of the record — to the reviewing court, the defendant’s appellate counsel, and the Attorney General.

Similar provisions apply to juvenile appeals. (Cal. Rules of Court, rules 8.410(a), 8.416(d).)

a. Examples of often omitted materials [§ 3.14]

Any matter prescribed for the normal clerk’s transcript or reporter’s transcript may occasionally be omitted. Certain items, however, are chronically overlooked, and counsel should be especially alert for them.

One example is the written transcript of any electronic recording provided to the trial court under California Rules of Court, rule 2.1040,<sup>15</sup> which is a required part of the clerk’s transcript. (Rule 8.320(b)(11).) Another example is any packet of records offered to prove prior convictions under Penal Code section 969b. (Rule 8.320(b)(13)(C).) If

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<sup>15</sup>Rule 2.1040 requires a party offering an electronic recording at trial to provide a written transcript of the recording, unless the trial judge orders otherwise. If a transcript of a recording was not provided to the superior court under rule 2.1040, counsel should consult with the assigned staff attorney on how to proceed.

these materials were before the superior court but are missing from the appellate record, counsel should request them by means of a rule 8.340(b) letter. Another frequently forgotten item is the record covering developments during the appeal. (See § § 3.16 and 3.23, *post*.)

b. Correction procedure [§ 3.15]

If seeking *only* to correct an omission in the normal record (not also to augment), counsel should send a letter to the superior court clerk specifically referring to California Rules of Court, rule 8.340(b) and stating what portions of the normal clerk's and/or reporter's transcripts are missing; an augmentation request in the Court of Appeal is not necessary or appropriate. The letter should describe the missing portions as specifically as possible as to dates, names or reporters, titles of documents, etc. The appeals section of the superior court will prepare and transmit the missing portion of the normal record upon receipt of counsel's letter. In the Fourth Appellate District counsel should send a copy of the letter to ADI. (Some Courts of Appeal also want a copy; counsel should check with the assigned staff attorney.) Requests filed after the opening brief should be served on opposing counsel. A sample rule 8.340(b) letter is on the ADI website.<sup>16</sup>

Division One has a form for notifying the Court of Appeal of missing items from the transcripts.<sup>17</sup>

If seeking *both* correction of the normal record and augmentation to include materials not in the normal record (see § § 3.21, 3.24, and 3.35, *post*), in the Fourth Appellate District counsel should include all requests in the application for augmentation filed in the Court of Appeal; a separate letter under rule 8.340(b) of the California Rules of Court may not be necessary.<sup>18</sup> The assigned staff attorney should be consulted for local policy on this matter.

The appellate court does not automatically extend time for the brief on learning a correction is underway. Because a California Rules of Court, rule 8.340(b) letter request is directed to the superior court and no action is required by the appellate court, a rule 8.340(b) letter request cannot be combined with a request to extend time, but counsel can

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<sup>16</sup>[http://www.adi-sandiego.com/PDFs/Forms/8340\(b\)Correction\\_of\\_Record\\_Letter.pdf](http://www.adi-sandiego.com/PDFs/Forms/8340(b)Correction_of_Record_Letter.pdf)

<sup>17</sup>[http://www.courts.ca.gov/documents/not\\_inc\\_juv\\_rec.pdf](http://www.courts.ca.gov/documents/not_inc_juv_rec.pdf)

<sup>18</sup>The Court of Appeal has authority to order correction as well as augmentation of the record. (Rule 8.340(d).)

send the Court of Appeal a separate extension request and use the pending record correction as a reason for needing it. Some courts grant an extension request until a certain number of days after the filing of the corrected record; others require periodic extension requests while the corrected record is being compiled (although the correction rarely takes more than a month).

c. Records of proceedings that occur during appeal [§ 3.16]

When during the appeal the trial court amends or recalls the judgment or makes an order such as one affecting the sentence or probation, California Rules of Court, rule 8.340(a) requires the superior court clerk to send an augmentation including the record of the new proceedings. In juvenile cases the clerk must notify those who received a copy of the record of such orders. (Rule 8.410(b)(2).) Clerks rarely remember this step.

