

APRIL 2008 – ADI NEWS ALERTS II

by

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This news alert covers a number of important matters. As always, please review carefully; counsel are responsible for being familiar with all matters covered in e-mail alerts, newsletters, and other information made available to the panel.¹ The topics covered here are:

- New information sheet for counsel to send to client when counsel has decided not to file a petition for review.
- Reminder: Promptly notify opposing counsel (and any other counsel involved in the appeal) upon deciding a brief or issue is to be withdrawn or substantially modified.
- Reminder: Include individual counsel's or judge's name at bottom of envelope when mailing to a public office, but address the document to the office itself.
- Importance of looking at Ninth Circuit decisions on federal habeas corpus.
- Division Two matters:
 - Including police reports in clerk's transcript, confidential envelope.
 - Transfer of certain criminal cases to Division Three.
 - Notifying court promptly of associate counsel at oral argument.
 - Providing copies of pro per briefs to counsel.
 - Separately listing documents in augment requests.
- Division Three changes in handling of fast-track cases: augments.
- ABA standards on sentencing youthful offenders.

¹Past alerts and newsletters are on ADI's website.
(http://www.adi-sandiego.com/news_alerts.html and
http://www.adi-sandiego.com/news_newsletters.html.)

New information sheet for counsel to send to client when counsel has decided not to file a petition for review

When counsel has decided not to file a petition for review,² we suggest sending the client information on how to do a pro per petition. To help with this, we have replaced our former multiple information sheets with a single, all-purpose one.³ (Attached.) It is written to be easily understood and user-friendly.

Counsel should always help the client by customizing the information. For example:

- *Time frame:* Give the client the deadline. Be sure to tell the client or modify the information sheet if exceptions to the general rules set forth on the sheet apply. For example, the time for filing a petition for review is geared to finality of the decision as to the Court of Appeal. The usual rule that a decision is final 30 days from the filing of the opinion does not apply if the court certifies the case for publication after the opinion is filed, or modifies the judgment, or grants rehearing, or denies a writ petition without an order to show cause (except that a habeas corpus petition decided on the same day as the appeal is final after 30 days).⁴ (Rules 8.264(b)(2)(A), (b)(4), (b)(5), (c)(2); 8.366; 8.474; see ADI Criminal Appellate Practice Manual, §7.29 et seq.)
- *Names and addresses:* Provide up front, with the information sheet, the names and addresses where required service copies are to be sent (opposing counsel, other parties' counsel on appeal, Court of Appeal, superior court). You should include the proof of service from the opening brief as a guide.
- *Exhausting state remedies:* If the petition is primarily for exhaustion purposes, to preserve an issue the client wants to raise on federal habeas corpus, remind the client a petition for review is necessary. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838.) Of course, if you think there is actually a reasonable possibility of federal relief, *you* should file the petition; exhaustion is a legitimate reason in itself. (See Cal. Rules of Court, rule 8.508, on abbreviated petitions filed solely to exhaust state remedies.)

²The ADI California Criminal Appellate Practice Manual, §7.46 et seq. discusses the criteria for making the decision whether to file a petition for review. (<http://www.adi-sandiego.com/manual.html>.)

³Forms are at http://www.adi-sandiego.com/practice_forms_motion.html.

⁴Realistically, the client will rarely have time to file a petition in the allotted 10 days when a decision becomes final immediately. Counsel should give any benefit of the doubt to filing it themselves in such circumstances.

If the client cannot afford to comply with all rule requirements, such as mailing the necessary number of filing or service copies, it may be possible to ask the Supreme Court for a waiver. Or it may sometimes be an appropriate and compensable expense for counsel to offer to do the mechanics of filing and/or service (but not to put counsel's name on the petition). Contact ADI first if the client asks for assistance.

Reminder: Promptly notify opposing counsel (and any other counsel involved in the appeal) upon deciding a brief or issue is to be withdrawn or substantially modified

Occasionally the attorney, after consultation with ADI, determines it is necessary to strike an opening brief and file a substitute, to withdraw a particular issue, to file a supplemental brief raising an additional issue, or to make substantial modifications in the way an issue is presented. For example, the issue raised may be untenable as framed but could be recast in another way to make it viable. Or counsel may decide an issue raised is not arguable and that it should be withdrawn or that a no-issue brief under *Wende, Sade C.*, etc., should have been filed. These decisions are usually totally appropriate.

Nevertheless, counsel should be cognizant of the fact that once the opening brief is filed, the opposing counsel will begin working on a response. If they do not know that the opening brief is going to be changed, they may spend fruitless time answering a non-issue. (The AG's office has called my attention to a couple of recent cases in which the AG had already written a respondent's brief before the motion to strike was made, because they did not know a substitute brief was coming.)

