

DECEMBER 2011 – ADI NEWS ALERT

BY

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This news alert¹ covers:

- Recent and upcoming changes in rules.
- Separate “Notice of Unavailability,” indicating dates counsel will be unavailable for oral argument, required in Division Two.
- Handling confidential records.
- Changes in Paul Bell Fellowship.
- Seminars: *Sentencing in a New Age*, January 28, 2012; California Appellate Defense Counsel, conference March 23-24.

Rule changes

The rule changes in late 2011 and early 2012 are mercifully very few and minor, for a change. The judiciary has put a temporary hold on any non-essential changes, in order to conserve resources at a time when its funding has been cut back substantially. The affected rules are:

Filing fees in appellate courts: Although a number of rules have been amended to take account of increased civil filing fees mandated by statute, these changes do not apply to ADI cases, because fees cannot be charged in juvenile, or conservatorship cases under Government Code sections 68926 and 68927. An advisory committee comment to rule 8.25(c) now definitively exempts such cases from the fees. That will help eliminate the confusion we have encountered in the past, with one court or another trying to apply rules intended for ordinary civil cases to juvenile or conservatorship ones – e.g., civil case information statements, certificates of interested parties, word count limits, costs of transcripts, costs on appeal, etc.

Habeas corpus petitions challenging parole denial filed in wrong court: Rule 8.385(c)(2) has been amended to provide that a Court of Appeal “should” (rather than “must”) deny a habeas corpus petition that challenges the denial of parole or the petitioner’s suitability for parole if the issue was not first adjudicated by the trial court that rendered the underlying judgment. The change reflects *In re Kler* (2010) 188

¹As always, panel attorneys are responsible for familiarizing themselves with all ADI news alerts and other resources on the ADI website.

Cal.App.4th 1399, 1403-1404, which held the rule invalid insofar as it would preclude the court's exercise of habeas corpus jurisdiction given it by the California Constitution, article VI, section 10. Although normal court *policy* is to resolve parole matters first in the superior court that rendered the judgment (*In re Roberts* (2005) 36 Cal.4th 575), the rules may not take away *jurisdiction* given the appellate court by the Constitution.

The *Kler* case raises the question of the legal status and effect of rules of court and the limits on them. The brief note attached summarizes the law on this matter.

Separate "Notice of Unavailability," indicating dates counsel will not be able to attend oral argument, to be used in Division Two

Division Two asks that counsel file a *separate* notice, *along with* a request for oral argument, indicating dates counsel might be unavailable for the argument.

Confidential records

ADI is adding to its website the accompanying memo on the handling of confidential records. It offers a brief guide to some common examples of confidential records encountered in our appeals:

- Juvenile dependency and delinquency cases;
- Probation and diagnostic reports;
- *Marsden* and related proceedings;
- Proceedings on a defense request for expert funds;
- *Pitchess* records;
- Evidence regarding a confidential informant;
- The limited Nondisclosure of Identity Policy for certain protected individuals (see [November 2011 news alert](#)); and
- Sealed records.

We urge counsel to keep the procedures and underlying law in mind when handling these sensitive records. Their obligations may variously include, among others, completing the record (e.g., defense experts, *Pitchess*, and confidential informant proceedings); ensuring confidential records do not unnecessarily go to opposing counsel (e.g., *Marsden* and defense expert issues) or to clients (e.g., records with juror identifying or other confidential information or juvenile records accessible only to specified individuals); avoiding references to confidential or identifying matters in publicly filed briefs and motions; asking the court to review records inaccessible to counsel (e.g., *Pitchess* and informant issues); and making use of sealing procedures and seeking protective orders when necessary.

Changes in Paul Bell Fellowship

In order to make the Paul Bell Fellowship available to broader ranges of panel attorneys and more relevant to all aspects of our work, we have decided to make some changes. (We traditionally have been sending one or more newer panel attorneys to the National Legal Aid and Defender Association Appellate Training Seminar each year.)

The new plan is to consider what programs each year might seem especially valuable. Some may be programs created and presented by ADI. Some may be seminars open to some or all of the panel, featuring prominent experts whose ordinary cost may be prohibitive to a number of attorneys. Others may be programs put on by other organizations in areas of practice related to ours. There may be more than one a year if the total costs are within our budget. We will try at various times to offer programs at basic and advanced levels, in criminal and juvenile practice, on current trends and classical principles, in substantive and procedural areas, etc. We welcome suggestions from panel attorneys who spot an especially interesting and relevant program.

Not yet a done deal, but just to tantalize: Our hope for the inaugural year of the “new” Paul Bell Fellowship is to offer a fellowship to the *entire* panel: a day-long seminar featuring Bryan Garner, the nationally known expert on legal writing. It would go to the heart of appellate practice – written advocacy – and would be of direct benefit to every panel attorney, whether new or highly experienced, criminal or dependency. We are in discussions with his office now and are looking at possible venues. Stay tuned.

Seminars

1. Panel attorneys are invited to attend a seminar, *Sentencing in a New Age*, on January 28 at the University of San Diego. An announcement and registration form are attached.

2. California Appellate Defense Counsel will have its 2012 conference March 23-24. The brochure and registration form are attached. The keynote speaker will be the Honorable Tani Cantil-Sakauye, Chief Justice of the California Supreme Court. Presentations for criminal and dependency attorneys will be by noted appellate experts.