Counsel should keep an eye out for such a development by maintaining regular contact with trial counsel and should seek addition of the record on such proceedings to the appellate record when the occasion requires. (Although rule 8.340(a) speaks of the additional record as an “augmentation,” the requirement of adding it to the appellate record is automatic, without court order. A rule 8.340(b) correction request, rather a rule 8.340(d) augment request, should therefore be sufficient. (See also § 3.23, *post.*)

2. Augmenting the record after it is filed in reviewing court [§ 3.17]

Augmentation is used to obtain materials not in the normal record after the record is certified and transmitted to the reviewing court. This process is governed by California Rules of Court, rule 8.155(a). (Rules 8.340(d), 8.410(b)(1), 8.416(d); see also *People v. Gaston* (1978) 20 Cal.3d 476, 482-484, *People v. Silva* (1978) 20 Cal.3d 489, 492-493, and *People v. Barton* (1978) 21 Cal.3d 513, 518-520.) Requests for additional record should be submitted to the Court of Appeal, not the superior court, once the record has been filed.<sup>19</sup>

a. Timing of request [§ 3.18]

Requests to augment or complete the record should be filed as soon as possible after receiving the record and determining that the additional material is needed – almost always before the original opening brief due date. The expectation is that a request

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<sup>19</sup>Rules 8.324 and 8.407(c) of the California Rules of Court govern additions to the normal record *before* it is certified in criminal and delinquency matters. (See § 3.11, *ante.*)

should be filed within 40 days of the later of the filing of the record or the appointment in criminal cases and within 15 days in fast-track dependency cases (Cal. Rules of Court, rule 8.416(d)(2)).<sup>20</sup>

b. Identification of materials in request [§ 3.19]

In identifying the documents or reporter's transcript sought, counsel should not just ask for "materials relevant to [a particular issue]" or use other such generalities. The exact record needed should be described with enough detail (dates and nature of proceedings, titles and filing dates of documents, etc.) that the reporter or clerk will not have to guess. (See Cal. Rules of Court, rules 8.130(a)(4), 8.120(a)(4), 8.155(a)(3).)

For augmentation of the clerk's transcript, if the material is not lengthy, counsel may obtain a copy of the document from the superior court clerk, attach the copy to the request to augment, and ask the Court of Appeal to order the copy be made part of the record without preparation of a formal supplemental clerk's transcript. (Cal. Rules of Court, rule 8.155(a)(2).)<sup>21</sup> A copy of the augmentation material must be included with the copy of the augmentation request served on opposing counsel. If the augmentation documents are so extensive that a supplemental clerk's transcript will be required, each item should be described as specifically as possible, including the title of the document and the date it was filed. (See rules 8.120(a)(4), 8.155(a)(3).)

A request to augment the reporter's transcript must describe the nature of the oral proceedings. The date, time, judge's name, and reporter's name (with CCSR number if available) should be provided, along with a citation to the portion of the clerk's transcript and/or reporter's transcript that refers to the requested proceeding. (See Cal. Rules of Court, rules 8.130(a)(4), 8.155(a)(3).)

c. Explanation of need for materials [§ 3.20]

The request must include a brief statement of why the augmentation is necessary or relevant to the appeal. (See Cal. Rules of Court, rules 8.155, 8.50, 8.54, 8.340; *People v. Hagan* (1962) 203 Cal.App.2d 34, 39-40 [defendant not entitled to augmentation of record in absence of showing of good cause].) It should describe the general issue to

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<sup>20</sup>See ADI news alerts of January 14 and February 4, 2011. ([http://www.adi-sandiego.com/news\\_alerts.html](http://www.adi-sandiego.com/news_alerts.html).)

