

ADI NEWS ALERT

To: ADI Dependency Attorneys

From: Elaine A. Alexander, Executive Director

Date: May 12, 2008

Re: Corrections and Augments of Record on Appeal in Dependency Appeals

This alert addresses the issue of incomplete records in dependency appeals. We are bringing up this matter because ADI staff attorneys have noticed with troubling frequency that attorneys have failed to attempt to correct omissions in the record. This problem comes to our attention especially when a case is submitted for a *Sade C.* review without a complete record, but it occurs in briefed cases, as well.

The alert also offers guidance in dealing with the recent problem that Division One records routinely omit reporter's transcripts of hearings at which a continuance is granted.

Duties of appellate counsel

Appellate counsel have a duty to ensure the record on appeal is complete and adequate to identify and evaluate all arguable issues properly, to provide the necessary factual foundation for those issues, and to document the arguments with citations to the records. (*People v. Barton* (1978) 21 Cal.3d 513, 518-520.) Appellate Defenders' Criminal Appellate Practice Manual, chapter 3, provides an overview of this pre-briefing responsibility.¹

IMPORTANT: Although the ADI manual is nominally on "criminal" appellate practice, much of the information in it is also relevant to dependency appeals.² *Dependency counsel are responsible for reviewing and applying all pertinent material.*

¹<http://www.adi-sandiego.com/PDFs/Manual%20April%202008/Chapter%20Three%20-%20%20Prebriefing%20responsibilities.pdf>.

²Chapters 1 (ABC's for appellate counsel), 3 (record completion and extensions of time), 4 (issue spotting and evaluation), 5 (briefing), 6 (oral argument), and 7 (decisions and post-decision processes) are almost entirely applicable to dependency cases, and some parts of chapters 2 (appealable orders and notices of appeal) and 8 (California writs) are applicable to dependency cases. Only chapter 9 (federal habeas corpus) is addressed exclusively to criminal proceedings.

Review of record to ascertain completeness

As a first step, upon getting the record counsel should determine whether it is complete. This determination must be made swiftly, especially in fast-track cases, because correction and augmentation requests are due within 15 days from the date counsel receives the record.³ (Rule 8.416(d)(2).) Specifically, counsel should:

- Compare the minute orders in the clerk’s transcript with the reporter’s transcript to ascertain whether all of the hearings mentioned in the minutes are in the reporter’s transcript. If a hearing took more than a day, all sessions should be included.⁴
- Determine whether all parts of the normal clerk’s and reporter’s transcripts have been included. The normal record in juvenile appeals is prescribed by rule in 8.404(a) and (b), which is reproduced in the appendix to this memo.
- Get a rough fix on the issues likely to be raised on appeal and determine whether any matters not in the original record, whether part of the “normal” record or not, are needed to evaluate or argue these.

Completion of the record

A matter of terminology: A record is “corrected” to add a mistakenly omitted part of the *normal* transcript. It is “augmented” to add material *not* in the normal record. A *combined* (or alternative) correction-augment request is filed under the procedures for augmentation.

Correcting omissions from normal record

If part of the prescribed normal record is missing, counsel must act to correct the omission. In non-fast-track juvenile cases, this is governed by rule 8.408(e)(1); in fast-track cases by rule 8.416(d). Despite the mishmash of cross-references in these rules (reproduced in appendix), the procedures can be summarized simply:

- *Division Two and Three*: Send a correction letter to the superior court and serve a copy on the Court of Appeal.
- *Division One*: Send the request for correction to the Court of Appeal.

³All Division One and Three dependency appeals are fast-track under rule 8.416, as are Division Two terminations of parental rights. Other dependency appeals in Division Two are under rule 8.408.

⁴Division One apparently disagrees on continued hearings, as noted below. Until a definitive ruling from the Supreme Court, counsel should ask for such hearings in that court and all others.

Division One completion requests may be filed in the Court of Appeal on a special form for that purpose.⁵ This form may be used when the *only* thing asked for is a clear part of the normal record. A *combined* or *alternative* correction-augmentation request should be in a standard narrative format.⁶ (See next section.) Theoretically the Court of Appeal has no discretion to refuse a correction: rules have the force of law if not inconsistent with statute or the Constitution. (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1011.)

