

## **DECEMBER 2009 – ADI NEWS ALERTS**

**By**

**Elaine A. Alexander, Executive Director**

This alert covers these topics:<sup>1</sup> save-the-date for the April 9 annual dinner next year (featured speaker: Justice Carlos Moreno of the California Supreme Court); telephonic oral argument in Division One; closure of Supreme Court's Los Angeles clerk's office; Paul Bell Memorial Fellowship recipients for 2009; continuing to preserve prior juvenile adjudications issues after *People v. Nguyen* (2009) 46 Cal.4th 1007; importance of signing up for automatic e-mail notification and regularly checking docket on court website; and pending changes to the ADI website.

### **Save the Date for the April 9 Annual Dinner and Supreme Court Justice Moreno**

We are honored to announce that Justice Carlos Moreno of the California Supreme Court has agreed to be the featured speaker at the ADI-Federal Defenders of San Diego, Inc., annual dinner. It is scheduled for Friday, April 9, 2010.

Because of our prominent speaker and the fact the event will be open to all members of the legal community, we anticipate a large turnout. So please be sure to save the date and send in your RSVP promptly when official invitations go out (at a time closer to the event).

### **Telephonic Oral Argument in Division One**

Division One Presiding Justice McConnell has asked us to notify attorneys that oral argument by telephone is available for attorneys who are ill but able to argue. They are especially emphasizing this during the flu season. Please contact the court at (619) 645-2760 to arrange to argue via teleconference.<sup>2</sup>

Divisions Two and Three do not offer that option and prefer that counsel ask to continue the argument if they are ill. The courts willingly accommodate such needs.

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<sup>1</sup>As a reminder: Counsel are responsible for all matters covered in e-mail alerts, newsletters, and other information made available to the panel. Past alerts and newsletters are at [http://www.adi-sandiego.com/news\\_alerts.html](http://www.adi-sandiego.com/news_alerts.html) and [http://www.adi-sandiego.com/news\\_newsletters.html](http://www.adi-sandiego.com/news_newsletters.html).

<sup>2</sup><http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv1/calendars.htm>

## **Supreme Court To Close Los Angeles Clerk's Office**

The California Supreme Court has announced it will close its Los Angeles clerk's office on December 31, 2009. The news release is attached. All filings must be sent or brought to the court's main office in San Francisco, except that the clerk's office of the Fourth Appellate District, Division One, in San Diego is still authorized to accept filings.

## **Paul Bell Memorial Fellowship**

We are pleased to announce the three winners of the fellowship for 2009, which sends the recipients to New Orleans for the National Legal Aid and Defender Association appellate training program. They are:

- Hassan Gorguinpour, who joined our dependency panel in January 2009.
- Lisa Holder, who joined our criminal panel in 2004, but because of law firm commitments was unable to accept appointments regularly until this year.
- Cathy Lintvedt, who joined our criminal panel in August 2008.

All three have been exceptional performers and shown great enthusiasm and promise for this work. We congratulate them and are confident this program will be a great learning experience.

I also want to take this chance to praise the many others who applied this year. The competition was the strongest it has ever been, and the choice the most difficult. It is a sign of the rich talents on our panel. We are grateful for their interest in our work.

## **After *Nguyen*: Keeping the Issue Alive**

In *People v. Nguyen* (2009) 46 Cal.4th 1007 the California Supreme Court held that use of a prior juvenile adjudication to increase the defendant's sentence under the Three Strikes Law is appropriate under the *Almendarez-Torres* prior conviction exception to *Blakely-Apprendi*,<sup>3</sup> even though the right to a jury trial was not afforded him in the prior juvenile proceeding. The court said that the absence of a jury trial right does not materially undermine the reliability of a juvenile adjudication and thus does not remove it from the *Almendarez-Torres* rationale. A petition for certiorari has been filed in *Nguyen*, No. 09-604.

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<sup>3</sup>*Almendarez-Torres v. United States* (1998) 523 U.S. 224; *Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466.

The California Supreme Court decision is not necessarily the last word on the subject. Although most appellate courts, inside and outside of California, have reached the same conclusion as *Nguyen* (see citations in *People v. Nguyen, supra*, 46 Cal.4th at p. 1021, fn. 10), the issue is not open and shut. Justice Kennard dissented in that case, and the Court of Appeal had reached the opposite conclusion, as had a Fourth Appellate District panel in an unpublished case (until the Supreme Court granted review). Two appellate courts in the country likewise have ruled differently from *Nguyen*. (*United States v. Tighe* (9th Cir.2001) 266 F.3d 1187, 1191-1195; *State v. Brown* (La.2004) 879 So.2d 1276, 1281-1290.)