<sup>21</sup>The rule does not require the copy to be certified by the superior court clerk, although it is always proper to ask for a certified copy.

which the augmented record relates and demonstrate, with references to the present record when available, that the material to be augmented was before the superior court judge. For example, a request might refer to court minutes showing denial of a challenge to a juror for cause in seeking augmentation of the reporter's transcript to include the jury voir dire, or cite to the reporter's transcript to show the trial court considered a Penal Code section 1203.03 prison diagnostic study.

d. Concurrent request for extension of time [§ 3.21]

If a supplemental transcript will have to be prepared, delay in filing the brief can be anticipated. Counsel's request to augment the record should therefore include or be accompanied by a request to extend time to "30 days after the supplemental record is filed"; court policy may vary on whether the requests should be separate or combined. If the requests are combined, the *title* of the combined document should clearly indicate both types of requests. (See also § 3.15, *ante*, and § 3.35, *post*.)

e. Formal requirements [§ 3.22]

A sample is on the ADI website.<sup>22</sup> An augmentation request must comply with rule 8.54 of the California Rules of Court, on motions. It must be on letter sized paper (8 ½" x 11") with a caption. It should not be on numbered pleading paper. The filing requirements include:

- File the original plus three copies with the Court of Appeal (rule 8.44(b)(4));
- Include a self-addressed, stamped envelope for a copy of the order ruling on the request (see rule 8.50(c));
- Show proof of service (rules 8.25(a), 8.54(a)(1)); and
- Include the name, address, telephone number, and State Bar number of counsel on the cover or, if no cover, the first page of the document (rules 8.204(b)(10)(D), 8.40(c)).

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<sup>22</sup><http://www.adi-sandiego.com/PDFs/augment.pdf>

f. Changes in judgment or other new orders made after record is certified [§ 3.23]

If, during the pendency of the appeal and after the record is certified, the trial court amends or recalls the judgment or makes any new order in the case (such as an order affecting the sentence or probation), the superior court clerk must send copies of the amended abstract of judgment or new order and related proceedings, to the reviewing court and the parties as an augmentation of the record on appeal. (Cal. Rules of Court, rule 8.340(a).) In practice, it is easy for clerks to overlook this rule; appellate counsel should keep in close touch with the client and trial counsel to find about such developments and remind the superior court clerks of their duty. (Although rule 8.340(a) speaks of the additional record as an “augmentation,” the requirement of adding it to the appellate record is automatic, without court order. A rule 8.340(b) correction request, rather a rule 8.340(d) augment request, should therefore be sufficient to remind the clerks. See § 3.16, *ante*.)

3. Combining requests for correction and augmentation [§ 3.24]

If both an augmentation and correction of the record are needed, in at least some districts all of the items should be included in a single augmentation request; a separate California Rules of Court, rule 8.340(b) letter is not necessary. (The assigned staff attorney should be consulted for local policy on this matter.)

E. Getting Exhibits Before the Reviewing Court [§ 3.25]

Exhibits are part of the record under California Rules of Court, rule 8.320(e) and need not be augmented into the record. Unless an exhibit is included in the clerk’s transcript, however, the court will not have physical access to it. If counsel wants the court to see it, the exhibit must affirmatively be brought before the court.

Counsel have a professional responsibility to view exhibits that are potentially critical to the appeal. In some circumstances a project staff attorney can view exhibits on behalf of a panel attorney and make copies. The assigned staff attorney can provide guidance on the procedures for viewing exhibits.<sup>23</sup>

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<sup>23</sup>See July 2003 ADI newsletter article on viewing exhibits, ages 4-7 at: [http://www.adi-sandiego.com/newsletters/2003\\_july.pdf](http://www.adi-sandiego.com/newsletters/2003_july.pdf)

1. Attachment to brief [§ 3.26]

A copy of some exhibits may be obtained from trial counsel. Certain exhibits, typically documentary exhibits on letter size paper, may be copied by the clerk if necessary. Copies of exhibits may be attached to a brief if the attachments do not exceed a total of 10 pages, but the presiding justice may permit a longer attachment for good cause. (Cal. Rules of Court, rule 8.204(d).) Exhibits incapable of being copied must be transmitted under rule 8.224. (See § 3.27, *post*.)

2. Transmission under rule 8.224 [§ 3.27]

Counsel may request an exhibit be transmitted to the court under rule 8.224,<sup>24</sup> which describes the formal method to have exhibits transmitted to the Court of Appeal. (Cal. Rules of Court, rule 8.320(e); see also rule 8.407(f) [juvenile cases].) The court may also order transmission on its own under rule 8.224. Some courts may prefer other times and methods of transmission; the assigned staff attorney can inform counsel of local variations.

