

NOVEMBER 2018 — ADI NEWS ALERT

This alert¹ discusses these matters:

[Augment request deadlines](#): 40 days after the record is filed for criminal cases and 15 days after the record for dependency cases.

[Augment for 1368 transcript: state whether sealed by trial court.](#)

[November 8 MCLE seminar/webinar on Division One practice now expanded](#). Presiding Justice Judith McConnell and Managing Attorney Marsha Amin will now be joined by Justice Patricia Guerrero and Assistant Clerk/Executive Officer Brandon Henson. Pizza for in-person attendees.

[New laws signed September 30.](#)

- [SB 1391](#) – district attorney authority to transfer cases charging listed serious offense when defendant was 14 or 15 at time of offense.
- [SB 1393](#) – authority of trial court to strike serious felony prior using Penal Code section 1385.
- [Making sure case is still on appeal on January 1, 2019](#). Division One is granting motions to recall the remittitur in cases where a certiorari petition would have kept the case on appeal by January 1 but was not filed.

Augment request deadlines

Administrative Presiding Justice Judith D. McConnell recently called to our attention an uptick in the incidence of augment requests violating the deadlines set by all three divisions: 15 days after the record is filed in dependency cases and 40 days after the record is filed in other cases. Alternatively, the date runs from the appointment order, if it is later than the record filing.

¹As always, panel attorneys are responsible for familiarizing themselves with all ADI news alerts and other resources on the ADI website.

This is not a new policy, and failure to honor it is irritating to the court, thus putting counsel at an unnecessary disadvantage. The court understands counsel may not be in a position to start full record review or briefing immediately on receiving the record, but it does expect counsel at least to look through the record promptly for any needed augments or corrections.

Augment for 1368 transcript: state whether sealed by trial court

In a request to augment for a Penal Code section 1368 transcript (competence to stand trial), counsel should state affirmatively whether the trial court ordered the transcript sealed or otherwise designated the proceedings confidential. This statement allows the appellate court itself to make such orders in appropriate cases and therefore helps protect the client's interests in confidentiality.

November 8 seminar/webinar on Division One practice, presented by Presiding Justice McConnell and Managing Attorney Marsha Amin, with newly announced guests Justice Patricia Guerrero and Assistant Clerk/Executive Officer Brandon Henson

Presiding Justice Judith McConnell and Managing Attorney Marsha Amin are scheduled to discuss practice in Division One on Thursday, November 8, 12:00-1:00. This week we were told we would have two additional guests – the court's most recent Associate Justice, [Patricia Guerrero](#), and Assistant Clerk/Executive Officer Brandon Henson.

We have given them questions submitted by panel and staff attorneys. The program will be broadcast via webinar, but not recorded for later self-study credit.

Panel attorneys planning to attend in person must RSVP by **November 7, 3:00**, since we will be serving pizza and will need to gauge the correct amount to order. To RSVP, send an email to Patricia Ihara at pmi@adi-sandiego.com. Space is limited.

New laws signed September 30

ADI analyses of SB 1391 and SB 1393

In the most recent news alert (October 2018), we mentioned some new statutes signed on September 30 by the Governor and going into effect on January 1, 2019. Our [Recent Changes in the Law](#) page under [Statutes](#) now offers these analyses:

[SB 1391](#) restricts district attorney's ability to seek transfer of cases from juvenile court to adult court if defendant was 14 or 15 when a serious offense was committed.

[SB 1393](#) amendments to Penal Code sections 667, subdivision (a) and 1385 will allow judges to strike serious prior conviction enhancements.

ADI's analysis of SB 1437 (felony murder, natural and probable consequence murder, remedies) is still a work in progress.

Making sure case is still on appeal on January 1, 2019

These bills become effective January 1, 2019. (Cal. Const., art. IV, § 8(c).) The ameliorative changes of SB 1391 and SB 1393 are very probably available to clients whose cases are not yet final as of that date. (See *In re Estrada* (1965) 63 Cal.2d 740.) Finality occurs when certiorari in the U.S. Supreme Court is either denied or is no longer available. (*People v. Vieira* (2005) 35 Cal.4th 264, 305-306, citing *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5.)

Cases with a petition for review denied after October 3, 2018, automatically will be non-final on January 1, 2019, given the 90-day period for filing a certiorari petition.² An actual petition is unnecessary. If the case is not now final but will become final before January 1, counsel should consider a certiorari petition filed late (but not *too* late!) in the period of cert availability.³ It requires the approval of the executive director.

Alternatively, Division One has been granting motions to recall the remittitur to re-open the appeal. *This is available only when a cert petition would have kept the appeal alive through January 1, 2019, but was not filed.*⁴

²The 90 days runs from the date of the *denial of review by the California Supreme Court*. The issuance of a remittitur is not relevant in determining the due date of a certiorari petition. ([Rules of the Supreme Court of the United States](#), rule 13.)

³Filing too early runs the risk the court will deny the cert petition before January 1, 2019. Of course, filing too late defeats the purpose of filing altogether.

⁴By our math, if the petition for review was denied no earlier than October 3, 2018, the case would qualify for a recall motion. Earlier review denials probably would not. Counsel may be able to persuade the court, however, to take into consideration the time the Supreme Court would require actually to rule on the petition.

Divisions Two and Three have not adopted this practice, to our knowledge, but we can try. It's cheaper to file a recall motion than a cert petition, given all the special requirements and components for the latter. (See [ADI Manual](#), § 7.113 et seq.) If you are unsure the court will grant the recall motion, take care to file the motion sufficiently in advance of your finality date to allow time for a follow-up cert petition.