

APRIL 2012 – ADI NEWS ALERT II

BY

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This is the second news alert¹ of April 2012, but matters have been arising fast and furiously. The alert covers:

- State Bar MCLE compliance audits will be increasing drastically.
- MCLE program on appellate standards of review: Thursday, May 3, at noon, San Diego County Bar Association.
- Invitation to comment on rule amendments issued: one affects panel attorneys, by requiring attorney email addresses on document covers; others affect our cases.
- E-service of criminal briefs on ADI required; served briefs must be *single* PDF document.
- Reminders from staff attorneys:
 - › Claim comments should not refer to “adverse consequences” or anything else that might be harmful to clients.
 - › We encourage inquiries from panel attorneys about their cases . . . but ask them to do their homework first.

State Bar MCLE Compliance Audits Increasing Drastically

I call attorneys’ attention to this memo from the president of the California State Bar, Jon Streeter, to bar groups throughout the state:

I am writing to alert you that the State Bar is taking a more aggressive approach to auditing MCLE compliance than it has historically. All California lawyers need to be aware of this change in the Bar's MCLE auditing process.

The result of the State Bar's recent 2011 MCLE audit of one percent or 635 lawyers has confirmed the need for increased auditing. Of the 635 audited attorneys, 539 provided the necessary documentation showing full compliance. Of the remaining 96 attorneys, five have been suspended due to their inability to show any compliance. Most of the remaining 91 attorneys had minor reporting deficiencies and received a cautionary letter from our MCLE compliance group about future compliance. Approximately 25 of the 91

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

are being referred to the Office to Chief Trial Counsel for disciplinary action. Using simple math, we see that 15% of this reporting group were not in compliance.

This result is troubling and reaffirms the action being taken by the State Bar. In 2012, California attorneys can expect that five percent or roughly 3,000-4,000 lawyers to be audited. In 2013, the goal is to audit 10% which translates to 7,000-8,000 lawyers. Letters requesting proof of compliance for 2012 will be mailed in June.

The message is clear. California lawyers must fulfill and accurately document and report their MCLE requirements. No California attorney should be surprised if their compliance certificate is audited. For more information regarding MCLE requirements and reporting, visit the State Bar's MCLE web page.

If you have any questions, please send an email to Carol Madeja, Managing Director of Bar Relations Outreach at carol.madeja@calbar.ca.gov.

The bottom line is the plans are to increase MCLE audits five-fold in 2012 and ten-fold by next year. That indeed earns the description “drastically increasing” audits. We urge attorneys to keep good records and comply. ADI’s criminal and dependency brownbags and webinars are free and a good way to get highly relevant MCLE credits. Watch our website and the ANNOUNCEMENTS column, as well as the Calendar of Events, both accessible from our [home page](#), to keep up.

Presentation on Standards of Review on Appeal

Apropos of the above warning, the Appellate Court Committee of the San Diego County Bar Association has announced a May 3 MCLE program on standards of review as applied on appeal. It will be from 12:00 noon to 1:45 p.m. at the bar building, Seventh and A. Panelists include Justice Judith Haller, ADI staff attorney Howard Cohen, Karin D. Vogel, and Pamela M. Parker. The [announcement](#) and a link for [online registration](#) are here and on the ADI home page.

Invitation to Comment on Rule Amendments Due June 15: Some Affect Our Cases and Panel Attorneys

The Appellate Advisory Committee of the Judicial Council has issued an [invitation to comment](#) on proposed changes to the Rules of Court. The deadline for comment is **June 15**. I especially call your attention to:

SPR12-09 -- Attorney email address on brief covers: This proposal would, among other things, require counsel to put their email address on the cover of their briefs. *Issue for attorneys:* During a previous comment period, ADI, FDAP, and CAP-SF noted that this provision might raise privacy and security issues, especially for attorneys in our area of practice, many of whom work at home. To safeguard these concerns and still

facilitate communication for the court and all counsel, we suggested the attorney have the option of providing the email address privately to the court and other counsel, rather than on documents accessible to the public. The re-issued invitation to comment retains the cover requirement but solicits input on that matter. I think the panel attorneys, either individually or collectively, are in the best position to answer the question of what privacy and security issues might be involved in having their email addresses made publicly available.

Three other proposals affecting our practice include:

SPR12-02 – Appointment of counsel at parent or guardian’s expense in 601/602 appeals: Deletes from rule 8.403(a) the sentence regarding appointment of appellate counsel for juveniles *at the parent’s or guardian’s expense* in delinquency appeals if the parent or guardian can afford counsel. The current provision is not authorized by statute and potentially creates pressures on minors not to appeal or to abandon their appeal to save the parent or guardian this substantial expense.²

SPR12-03 – Normal record in post-judgment appeals: Amends rule 8.320(d) by adding, to the normal record for probation revocations and other appeals from orders after a judgment, a number of items that now routinely have to be added by augmentation.

SPR12-04 – Premature and late notices of intent: This proposal fills a gap in current rule 8.450 by prescribing what to do when a notice of intent is premature or late. *Issue for attorneys:* This proposal deviates from rule 8.454(f)(1) on premature notices of intent from post-termination placement orders and rule 8.406(d) on premature notices of appeal by deleting the discretion of the Court of Appeal to hold onto a premature notice of intent and deem it filed when ripe. If panel attorneys have found this discretion to be valuable in some of their cases, a comment would be useful.