F. Agreed and Settled Statements and Motion for New Trial [§ 3.28]

1. Agreed statement [§ 3.29]

Agreed statements are used, by mutual consent of the parties, in lieu of a normal record or part of the record. They are permitted by California Rules of Court, rule 8.344 in criminal cases (e.g., *People v. One 1964 Chevrolet Corvette Convertible* (1969) 274 Cal.App.2d 720) but are rare. An agreed statement must conform to rule 8.134, which prescribes contents and procedures, except for the special filing requirement set out in rule 8.344.

2. Settled statement [§ 3.30]

Settled statements replace unavailable parts of the record. The procedures for obtaining a settled statement are set forth in California Rules of Court, rule 8.346:

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<sup>24</sup>Some courts may prefer other times and methods of transmission; counsel should ask the assigned staff attorney about local variations. Some courts provide a form for requesting exhibits.

**(a) Application**

As soon as a party learns that any portion of the oral proceedings cannot be transcribed, the party may serve and file in superior court an application for permission to prepare a settled statement. The application must explain why the oral proceedings cannot be transcribed.

**(b) Order and proposed statement**

The judge must rule on the application within five days after it is filed. If the judge grants the application, the parties must comply with the relevant provisions of rule 8.137, but the applicant must deliver a proposed statement to the judge for settlement within 30 days after it is ordered, unless the reviewing court extends the time.

**(c) Serving and filing the settled statement**

The applicant must prepare, serve, and file in superior court an original and three copies of the settled statement.

A settled statement is used to ensure the record on appeal conforms to the actual proceedings in the trial court. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 585; see also *People v. Pinholster* (1990) 1 Cal.4th 865, 922 [settled statement of unreported bench conferences between court and counsel].) It may not be used to change the evidence – e.g., to improve on the quality of a sound recording introduced below. (*People v. Anderson* (2006) 141 Cal.App.4th 430, 440-441; see also *People v. Tuilaepa, supra*, at p. 585 [settlement, augmentation, and correction process does not allow parties to create proceedings, make records, or litigate issues they neglected to pursue earlier].)

The settlement process is typically initiated in the superior court. Rules 8.346 and 8.137, as outlined above, govern. (See also rule 8.407(d) (juvenile rule), which refers to rules 8.344 and 8.346.) But an alternative route is available in the Court of Appeal. A party may move to have the record corrected under rule 8.340(c), as provided under rule 8.155(c)(1) & (2). (See rule 8.410(b)(1) (juvenile rule), which refers to rule 8.155.) The correction can be also done by stipulation. (Rule 8.155(c)(1).) Under rule 8.155(c)(2), the reviewing court may order the superior court to settle disputes about omissions or errors in the record.

3. Motion for new trial under Penal Code section 1181, subdivision 9  
[§ 3.31]

The use of a settled statement is typically confined to the loss of a comparatively small portion of the reporter’s transcript of matters heard before the trial court alone. The loss of a significant portion of the record could be cause for filing in the reviewing court a

motion for new trial under Penal Code section 1181, subdivision 9. (*In re Stephen B.* (1979) 25 Cal.3d 1; see *People v. Cervantes* (2007) 150 Cal.App.4th 1117.) If the appeal can be resolved fairly without the transcript, a new trial is not in order. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1381-1382; *People v. Pinholster* (1992) 1 Cal.4th 865, 921-922, and cases cited.)

### III. REQUESTS FOR EXTENSION OF TIME [§ 3.32]

Requests for extension of time in criminal appeals are governed by California Rules of Court, rules 8.50, 8.60, 8.63, and 8.360(c)(4). Extensions are used primarily for the appellant's opening brief and respondent's brief and sometimes for the reply brief. They are not available for petitions for rehearing or review, although relief from default can be sought. (Rules 8.268(b)(4) & (c), 8.500(e)(2).) Counsel should note that extension requests must be received by the clerk's office on or before the due date; unlike briefs or certain petitions, they are not considered timely if merely mailed by that date. (Rule 8.25(b).<sup>25</sup>)

