JANUARY 2010 – ADI NEWS ALERTS

By
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This alert covers these topics:[1] (1) Adjusting to *In re Phoenix H.*: filing no-issue briefs instead of letters (as was the practice in Division Three), setting out the law and not just the facts in a no-issue brief, and facilitating any pro per filing the client wants to submit. (2) Rule 8.340(b) letters in Division Two. (3) Rule changes effective January 1, 2010. (4) Division One and Two miscellaneous orders. (5) Reliability concerns with San Diego toxicology lab.

In re Phoenix H.

On December 21, the Supreme Court decided *In re Phoenix H.* (Dec. 21, 2009, S155556) ____Cal. ___ [2009 WL 4893602, 09 C.D.O.S. 15,028, Cal., 2009 DJDAR 17665], holding 6-1 that a client has no right to file a pro per brief when counsel has filed a *Sade C.*[2] no-issue brief. We had argued for such a right as a matter of constitutional due process, specifically, the right of access to the courts: when appointed appellate counsel has raised no issues, the appellant has no way to challenge the judgment except through self-representation. The court rejected this argument, concluding "the Court of Appeal is not required to permit the parent to personally file a brief unless the parent can establish good cause by showing that an arguable issue does, in fact, exist." The court repeated the directives laid down in *In re Conservatorship of Ben C.* (2006) 40 Cal.4th 529, 544:

> [W]e direct the Court of Appeal that appointed counsel for a parent in an appeal from an order of the juvenile court affecting parental rights who finds no arguable issues need not and should not file a motion to withdraw, but should (1) inform the court he or she has found no arguable issues to be pursued on appeal, (2) file a brief setting out the applicable facts and the law, and (3) provide a copy of the brief to the parent. But unlike in the conservatorship proceedings at issue in *Ben C.*, the Court of Appeal is not required to permit the parent to file an additional brief absent a showing of good cause.

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[1]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 and http://www.adi-sandiego.com/news_newsletters.html.

[2]*In re Sade C.* (1996) 25 Cal.3d 436.

The court also declined to exercise its supervisory power over the courts to require pro per briefing, reasoning this would build additional delay into a system where timeliness is crucial.

We have filed a petition for rehearing, and the court has extended the time for granting or denying it by 60 days.[3] Regardless of that outcome, the *Phoenix H.* decision raises several matters for counsel:

Sade C. brief, not letter, in all divisions

Directive (2) in the passage from *Phoenix H.* quoted above requires counsel to file a "brief." That will be a change in Division Three of our district, which previously required a summary letter, not a brief. After consultation with the court, ADI is now advising counsel in Division Three of the Fourth Appellate District to file a traditional *Sade C.* brief, with a statement of facts and issues considered. A template for a post-*Phoenix H.* brief is attached. *Counsel with cases in other districts*: Be sure to check with the appellate project to see how the project and its courts are interpreting this language.

Setting out law, not just facts

Directive (2) requires that a *Sade C.* brief set out the facts "*and the law*." This would be a change for counsel who normally file a *Wende*-type brief, with only facts mentioned, and do not use what we have called the *Anders* format, which includes a list of issues considered and related authorities.[4] Under the directives of *Phoenix H.* and *Ben C.*, ADI will be enforcing the *Anders*-type of brief requirement in all Fourth District dependency and conservatorship appeals from now on and strongly urges counsel to follow it in criminal and other cases, as well.[5]

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[3]Since due process and equal protection issues were federalized, we are also considering a petition for certiorari.

[4]*Anders v. California* (1967) 386 U.S. 738; *People v. Wende* (1979) 25 Cal.3d 436.

[5]The *Wende*-type of brief (no law or issues) was upheld against a federal constitutional challenge in *Smith v. Robbins* (2000) 528 U.S. 259. The *Phoenix H.* court is relying, however, on its supervisory power over the courts, not the federal Constitution, to set out its requirements. The fact it is not unconstitutional to use such a brief in a criminal case does not prevent the state Supreme Court from discretionarily applying broader requirements as a matter of good practice. In dependency cases, where the court does not routinely read the record, an *Anders*-type brief is essential to get any issues at all before the court. A bare *Wende*-type brief in the dependency context does nothing to serve the client's interests: it is simply an invitation to dismiss the appeal or affirm.

ADI's Criminal Appellate Practice Manual,[6] §§ 1.26 and 4.77, gives guidance on how to present such issues properly. The basic approach is to *describe* the issues without either advocating for relief based on them or disparaging them as meritless. The attached brief template referred to above has illustrative issues listed.

Counsel with cases in other districts: Consult with the applicable project for its policies.

Showing good cause – facilitating any pro per filing

Phoenix H. presents some nettlesome problems that raise practical questions and/or contradict existing law:

First, the opinion does not explain how a client is to show "good cause" for a pro per filing without having an opportunity to file to a brief or even a letter. The opinion sanctions the practice of the Fourth Appellate District, Division One, of dismissing an appeal immediately on receiving a *Sade C.* brief.

Second, once the client shows good cause, which the court defines to mean "an arguable issue does, in fact, exist," the court should order *counsel* to brief it, not just decide the issue on the basis of pro per briefing. (See *Penson v. Ohio* (1988) 488 U.S. 75.)

Third, coming full circle – if a client has a right to have counsel's briefing upon the identification of an arguable issue, why should the client also then have a right to pro per briefing per *Phoenix H.*? Normally a client represented by counsel has no right to pro per filings in addition. (*In re Barnett* (2003) 31 Cal.4th 466.)