Augmentation

If counsel determines matters outside the normal record are needed, a request for augmentation filed in the Court of Appeal is required. (Rules 8.408(e)(2), 8.416(d)(1).) As discussed more fully in chapter 3 of the ADI Manual, the request must:

- *Be prompt.* In a fast-track case, it has to be filed within 15 days of the date counsel receives the record. (Rule 8.416(d)(2).)
- *Identify the exact transcripts needed.* The request should describe these 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. Be sure to include *a separate list* for the use of the clerk in preparing the augment.
- *Explain why the transcript is relevant to a potential issue on appeal.* Be as specific as possible. Cite to parts of the filed record that suggest the existence of additional relevant material, and/or check with the trial attorney about what happened on that date and mention that conversation in the request.

Special record problem currently being encountered in Division One

The problem of incomplete records has particular urgency in Division One of the Fourth Appellate District, where attorneys have noticed that reporter's transcripts of continuance hearings are routinely omitted from the appellate record. Apparently this is a matter of policy, not inadvertence or inadequate training of clerks: a juvenile court clerk has advised an attorney that the Court of Appeal has directed them to omit such hearings. This statement is corroborated by the fact the Court of Appeal routinely denies requests to correct and/or augment the record for such transcripts.

⁵http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv1/documents/not_inc_juv_rec.pdf.

⁶E.g., <http://www.adi-sandiego.com/PDFs/Augment%20Request2007.pdf>.

We are challenging the policy in one case in an interlocutory petition for review filed recently.⁷ *It is essential that counsel not passively accept this state of affairs* while the question of the right to these transcripts is being settled. This section offers guidance on how to deal with the matter proactively.

First, try to complete the record. If a continuance hearing is missing, file a request for “correction and/or augmentation” in Division One. In it, argue (a) this is part of the normal record within the meaning of rule 8.404 and so should have been included originally, and (b) in any event, “this hearing is necessary because [specify].” For example, “it is relevant to an issue that may be raised on appeal, namely, ____.” Or “matters were handled that may give rise to an issue on appeal such as ____, and therefore counsel has an obligation to examine the record.” Authorities on this matter are cited in chapter 3, § 3.1 of the ADI Manual and in the attached sample petition for review.

Second, if the effort is unsuccessful, consider challenging the ruling. Counsel has several alternatives here.

- If counsel cannot proceed at all on the opening brief without the record or thinks this may be a good test case, an interlocutory petition for review may be filed. (Rule 8.500(a); e.g., *People v. Gaston* (1978) 20 Cal.3d 476.) This is a relatively drastic step; *consult ADI first.*
- Counsel should refer to the absence of the record in the briefing, stating how it could have been useful in presenting the client’s case. This serves the purposes of (a) showing the continued relevance of the missing record and providing grounds for a later petition for review and (b) alerting the panel of three justices on the case to the individual justice’s denial of the requested transcripts (they might decide they need the record, after all).
- In appropriate cases, counsel should file a petition for review after the Court of Appeal opinion, arguing counsel did not have an adequate record for the appeal.⁸ (E.g., *People v. Silva* (1978) 20 Cal.3d 489.)

Finally, counsel should always consult with the assigned ADI staff attorney if any questions arise.

⁷Attached to this alert is a redacted copy of that petition.

⁸Counsel should not file a petition for review automatically in every case where the court has denied correction or augmentation, but needs to exercise critical judgment as to whether the client will potentially benefit and also ascertain whether the client *wants* to go on.

APPENDIX: SELECTED PROVISIONS OF THE CALIFORNIA RULES OF COURT

NORMAL RECORD

RULE 8.404. RECORD ON APPEAL

(a) Normal record: clerk's transcript

The clerk's transcript must contain:

- (1) The petition;
- (2) Any notice of hearing;
- (3) All court minutes;
- (4) Any report or other document submitted to the court;
- (5) The jurisdictional and dispositional findings and orders;
- (6) The judgment or order appealed from;
- (7) Any application for rehearing;
- (8) The notice of appeal and any order pursuant to the notice;
- (9) Any transcript of a sound or sound-and-video recording tendered to the court under rule 2.1040;
- (10) Any application for additional record and any order on the application; and
- (11) Any opinion or dispositive order of a reviewing court in the same case.