#### A. Number of Extensions [§ 3.33]

In most criminal cases, one or two 30-day<sup>26</sup> extensions for filing the appellant's opening brief are fairly routinely granted, although counsel should consult the assigned staff attorney for current local policies. The courts may entertain more than two extensions, especially in very long record cases, but counsel must specify with particularity the need for additional time. (See § 3.34, *post.*)

If an extension has not been granted and no opening brief is filed on the due date, the court will issue a notice that if the brief is not filed within 30 days and counsel is appointed, new counsel may be appointed or, if counsel is not appointed, the case may be dismissed. (Cal. Rules of Court, rule 8.360(c)(5)(A).) In practice, an order relieving counsel for failure to file a brief is "without compensation"; the issuance of such an order puts the attorney's panel status in severe jeopardy. If the late brief is the respondent's, the

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<sup>25</sup>The mail filing rule applies to priority or express mailing of a brief, petition for rehearing, answer to a petition for rehearing, petition for review, answer to a petition for review, or reply to an answer to a petition for review. (Rule 8.25(b)(3).)

<sup>26</sup>On occasion, when counsel knows that 30-day extensions will be inadequate because the case has a very long record, extensions may be requested in larger increments.

notice will say the case may be decided on the basis of the record, the appellant's opening brief, and argument by the appellant. (Rule 8.360(c)(5)(B).) The court may impose the specified sanction at the appropriate time. (Rule 8.360(c)(6).)

B. Grounds for Extension [§ 3.34]

Extensions of time will be granted only upon a showing of good cause. Acceptable reasons for requiring more time are illustrated in California Rules of Court, rule 8.63(b), and include such things as work on other appointed appeals (case names and numbers should be listed), length of the appellate record, or the number and complexity of issues. *A general "press of business" excuse is not acceptable.* The court's policy is to require special justification for more than two extensions or for extensions that appear excessive given the special needs of the case (for example, fast-track cases under rule 8.416 and time-sensitive ones).

Counsel must not give as an excuse that a *Wende-Anders* brief<sup>27</sup> is contemplated or that ADI is reviewing the record for that purpose. Such a statement tends to disparage any issues ultimately raised. Similarly, if counsel needs time to explain to the client potential adverse consequences from pursuing the appeal, the existence and nature of such consequences should not be mentioned. Other prejudicial matters might include time spent looking for a fugitive client (could lead to dismissal of appeal); difficulties in dealing with client (could disparage client); and numerous other situations. If it is necessary to use some detail to support the amount of time required for a potentially prejudicial matter, counsel may put it in a confidential memo to ADI.

In all extension requests counsel should advise the court in simple terms of the progress made toward preparation of the brief. Counsel should use discretion and not go into great detail regarding illnesses or other personal circumstances.

C. Extensions Pending Augmentation or Correction of the Record [§ 3.35]

If an augmentation may delay the brief, the request to augment the record should include or be accompanied by a request for an extension of time to, for example, "30 days after the supplemental record is filed." Court policy may vary on whether the requests

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<sup>27</sup>A *Wende-Anders* brief is filed when counsel can find no arguable issues. (*People v. Wende* (1979) 25 Cal.3d 436; see also *Anders v. California* (1967) 386 U.S. 738.) Such briefs are discussed in more detail in § 1.24 et seq. of chapter 1 of this manual, "The ABC's of Panel Membership: Basic Information for Appointed Counsel," and § 4.73 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection."

should be separate or combined. If the requests are combined, the *title* of the combined document should clearly indicate both types of requests. (See § § 3.21, 3.24, *ante.*)

Because a California Rules of Court, rule 8.340(b) letter request is directed to the superior court and no action is required by the appellate court, a rule 8.340(b) letter request cannot be combined with a request to extend time, but counsel can send the Court of Appeal a separate extension request and use the pending record correction as a reason for needing it. Some courts grant an extension request until a certain number of days after the filing of the corrected record; others require periodic extension requests while the corrected record is being compiled (although the correction rarely takes more than a month).

#### D. Contents and Form of Extension Request [§ 3.36]

A sample form is on the ADI website.<sup>28</sup> This form is the preferred format for extension requests, at least in the Fourth Appellate District. It includes the present and proposed due dates; the number of previous requests; previous notice, if any, under California Rules of Court, rule 8.360(c)(5); the dates counsel was appointed and the record was filed; and the reasons for extending time.