We think there is a sufficient chance the United States Supreme Court will grant certiorari in *Nguyen* or another case to make it advisable at this time for counsel to preserve the *Nguyen* issue, as it applies in their cases. This conclusion could change if the high court denies certiorari in that case or it otherwise becomes clear the court is not going to take the issue up in the near future. (If the court grants certiorari in a juvenile prior case, obviously it would be imperative to preserve the issue.) Counsel may raise the issue in a summary argument in the Court of Appeal, acknowledging *Nguyen* is the law in California, binding on lower courts, and indicating the issue is raised for the purpose of preserving it. Counsel must also file a regular or exhaustion petition for review (Cal. Rules of Court, rules 8.500-8.508) in the California Supreme Court, again stating it is for purposes of preservation.

A petition for certiorari would be important in order to take the issue to federal court, because the lack of clearly established United States Supreme Court authority on the subject could well make federal habeas corpus unavailable. (28 U.S.C. § 2254(d)(1); see also *Teague v. Lane* (1989) 489 U.S. 288 [issue that would create new procedural law cannot be considered on federal habeas corpus]; ADI California Criminal Appellate Practice Manual, chapter 9, §9.26 et seq.) However, counsel should assay the legal terrain before filing one and must, as always, *consult with ADI first*.

To keep briefing and petition costs to a minimum, we will post samples.

**Important: Sign Up for Automatic E-Mail Notification of Developments in Your Cases and Track Your Cases Online**

We have had to deal with several situations recently where the court failed to notify an attorney of an order or decision, or the attorney did not get a copy of the opposing party's filing, and the attorney inadvertently violated the order, or missed a deadline, or otherwise failed to act appropriately. These situations take a lot of work to straighten out – if they can be straightened out at all. Attorneys should realize that mistakes of this kind are inevitable, especially in high-volume offices like the courts, the

Attorney General, County Counsel, and ADI, and should make every effort to protect themselves and their clients.

One resource freely and easily available is the appellate court website, with its online docket.<sup>4</sup> One can track developments in all of one's cases, especially now that juvenile cases are also shown. One of the first things counsel should do on getting a case is to look it up on the website and check for any prior events or rulings. Counsel should immediately sign up for automatic e-mail notification for that case at that time. Because not all developments in a case are eligible for such notification (we are lobbying for *all* entries on the docket to be eligible but aren't there yet), counsel should also schedule regular times to check the docket, to make sure they have not missed anything. Those simple steps can prevent a number of these mistakes from turning into major crises or even disasters.

### **ADI Website**

As you may know, ADI has been reviewing our website, to make it more functional for our panel attorneys. We solicited input from the panel and received a number of very thoughtful comments. Thanks to those who participated. It's not too late to send your ideas to staff attorney Anna Jauregui, [amj@adi-sandiego.com](mailto:amj@adi-sandiego.com), who is chairing the review committee. The planned changes – updating current content, adding new materials, deleting dead links, and making the web-site more user-friendly – will be implemented gradually over the next few months.

#### *Deferred but not forgotten: briefbank and discussion board*

A couple of ideas that we're going to defer a bit are to develop a briefbank and to create some forum for communication among panel attorneys. We know from the survey and our own experience that both would be a great help to attorneys, but they are labor-intensive undertakings, and right now our staffing is restricted. When resources improve, we will launch plans for them.

#### *New features*

Already added to the home page is a “search” tool for the site. Just click on it and type in the key word or phrase. We think this will be very helpful in finding needed information efficiently. (See also the next item, with instructions on searching PDF documents. The home page search function can find topics within those documents, too.)

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<sup>4</sup><http://appellatecases.courtinfo.ca.gov/>.

We will be adding such features as FAQ's (e.g., a guide on whom to contact at ADI for certain questions), help for pro pers, computer use tips, a page on ethical considerations in the electronic age (with links to a number of articles on other websites, such as bar associations), news media articles, guide to working with trial counsel, and forms and instructions in Spanish.