Pending finality of the *Phoenix H.* decision and any disposition by the United States Supreme Court, we think the most productive way to approach these dilemmas is to see a pro per filing as a way of calling attention to issues the client wants the court to consider. Counsel should accordingly work with the client to submit, as expeditiously as possible, a pro per filing (which probably need not be a formal brief) so that the court can consider it as an effort to show good cause. Ideally, the pro per brief or at least an issue letter from the client should be submitted at the same time as counsel's *Sade C.* brief. To this end:

- *Make arrangements for the record:* If the client is to prepare a pro per brief or letter, he or she will likely need the record. As soon as counsel has reviewed the

[6] http://www.adi-sandiego.com/manual.html.

record and determined the case is a likely *Sade C.*, counsel should call ADI to see whether it has its own copy of the record. In most cases it does, and counsel can simply send the record to the client along with an explanatory letter (next paragraph); ADI's copy then can be used by ADI and counsel. If ADI did not receive a copy, counsel should make arrangements with the ADI staff attorney to ensure they will have access to a copy after counsel sends the original to the client. Scanning, copying, and borrowing from another party are possible solutions.

• *Inform the client early:* As soon as counsel has made arrangements for the record and is ready to submit the draft *Sade C.* brief to ADI,[7] counsel should inform the client about the situation, ask whether he or she is interested in doing a pro per filing, and if so urge the client to start to work on a brief or at least an issue letter right away. A sample client letter is attached. The record and draft *Sade C.* brief should be enclosed.

• *Keep in close touch with client:* If the client is interested in a pro per filing, counsel should work closely with him or her to secure the filing promptly, so as to coordinate with the deadlines imposed on counsel, with the goal of submitting the pro per filing at the same time as the *Sade C.* brief.

• *Have fall-back procedures (Plan B) ready:* If the client is unable to produce the pro per filing in time but still has expressed genuine interest in submitting one, counsel can resort to alternative procedures. For example:

  • Counsel may ask the court for a brief extension on behalf of the client.

  • If counsel knows what the client's issues are, counsel can summarize them in the *Sade C.* brief.

  • If the case is dismissed, counsel may ask for reinstatement when and if the client produces the filing, provided it is within the 30 days that the court has jurisdiction after the opinion is filed (rule 8.264(b)(1)). Obviously, counsel should make sure the client is aware of this jurisdictional deadline.

• *Consider habeas corpus instead:* If the issues the client wants raised are based on facts outside the record (as is often the case), counsel may suggest the client file a pro per petition for writ of habeas corpus rather than a brief. The Judicial

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[7]The submission to the staff attorney should include not only the record, but a statement of the case and facts, a description of issues considered and rejected, and the results of research on those issues.

Council form, MC-275,[8] can be used, but counsel should suggest modifications suitable to a dependency case.

> *Caveat:* If the appeal is from a termination of rights, counsel needs to keep in mind Welfare and Institutions Code section 366.26, subdivision (i)(1), which provides that the court has no power to modify an order terminating parental rights, except for the right to appeal. See *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 859: "[W]e hold that habeas corpus may not be used to collaterally attack a final nonmodifiable judgment in an adoption-related action where the trial court had jurisdiction to render the final judgment." In that case the time for appealing had elapsed. In *In re Darlice C.* (2003) 105 Cal.App.4th 459, in contrast, the court issued an order to show cause in a habeas corpus proceeding while the appeal was still in progress and directed the trial court resolve it before the appeal was final. It disagreed with *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1161-1163, which held habeas corpus may not be used at all in termination cases. In light of these authorities, any habeas corpus petition should be filed in time for it to be decided before the appeal is final.

Division Two record corrections under rule 8.340(b) must go to main branch, appeals division

Division Two has asked us to remind panel attorneys to send their rule 8.340(b) letters to correct omissions from the normal record to the *main branch, appeals division*. Thus letters should be sent to either:

San Bernardino Superior Court
Appeals Division
401 North Arrowhead
San Bernardino, CA 82415-0210
or
Riverside Hall of Justice
Appeals Division
4100 Main Street
P.O. Box 431
Riverside, CA 92501

[8] http://www.courtinfo.ca.gov/forms/fillable/mc275.pdf. See also rule 8.380 [MC-275 form must be used by a pro per petitioner seeking release from, or change in conditions of, custody].

Rule changes effective January 1, 2010

Among various rule changes made by the Judicial Council in 2009, to go into effect at the first of 2010, are the following most closely related to our practice:

- Diagnostic reports under Penal Code section 1203.03(b) and psychological reports under Penal Code section 1369 are made part of the normal clerk's transcript, as prescribed by rule 8.320(b).

- Section 1203.03 reports are to be handled confidentially, like probation reports, under rule 8.336(g).

Be forewarned: Significant changes in juvenile appeals and writs rules are coming as of July 1, 2010. See http://www.courtinfo.ca.gov/rules/amendments/jan2010-jan2011.pdf.

Division One and Two miscellaneous orders

At our request, Division One has issued a miscellaneous order (attached) giving ADI staff attorneys access to confidential files, such as juvenile and conservatorship records, at the request of panel attorneys.

Division Two has issued its annual miscellaneous orders for 2010. They are attached.[9]

Pacific Toxicology Laboratories

The San Diego District Attorney's office has notified attorneys that it has stopped using the services of Pacific Toxicology Laboratories because of reliability concerns. A copy of the notice is attached. If you have a case potentially affected, the letter discusses options.

[9]Order number 10-11, on police reports in the record, lacks provisions added last year to safeguard the confidentiality of information in those reports. We think this omission was inadvertent and are checking with the court.