Important filing requirements under the California Rules of Court include these steps:

- File with the Court of Appeal an original and one copy, plus copies for the appellate project, opposing counsel (usually, the Attorney General), and all other parties involved in the appeal (such as co-appellants). (Rule 8.44(b)(7).)
- Show proof of service on opposing counsel and any other parties involved in the appeal. (Rules 8.25(a), 8.50(a).)
- Include self-addressed stamped envelopes for oneself, opposing counsel, and all other parties. (Rule 8.50(c).)<sup>29</sup>

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<sup>28</sup> <http://www.adi-sandiego.com/PDFs/extension.pdf>

<sup>29</sup>In some districts such as the Fourth, the Court of Appeal may forward its ruling on the motion to the Attorney General and the appellate project in its daily packet to each, and therefore no prepaid, preaddressed envelope to those entities is required. (Counsel should consult the district project for local practices.) If the district attorney instead of

- Include the name, address, telephone number, and State Bar number of counsel on the first page of the document. (Rules 8.204(b)(10)(D), 8.40(c).)

The court's order will typically be stamped directly on the request.<sup>30</sup> One copy will be mailed back to counsel in the envelope counsel has provided; the court will forward the additional copies to opposing counsel, the appellate project, and any other parties involved in the appeal. Counsel may also monitor the Court of Appeal website for the order.<sup>31</sup>

#### IV. RELEASE PENDING APPEAL [§ 3.37]

The California Constitution provides for the right to bail subject to specified exceptions. (Cal. Const., art. I, § 12.) The applicable statutory provisions for release pending appeal are Penal Code sections 1272 and 1272.1, discussed in § 3.38 et seq., *post.*) Proceedings in the appellate court after unsuccessful application in the trial court are governed by California Rules of Court, rule 8.312.

Although release pending appeal is not common, under some circumstances appellate counsel may have an obligation to seek it or assist the client or trial counsel in doing so. Indeed, in some cases it may be crucial to preserve even the possibility of meaningful appellate relief. (See § 1.30 et seq. of chapter 1, "The ABC's of Panel Membership: Basic Information for Appointed Counsel," on methods of ensuring timely relief.)

Money bail is one possible method to effect release on appeal. The courts may impose alternative conditions to assure a defendant's presence at all necessary proceedings. (*People v. Overstreet* (1986) 42 Cal.3d 891, 898; *In re Pipinos* (1982) 33 Cal.3d 189, 192, fn. 1.)

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the Attorney General is representing the People, a prepaid envelope addressed to the district attorney is required under rule 8.50(c).

<sup>30</sup>In the Fourth Appellate District, Division Two, for rulings on second and subsequent extension requests, the court issues its own separate order.

<sup>31</sup><http://appellatecases.courtinfo.ca.gov/index.html> Some older cases and some that require confidentiality may not be posted.

Release pending appeal may also be sought when the client is ordered to serve time in county jail as a condition of probation. (*People v. McNiff* (1976) 57 Cal.App.3d 201, 205.)

A. Standards [§ 3.38]

1. Eligibility for release [§ 3.39]

Penal Code section 1272 governs eligibility for release pending appeal:

After conviction of an offense not punishable with death, a defendant who has made application for probation or who has appealed may be admitted to bail:

1. As a matter of right, before judgment is pronounced pending application for probation in cases of misdemeanors, or when the appeal is from a judgment imposing a fine only.
2. As a matter of right, before judgment is pronounced pending application for probation in cases of misdemeanors, or when the appeal is from a judgment imposing imprisonment in cases of misdemeanors.
3. As a matter of discretion in all other cases, except that a person convicted of an offense subject to this subdivision, who makes a motion for release on bail subsequent to a sentencing hearing, shall provide notice of the hearing in the bail motion to the prosecuting attorney at least five court days prior to the hearing.

Release pending appeal is thus at the discretion of the court in most felony cases. (Pen. Code, § 1272, subd. 3.)