It is ADI's policy that, as a professional courtesy, you should *notify opposing counsel as soon as a decision is made* to move to strike a brief, withdraw an issue, or substantially modify one. You also should notify other counsel involved in the appeal, such as counsel representing a co-appellant or a non-appealing minor. Do the same when you have decided to file a supplemental brief, because it may be more efficient for counsel to work on a case all at one time. You do not have to say why, or have the substitute brief or motion ready; just inform counsel of the decision.

Reminder: Include individual counsel's or judge's name at bottom of envelope when mailing to a public office, but address the document to the office itself

Gary Nichols of the San Diego Public Defender has asked us to remind attorneys to include the *trial deputy's name* at the bottom of the envelope when addressing that office's service copy of a brief. Apparently there have been a number of lapses in observing this procedure. Indeed, it is important to include that information for *all* mailings to public offices and courts where you know the name of the individual attorney or judge who handled or is handling the case. Here is what we said in a September 2005 alert:

When serving a brief on trial counsel in a public defender's office or district attorney's office or on the superior court, be sure to include the name of the individual attorney or judge involved in the trial. It is a time-consuming job for the clerks in those organizations to go back through closed records and try to identify the attorney or judge. Appellate counsel has the information right on the transcript and can do so much more efficiently. Please include this information on the proof of service, as well.

Nevertheless, please do not actually *address* the brief to that individual. Some district attorney offices, for example, want briefs routed to their appellate department, not their individual trial deputies. Address the brief to the *office* and state at the *bottom* of the envelope: "Trial [deputy or judge]: XXX." The office can then direct the brief as its internal practices dictate.

Importance of looking at Ninth Circuit decisions on federal habeas corpus

In a mailing earlier this month, we provided a memo on evaluating and selecting issues.⁵ In it we noted that attorneys need not give up prematurely on an issue merely because of some adverse authority, if there is a reasonable possibility another court, such as a federal court, will accept the issue. Panel attorney Rebecca Jones has made an excellent suggestion for following up on that point: "[C]ounsel needs to look at 9th circuit habeas cases to figure out whether an issue that appears to be meritless under California. Law will nonetheless lead to a reversal on federal habeas."

That is good general advice, as well. One of counsel's responsibilities is to federalize issues that may later be taken into federal court. (See ADI Manual, §§5.42 et seq., 9.71 et seq.) Staying current on federal habeas corpus law and researching the particular issue in Ninth Circuit cases are very important to fulfilling this responsibility and making a reasoned assessment of what issues can and should be federalized.

Division Two matters

Division Two has issued an order requiring clerks to include any police report offered as a factual basis for the plea in the clerk's transcript. The clerk is to place the report in an envelope marked "confidential." Inform staff attorney David Rankin or Lynelle Hee of any problems in compliance with this order. Certain information, such as names and addresses of potential witnesses not made available to the defendant at trial, may need to be redacted when the record is sent to the client. Check with trial counsel or ADI when in doubt.

⁵"To Brief or Not to Brief: Marginal Issues," April 2008, at <http://www.adi-sandiego.com/PDFs/Arguable%20issues%20memo.pdf> and <http://www.adi-sandiego.com/PDFs/April%202008%20News%20Alert.pdf>.

Division Two will be possibly be transferring eight criminal cases a month to Division Three to equalize workload. The Riverside superior court is still suffering from an overload of cases.

If a panel attorney intends to associate counsel for oral argument, notify the court as soon as possible. If the notice is necessarily last-minute, fax it.

The court's policy is for its clerk's office to copy and mail pro per briefs to counsel. Inform staff attorney David Rankin or Lynelle Hee of any problems.

Conclude augment requests with a list of documents requested. Do not just bury the requests in the text of the request. A checklist facilitates the clerk's preparation of the record and reduces errors.

Division Three changes in handling of fast-track cases

Division Three has announced two changes in policy to speed up dependency appeals:

- (1) When augments are granted, the reporter must certify the augmented record within 10 days of the order; and
- (2) Counsel requesting the augment will then have an EOT of 10 days after the augment is filed to file the brief, but this does not waive the 15 days of default time under rule 8.416(g).

Sentencing youthful offenders

In February 2008 the American Bar Association adopted a resolution concerning basic principles and procedures in sentencing youthful offenders.⁶ It was based on a report of the Criminal Justice Section. Both are attached to this alert. See also the recent study by Center for Families, Children & the Courts of the Administrative Office of the Courts, the staff agency that carries out the policies of the Judicial Council.⁷ These studies may be useful in appeals involving minors, such as juvenile delinquency adjudications, youthful offender commitments, and convictions of minors tried as adults in criminal court.

⁶http://www.abavideo.org/ABA496/media/pdf/hod_resolutions/105c.pdf . See also "Youth in the Criminal Justice System" Guidelines (Feb. 2002).
<http://www.abanet.org/crimjust/juvjus/jjpolicies.html#guidelines>.

⁷<http://www.courtinfo.ca.gov/jc/documents/reports/042508item7.pdf> .