If you prefer communicating informally to me, rather than preparing a comment for the committee as a whole, I would be happy to convey your thoughts to the Appellate Advisory Committee, of which I am a member.

²See, e.g., *In re Ricky H.* (1970) 2 Cal.3d 513, 525.

E-Service on ADI

E-service on ADI required in criminal cases and soon to be required in dependency cases

As the criminal panel has already been informed, as of April 15, all panel attorney briefs in criminal cases served on ADI must be in electronic form only. A description of the e-service program is on the ADI website.³ Attorney Lynelle Hee has been working with panel attorneys in groups to give all attorneys a chance to prepare and practice. Although we previously have been relaxed about enforcing this requirement, from now on attorneys who send paper copies will be contacted and asked to provide a PDF copy.

Lynelle Hee is taking steps to institute e-service on ADI for the dependency panel and has notified attorneys it will be mandatory as of May 1.

This requirement applies only to service on **ADI**. E-service on opposing counsel still requires going through a pilot program. (Once attorneys are trained for service on ADI, the technicalities of e-service on opposing counsel should pose no problem for them; the holdup at this point is not on our end but the ability of the agency offices internally to process such service.)

E-served briefs must be a single document as of June 1

Beginning June 1, all e-served documents will need to be served as a single PDF file that is a duplicate of the paper copy (including the order of the tables of contents, tables of authorities, and proof of service). ADI has been accepting briefs as separate documents (e.g., cover page and tables, brief and proof of service), but the task of saving and retrieving such documents is cumbersome. Now the court requires a single document; thus providing the same to ADI is no additional work.

In some cases, this may require purchase of additional software. There are a number of software programs that allow a user to combine PDF documents. Panel attorneys who prepare their briefs as separate documents can convert each document into a PDF file, and combine all of the PDF files into one document for e-service. A few of the available options are listed below:

- Adobe Acrobat is available for purchase.

³http://www.adi-sandiego.com/E-Service_ADI.html

- Adobe CreatePDF is an online service for combining PDF documents at: <https://www.acrobat.com/createpdf/en/home.html> The annual subscription rate is \$7.50/month. The monthly subscription rate is \$9.50/month.
- Batch PDF Merger can be purchased at: <http://www.pdfsam.org/> This software program offers a free trial. The full version is \$29.95.

Please contact Lynelle Hee at 619-696-0284, ext. 29, or lkh@adi-sandiego.com for assistance.

Reminders from Staff Attorneys

Occasionally a staff attorney will request we remind panel attorneys of one matter or another, because a problem is becoming more frequent. So

Claim comments should not refer to “adverse consequences” or anything else that might be harmful to clients

Our claims manual advises panel attorneys not to put in their comments matters that might harm the client if the court knew about them. Compensation claims are not public and normally do not go to the court deciding the case, but they are processed through the judiciary and, theoretically at least, are available to the court. Confidentiality is especially sensitive before the case is over, as in an interim claim (but something like an unauthorized sentence can be corrected at any time and so may be prejudicial even if it comes to the court’s attention in a final claim comment).

Prejudicial matters might include: possible adverse consequences (could trigger corrective action); the fact a *Wende* or *Sade C.* review was done, if a merits brief is ultimately filed (could suggest briefed issue is marginal); time spent looking for a fugitive client (could lead to dismissal of appeal); difficulties in dealing with client (could disparage client); and numerous other situations.

If it is necessary to use some detail to support the amount of time required for a potentially prejudicial matter, please put it in a confidential memo to ADI. We will maintain confidentiality and can assure the court we have looked at the necessity for the time and are satisfied the amount awarded is reasonable under judicial standards.

Inquiries from panel attorneys about cases encouraged – please do your homework first

The question of properly consulting with the assigned staff attorney is a recurring one. It was addressed in an [April 1997 newsletter article](#), which I reproduce here:

I was quite stunned a few months ago when a panel attorney told me he frequently advised other attorneys: “Never call the projects.” The reason? You might ask a stupid question or give the impression you require too much assistance, and that could affect your standing.

I can’t imagine worse advice than never to call the projects. We’re here to provide assistance, bounce ideas off of, channel information, offer a second opinion, etc., etc. It’s one of the major advantages of working in a system such as ours. If someone doesn’t ask for guidance and ends up doing the wrong thing, that’ll hurt far more than a mere inquiry. Believe me, except in extreme cases, staff attorneys don’t want to spend their time reporting that so-and-so asked a question s/he really shouldn’t have asked.

Still, of course, reasonableness is a guide. Ask whether you’d want to pose the question to a colleague who was amiable, patient, and “there to help,” but busy. Do your homework first: be organized and concise in your presentation, be familiar with the relevant record, check basic research resources such as the rules of court, the applicable code section, and so forth. An attorney who calls several times a day to ask questions such as “When is a brief due?” or “What is the citation to *Miranda*?” or who isn’t able to answer relevant questions about the facts may eventually create a bad impression. But by and large the best advice is, “When in doubt, call.”

On the matter of “homework”: Beyond reviewing and, if necessary, completing the record and doing basic research (including the rules, statutes, and foundational case law), the groundwork for a consultation should always include exploring matters ADI and other projects have already posted on their websites. The [ADI Criminal Appellate Practice Manual](#) and [compensation claim manual](#) “codify” a great deal of the material and policies included in our news alerts over the years. Our inter-project [Index](#) lists numerous topics addressed on project websites. Our home page also has two search buttons (left side), one for the [ADI website](#) and one for [all project websites](#).