There are exceptions to the eligibility provisions of these sections. For example, convicted felons who have been placed on a “parole hold” are not entitled to release pending appeal even though the alleged offense triggering the hold is a bailable offense, because the Board of Parole Hearings has exclusive jurisdiction over parolees. (Pen. Code, § § 3040, 5077; *In re Law* (1973) 10 Cal.3d 21, 24-25; see also *In re Fain* (1983) 145 Cal.App.3d 540, 548.) Juvenile offenders also are not entitled to release pending appeal on the theory that juvenile court procedures contain adequate substitutes for bail. (Welf. & Inst. Code, § 628 et seq.; *In re Talbott* (1988) 206 Cal.App.3d 1290, 1293; *Aubry v. Gadbois* (1975) 50 Cal.App.3d 470, 473-475.)

2. Considerations for court in exercising discretion whether to grant release pending appeal [§ 3.40]

In *In re Podesto* (1976) 15 Cal.3d 921, the California Supreme Court held that in exercising its discretion whether to grant release pending appeal, the superior court “may consider (1) the likelihood of the defendant’s flight, (2) the potential danger to society posed by the defendant’s release, and (3) the frivolousness or lack of diligence in defendant’s prosecution of his appeal.” (*Id.* at p. 933.) Penal Code section 1272.1 incorporates the standards set out in *Podesto* and *In re Pipinos* (1982) 33 Cal.3d 189.

Penal Code section 1272.1 also requires the court to include a brief statement of reasons in support of its order granting or denying a motion for release pending appeal, so that an appellate court can determine whether discretion was properly exercised. (See *In re Christie* (2001) 92 Cal.App.4th 1105, 1107.) “The statement need only include the basis for the order with sufficient specificity to permit meaningful review.” (Pen. Code, § 1272.1, subd. (c).) *In re Podesto* (1976) 15 Cal.3d 921 and *In re Pipinos* (1982) 33 Cal.3d 189 provide guidance in interpreting this requirement. (See, e.g., *In re Hernandez* (1991) 231 Cal.App.3d 1260, 1262.)

a. Defendant is not likely to flee [§ 3.41]

Subdivision (a) of Penal Code section 1272.1 codifies the first *Podesto* requirement. The defendant must show by clear and convincing evidence that he or she is not likely to flee while released.

In determining whether the defendant is likely to flee the court must consider such factors as:

- The ties of the defendant to the community, including employment, duration of residence, family attachments, and property holdings. (Pen. Code, § 1272.1, subd. (a)(1).)
- The defendant’s record of appearance at past court hearings or of flight to avoid prosecution. (Pen. Code, § 1272.1, subd. (a)(2).)
- The severity of the sentence. (Pen. Code, § 1272.1, subd. (a)(3).)

b. Defendant poses no danger [§ 3.42]

Under subdivision (b) of Penal Code section 1272.1, the defendant must show by clear and convincing evidence the release would not present a danger to any other person or to the community. In evaluating this matter, the court must consider, among other factors, whether the crime for which the defendant was convicted was a violent felony as defined under Penal Code section 667.5, subdivision (c).<sup>32</sup>

c. Appeal is good-faith and substantial [§ 3.43]

The defendant must demonstrate the appeal is not for the purpose of delay and raises a substantial legal question which, if decided in the defendant's favor, is likely to result in a reversal. (Pen. Code, § 1272.1, subd. (c).) Under subdivision (c) a "substantial legal question" is defined as "a close question, one of more substance than would be necessary to a finding that it was not frivolous." (See, e.g., *People v. McGuire* (1993) 14 Cal.App.4th 687, 702-703 [superior court acted within its discretion when it determined appeal presented a substantial legal question].) In making this assessment, the court is not required to determine whether it committed error. (Pen. Code, § 1272.1, subd. (c).)

B. Procedures [§ 3.44]

1. Initial application in superior court [§ 3.45]

A motion for release pending appeal or for a reduction of bail on appeal must be made to the superior court. (Cal. Rules of Court, rule 8.312(b).) If the motion is made after the sentencing hearing, the defendant must provide notice to the prosecution at least five court days before the hearing. (Pen. Code, § 1272, subd. 3.)