### *Criminal Appellate Practice Manual*

In the survey we got very useful comments about the ADI Criminal Appellate Practice Manual.<sup>5</sup> Some reported they are not using it much because it's "not searchable." In fact, a PDF document such as the manual *is* searchable. (Indeed, as noted in the preceding section, the entire website is now searchable.) Open the document and click the "find" box, then type in your key word or phrase. The box is usually in the upper right hand corner. Or you can get the box by clicking the binoculars icon, or "edit-find," or control-F. If you still have trouble, contact ADI. We hope this will make the manual more useful to those who did not know about this capability.

Another way to locate your manual topic quickly is to search the table of contents.<sup>6</sup>

Some dependency attorneys commented that they rarely look at the manual, because it's for criminal practitioners. In truth, although the word "Criminal" is in the title, much is actually applicable also to dependency cases. Most of chapter 3 (records, extensions, release on appeal), much of 4 on issue spotting and selection, and virtually all of chapters 1 on general information for panel attorneys, 5 on briefing, 6 on oral argument, 7 on decisions, and 8 on state writs apply to dependency cases, too. (Chapters 2 on appeal preliminaries and 9 on federal habeas corpus are mostly for criminal cases, as are parts of chapter 4, such as the list of common issues and some of the common adverse consequences.) *All* ADI panel attorneys are responsible for knowing what's in the manual. And even more importantly, all appellate attorneys would benefit from familiarizing themselves with it as a resource in their practice.

The manual has gone through its quarterly update and the November 2009 revision will soon be posted online. We are briefly holding off on chapter 2, in order to incorporate the Supreme Court's recent decision in *People v. Johnson* (Nov. 23, 2009, S166894) \_\_\_ Cal.4th \_\_\_ [2009 WL 4017172], ruling that a certificate of probable cause is required for an appellate issue alleging ineffective assistance of counsel in conducting a hearing on a motion to withdraw a plea.

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<sup>5</sup><http://www.adi-sandiego.com/manual.html>.

<sup>6</sup><http://www.adi-sandiego.com/PDFs/April%202009%20for%20Website/4%20TOC.pdf>.

### *Appointed Counsel Guidebook and Compensation Claim Manual*

Our online guidebook<sup>7</sup> is being updated and will be posted soon. It's a much condensed rendition of the information available in the appellate practice manual and is useful as a quick guide to basic matters that panel attorneys need to know. The guidebook is especially valuable as an introduction to life on the panel for new panel attorneys.

The claims manual, or “encyclopedia,”<sup>8</sup> is updated fairly regularly. A number of commentators said this is one of their more frequently used features on our website.

### *Forms, Motions, Samples*

We recently redid the information sheets for clients on pro per petitions for review and our form notices of appeal.<sup>9</sup> Now in the works: updated versions of other forms, plus a number of new ones, sample briefs and pleadings, etc.

### *Index to articles*

In an effort to save attorneys time searching for an article in point, last year I prepared a topical index to the ADI newsletters, news alerts, and articles.<sup>10</sup> After that was posted I got more ambitious and decided to expand it to include references to materials on other appellate project sites, as well, so that attorneys would not have to search five websites to find something. I got bogged down at the end of last year and had to let it slide, but our website review committee has revived the endeavor, especially after several survey respondents mentioned the current, limited index is one of their most-used features. The expanded index is now complete and will be posted in the website revision process. Of course, such an index is by its nature a work in progress and will need constant monitoring to stay current.

As with all matters on the website or other resources produced by ADI, we surely are receptive to suggestions for changes – corrections, additions, deletions, updates, whatever. It is a huge amount of material, and no one can constantly monitor it all. The more sets of eyes, the better. Please contact Anna Jauregui at [amj@adi-sandiego.com](mailto:amj@adi-sandiego.com) with any suggestions.

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<sup>7</sup>[http://www.adi-sandiego.com/panel\\_guidebook.html](http://www.adi-sandiego.com/panel_guidebook.html).

<sup>8</sup>[http://www.adi-sandiego.com/claim\\_manual.html](http://www.adi-sandiego.com/claim_manual.html).

<sup>9</sup>[http://www.adi-sandiego.com/practice\\_forms\\_motion.html](http://www.adi-sandiego.com/practice_forms_motion.html).

<sup>10</sup>[http://www.adi-sandiego.com/newsletter\\_index.html](http://www.adi-sandiego.com/newsletter_index.html).