

JANUARY 2008 – ADI NEWS ALERTS

by Elaine A. Alexander, Executive Director

Augmentation requests: be *specific*

The court has called to our attention some augmentation requests that are not sufficiently specific to give adequate guidance to the clerks or reporters preparing the additional transcripts. They use a copy of the request to identify the documents and transcripts needed for the augmented record. It is important to identify as specifically as possible the requested documents and hearing dates. It is recommended to include *a list of the documents and hearing dates* at the end of the augment request, indicating title and date filed. Doing so should reduce the possibility of omissions. Some counties have a high turnover in the clerk's office, and the clerks benefit from that level of detail and clarity.

Chapter 3 of the ADI Criminal Appellate Practice Manual outlines the necessities of record augmentation. (§3.12 et seq.; see rules 8.155(a) [general], 8.340(c) [criminal], 8.408(e) [juvenile], 8.416(d) [fast-track].) In a nutshell: Do the request as early as possible; do not wait until the case has already had multiple extensions. Be specific, as just explained, giving names of the judge, counsel reporter or titles of documents, exact dates, and other identifying information. (See rules 8.120(a)(4), 8.130(a)(4), 8.155(a)(3).) Explain the need for the additional record, pointing to references to it in the existing transcript where applicable and setting out the potential issues the record may support. An augmentation request may be combined with an extension of time request and/or a request for correction of omissions in the normal record.

Faxed extension requests: must check court website for order and send copy of request to ADI

As we have notified you, the courts will accept faxed requests for an extension of time. However, they will not send out written orders granting or denying them, except that Division Two will send orders *denying* the request and orders indicating “no further extensions.” The attorney must obtain information about the court's action online. It is important that the attorney send ADI a copy of the request, since otherwise we would have no way of tracking the court's orders.

Time and record completion problems: imperiling both the client *and* the attorney

Time and record completion problems have, for some reason, become more frequent recently. Please be aware that an attorney's panel standing and reputation with

the court are vitally affected by the attorney's attention to those matters. Few derelictions can cause greater harm to both the attorney and the client than failure to comply with deadlines and failure to obtain a record adequate to ensure all issues are identified and supported. And the combination of these two problems magnifies the dangers in each individually.

The ADI Criminal Appellate Practice Manual addresses these matters. Chapter 1, § 1.119 et seq. explains how they affect ADI evaluations of attorney performance. Chapter 3 covers both extension requests and, as already noted, record completion.

Scheduling of oral argument in Division Two: ask to trail to end of calendar if traveling from out of town

The ADI claims manual (http://www.adi-sandiego.com/claim_manual.html) requires attorneys to ask the court to change the calendar of oral argument, if necessary, in order to avoid overnight hotel costs. Unfortunately, the Court of Appeal in Division Two is unable to accommodate requests to move oral argument from the morning to afternoon calendar and vice versa. The court can, however, accommodate a request to trail the case to the end of the calendar. Division Two lists cases on the calendar in the order they will be called. If out of town counsel sees the case is one of the first scheduled to be called, he or she can write to the court and ask to trail the case to later in the morning. The court should be able to accommodate that request, but might not if for some reason one of the justices has to leave early. Panel attorneys who run into a scheduling difficulty should notify the assigned staff attorney and discuss options, such as an overnight stay.

Associate counsel: acceptable only in independent cases

Please be aware that the policy of the Appellate Indigent Defense Oversight Advisory Committee of the Judicial Council is that attorneys in assisted cases may not use associate counsel or law clerks. The assisted (including modified assisted) case period is used for training and evaluating the panel attorney's individual skills and needs for development. It is important we know the work is the attorney's own. Any rare exceptions must be approved by the executive director.

Sealing juvenile records

ADI staff attorney Jamie Popper recently has updated our juvenile delinquency article entitled "Representing a Minor on Appeal in a Juvenile Delinquency Case." The new version is available on our website in the section "ADI Juvenile Delinquency Handouts," which is located under the "Juvenile Appeals" tab.

(http://www.adi-sandiego.com/juvenile_delinquent_articles.html .) The purpose of the

article is to highlight some major distinctions between juvenile delinquency cases and adult cases. It is by no means exhaustive.

The updated article reminds attorneys to advise clients to petition to seal their records upon turning eighteen or five years after the termination of juvenile court jurisdiction. (Welf. & Inst. Code, § 781, subd. (a).) Minors in California must take action to seal their records. Given the severe consequences for sentencing in adult cases where the adult has a history of prior offenses, sealing a juvenile record can greatly benefit, and not sealing it can greatly harm, an individual. (See *T.N.G. v. Superior Court* (1971) 4 Cal.3d 767, 777 [explaining effect of juvenile court record sealing].) Therefore, it is important to advise clients about the right to seal their records, the importance of sealing their records, and the process for sealing their records. In most cases, such advice will be most appropriate in a final client letter.

The applicable statute for sealing records is Welfare and Institutions Code section 781, which requires record sealing if the court is satisfied the petitioner has been rehabilitated. Within the above-mentioned timelines, all individuals are eligible to seal their records, unless they were subject to a true finding for a Welfare and Institutions Code section 707, subdivision (b), offense committed after age 14. Petitioning for record sealing as soon as possible is generally in an individual's best interests because a juvenile record can no longer be sealed if the petitioner is convicted of an adult felony or misdemeanor of moral turpitude. A useful publication about sealing juvenile court records can be found on FDAP's website (<http://www.fdap.org/downloads/seminar-deliq/SealingJuvenileRecord.pdf>) and is appropriate to send to clients. Minors should contact the local public defender office and/or probation department for assistance in record sealing.

New Rules in the New Year

Happily, the changes to the California Rules of Court effective January 1, 2008, are far more restricted in scope than the massive renumbering we went through a year ago. Many are intended to be a clarification of existing rules. The provisions that most closely affect us include:

Deadline for amicus curiae briefs in Court of Appeal: A new provision is that an amicus curiae brief in the Court of Appeal is due 14 days after the reply brief is filed or due to be filed, whichever is earlier. The presiding justice may extend that time for good cause. (Rule 8.200(c)(1).)

Certificate of interested parties: An Advisory Committee comment to rule 8.208 and new subdivision (i)(1) of rule 8.490 clarify that a certificate of interested parties is not required for criminal, juvenile, family, or conservatorship appeals and prerogative writs.

Cross-appeals: A clarification intended to reflect existing provisions is that the rules on cross-appeals *extend* the time for filing a notice of appeal. A cross-appeal must be filed within 60 days of the judgment or 30 days (criminal cases) / 20 days (juvenile cases) from the mailing of the notification of the first appeal, *whichever is later*. (Rules 8.308(b), 8.400(e).)

Normal clerk's transcript: The transcript must include, not only jury instructions submitted in writing, but a cover page as required by rule 2.1055(b)(2), stating the party requesting each and the disposition of the request, and any written instructions given by court.

Sanctions: For the most part, rule 8.276 on sanctions applies to criminal appeals as well as civil ones, and to proceedings involving writs of mandate, prohibition, and certiorari. (Rules 8.366, 8.490(n).) An exception is that sanctions cannot be imposed for the taking of a frivolous criminal appeal. (Rules 8.276(a)(1), 8.366.)

Remittitur in habeas corpus and prerogative writ cases: A remittitur is required if the Court of Appeal issued an order to show cause (or alternative writ), but not if the petition was denied summarily. (Moved from rule 8.272(a)(2) to new rule 8.386 (habeas) and 8.499 (mandate, prohibition, certiorari); rule 8.272(b)-(d) continues to govern remittitur procedures in writ cases.)