In most cases, trial counsel is in the best position to make the motion in the superior court. Trial counsel is most familiar with the facts of the case as well as other matters, such as whether the trial court might be favorably disposed to grant a motion for

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<sup>32</sup>Conviction of a violent felony is only one factor the court may use to determine whether the defendant poses a danger to the safety of others or the community. (*In re Hernandez* (1991) 231 Cal.App.3d 1260, 1261-1264 [writ petition seeking bail pending appeal denied where defendant, convicted of possessing for sale controlled substances and maintaining place where drugs were sold, did not show by clear and convincing evidence she was not a danger to community].)

release pending appeal. Also, trial counsel will most likely be geographically close to the trial court.

However, the appellate attorney may be helpful in providing an opinion that a “substantial legal question” may be presented on appeal. If a motion for release pending appeal is clearly indicated and trial counsel will not or cannot make the motion, appellate counsel should file the motion in the superior court.

## 2. Application in the appellate court [§ 3.46]

If dissatisfied with the superior court’s decision on the request for release pending appeal, the defendant may apply to the Court of Appeal. It must include a showing that the defendant sought relief in the superior court and the court unjustifiably denied the application or set bail so high as to amount to a denial of the motion. (Rule 8.312(b); see *People v. Remijio* (1968) 259 Cal.App.2d 12, 13 [high bail was denial of due process].) The application must be served on the district attorney and Attorney General. (Cal. Rules of Court, rule 8.312(c).) Normally an application for release pending appeal is made by motion, but a petition for writ of habeas corpus can also serve that function. (E.g., *In re Pipinos* (1982) 33 Cal.3d 189, 196-197; see § 8.55 of chapter 8, “Putting on the Writs: California Extraordinary Remedies.”)

When the decision to grant release pending appeal is matter of a discretion (Pen. Code, § 1272, subd. 3), that decision is reviewed under an abuse of discretion standard. (*In re Christie* (2001) 92 Cal.App.4th 1105, 1107; *In re Hernandez* (1991) 231 Cal.App.3d 1260, 1262, 1264.)

The reviewing court may grant temporary release pending its ruling on the application for release during appeal. (Cal. Rules of Court, rule 8.312(d); e.g., *In re Fishman* (1952) 109 Cal.App.2d 632, 633.)

## C. Considerations in Deciding Whether To Seek Release Pending Appeal [§ 3.47]

Determining whether an application for release pending appeal is appropriate is not a mechanical process, but requires sound professional judgment. Considerations include the legal merits of the motion and the client’s individual circumstances and wishes.

One factor is the likelihood of success in seeking release, given the statutory criteria and the facts in the particular case.

Counsel must also consider the date the client is likely to be released from custody.<sup>33</sup> One of the main reasons for seeking release on appeal is to safeguard the possibility of meaningful relief for the client in time-sensitive cases and avoid the possibility the client might end up serving “dead” time – custody in excess of the lawful sentence – in the event of a favorable result on appeal. This might happen, for example, if the sentence is short, a reduction in sentence is probable, or substantial additional credits may be ordered.<sup>34</sup>

If counsel determines release might be appropriate, counsel should consult with the client and explain the possible benefits and liabilities of seeking release. The client may want to post a bond or ask counsel to seek release on other conditions. (See, e.g., *In re Podesto* (1976) 15 Cal.3d 921, 925, fn. 1.)

Release pending appeal is not necessarily desirable in every situation, even if it is theoretically available. If the chances for relief are not strong, the client is often well advised to continue serving the term of imprisonment pending appeal, rather than facing the disruption of returning to confinement after affirmance of the judgment on appeal or the financial burden of posting bail. The decision to seek release should be made by the *client*, after full and informed consideration of the matter.

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<sup>33</sup>As a preliminary step during the initial review of the case following appointment, especially when the sentence is relatively short, appellate counsel should determine the client’s expected release date and calculate how that might be affected by a favorable ruling on appeal.

<sup>34</sup>If counsel determines the case might indeed be time-sensitive, a number of options can be considered, in addition to or instead of release pending appeal. This topic is covered in § 1.30 et seq. of chapter 1, “The ABC’s of Panel Membership: Basic Information for Appointed Counsel.”