(b) Normal record: reporter's transcript

The reporter's transcript must contain:

- (1) Except as provided in (2), the oral proceedings at any hearing that resulted in the order or judgment being appealed;
- (2) In appeals from dispositional orders, the oral proceedings at hearings on
 - (A) Jurisdiction and disposition; and
 - (B) Any motion by the appellant that was denied in whole or in part; and
- (3) Any oral opinion of the court. . . .

CORRECTION AND AUGMENTATION

Non-fast-track cases (*Fourth District: Non-termination of rights dependency cases, Division 2 only*)

RULE 8.408. PREPARING, SENDING, AUGMENTING, AND CORRECTING THE RECORD

*** * *(e) Augmenting and correcting the record in the reviewing court**

- (1) Rule 8.340(a)–(b) governs augmentation of the record without court order.
- (2) On request of a party or on its own motion, the reviewing court may order the record augmented or corrected as provided in rule 8.155(a) and (c).

Fast-track cases (*Fourth District: All dependency cases, Divs. 1 and 2; terminations, Div. 2.*)

RULE 8.416. APPEALS FROM ALL TERMINATIONS OF PARENTAL RIGHTS; DEPENDENCY APPEALS IN ORANGE, IMPERIAL, AND SAN DIEGO COUNTIES

*** * *(d) Augmenting or correcting the record in the reviewing court**

- (1) Except as provided in (2) and (3), rule 8.155 governs any augmentation or correction of the record.
- (2) An appellant must serve and file any request for augmentation or correction within 15 days after receiving the record. A respondent must serve and file any such request within 15 days after the appellant's opening brief is filed.

RULE 8.155. AUGMENTING AND CORRECTING THE RECORD
(cross-referenced in rules 8.408(e)(2) and 8.416(d)(1))

(a) Augmentation

(1) At any time, on motion of a party or its own motion, the reviewing court may order the record augmented to include:

(A) Any document filed or lodged in the case in superior court; or

(B) A certified transcript—or agreed or settled statement—of oral proceedings not designated under rule 8.130. Unless the court orders otherwise, the appellant is responsible for the cost of any additional transcript the court may order under this subdivision.

(2) A party must attach to its motion a copy, if available, of any document or transcript that it wants added to the record. The pages of the attachments must be consecutively numbered, beginning with the number one. If the reviewing court grants the motion it may augment the record with the copy.

(3) If the party cannot attach a copy of the matter to be added, the party must identify it as required under rules 8.122 and 8.130.

(b) Omissions

(1) If a clerk or reporter omits a required or designated portion of the record, a party may serve and file a notice in superior court specifying the omitted portion and requesting that it be prepared, certified, and sent to the reviewing court. The party must serve a copy of the notice on the reviewing court.

(2) The clerk or reporter must comply with a notice under (1) within 10 days after it is filed. If the clerk or reporter fails to comply, the party may serve and file a motion to augment under (a), attaching a copy of the notice.

(c) Correction

(1) On motion of a party, on stipulation, or on its own motion, the reviewing court may order the correction or certification of any part of the record. . . .

RULE 8.340 AUGMENTING OR CORRECTING THE RECORD IN THE COURT OF APPEAL
(cross-referenced in rule 8.408(e)(1) for non-fast-track dependency cases)

(a) Subsequent trial court orders

(1) If, after the record is certified, the trial court amends or recalls the judgment or makes any other order in the case, including an order affecting the sentence or probation, the clerk must promptly certify and send a copy of the amended abstract of judgment or other order—as an augmentation of the record . . .

(2) If there is any additional document or transcript related to the amended judgment or new order that any rule or order requires be included in the record, the clerk must send this document or transcript with the amended abstract of judgment or other order. The clerk must promptly copy and certify any such document, and the reporter must promptly prepare and certify any such transcript.

(b) Omissions

. . . 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 to be 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 all those who are listed under (a)(1).