

APRIL 2012 – ADI NEWS ALERT

BY

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This news alert¹ covers:

- Reminder re use of associate counsel at oral argument: get preapproval from court and ADI whenever possible; notify court and ADI if not possible.
- Reminder from staff attorneys re quality of drafts in assisted cases: panel attorneys should edit draft briefs carefully and put them into final form as much as possible *before* submitting them to the staff attorney.
- Save the date for the Paul Bell Fellowship all-panel program! Bryan Garner seminar on *The Winning Brief*, 9:00 a.m.- 4:00 p.m. on Saturday, September 22, 2012, at the Bahia Hotel in San Diego.
- Legal developments and accompanying potential ex post facto problems: (1) increase in minimum restitution fines; (2) amendment to Welfare and Institutions Code section 731 to neutralize *In re C.H.* (2011) 53 Cal.4th 94.
- E-service: ADI is now registered on GreenPath's AttorneyXpress.

Use of associate counsel at oral argument: preapproval by court and ADI required when possible; procedures when there is no opportunity to obtain preapproval

Preapproval when possible

Our courts have asked that we remind panel attorneys they need to get preapproval from the court when they plan to have associate counsel appear at oral argument. Preapproval from ADI is additionally required. The written request should include a brief statement that associate counsel is qualified and will be adequately prepared for oral argument. (See [ADI Criminal Appellate Practice Manual](#) (Manual), chapter 1, § 1.80 [“Unless advance arrangements have been made, ADI expects appointed counsel to make all appearances personally”].)

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

The court, as the appointing authority, has named the panel attorney as counsel of record, not someone else. Further, it has relied on ADI's judgment that the given attorney is qualified to handle the appeal. If another attorney takes over a key aspect of the case, the usual quality controls cannot operate as intended. In such a situation, both the court and ADI need assurance that the presentation of oral argument will meet appropriate standards.

Procedures when there is no opportunity to obtain preapproval

In the event counsel becomes unable to attend at the last moment (because of illness, transportation difficulties, etc.), with no opportunity to obtain preapproval, we recommend counsel contact the Court of Appeal clerk immediately. If there is no other attorney prepared to present oral argument, counsel may request a continuance. If another attorney is available, counsel may ask the clerk whether the court prefers to continue argument or hear argument on schedule by the other attorney. If the court prefers adhering to the scheduled time with the other attorney, counsel should notify ADI and explain the circumstances and the qualifications of the substitute attorney.

Quality of draft briefs submitted for ADI review

Staff attorneys have asked me to remind panel attorneys who submit draft briefs to ADI for review that the submissions should be in as finished a form as possible. Sometimes staff attorneys get a draft that looks more like an outline than a brief. It is impossible to make suggestions for a final product with such a document. As the Manual says in chapter 1 at § 1.3, in discussing staff attorney reviews of drafts: "Suggestions may be made concerning style, form, grammar, or citations, but the ADI attorney should not be expected to edit or rewrite the brief; the draft should therefore represent a finished product as much as possible. Drafts must be typed or computer-printed and must be double-spaced."

Paul Bell Fellowship: September 22 Bryan Garner seminar for all panel attorneys. SAVE THE DATE!

We suggested in a previous news alert "teaser" that we were considering making the Paul Bell Fellowship one for the entire panel this year, with an all-day seminar by the nationally renowned speaker and expert on legal writing, [Bryan Garner](#). I am delighted and excited to announce those plans have been made.

The seminar, *The Winning Brief*, will be 9:00 a.m. to 4:00 p.m. on September 22 at the Bahia Hotel in San Diego. The charge for attendees will be only \$60, which is the cost of the required book and meals at the seminar. (The cost of that seminar is normally \$899 a person.) ADI is paying for the speaker's fee, the venue, and related incidentals as

the value of the Fellowship. Attendees themselves must pay for the cost of any travel, lodging, parking, etc. ADI has reserved a block of rooms at a reduced price at the Bahia for out-of-town attendees.

Details and a formal announcement with RSVP form will be provided closer to the time of the seminar. For now, we strongly urge panel attorneys to save the date for this fantastic opportunity to learn about the essence of our craft, appellate writing, from a renowned expert.

Recent changes in the law on restitution fines and juvenile

Two recent changes in the law unfavorable to clients prompt us to remind attorneys to check for ex post facto violations: (1) an increase in the minimum restitution fine for both felonies and misdemeanors and (2) expansion of cases in which incarceration in the Division of Juvenile Justice is a possible disposition.

Any time penalties increase, counsel should be alert to the possibility of a violation of the ex post facto provisions of both the state and federal Constitutions. (U.S. Const., art. I, § 9, cl. 3; art. I, § 10, cl. 1; Cal. Const., art. I, § 9; see also Pen. Code, § 3 [“No part of it [the Penal Code] is retroactive, unless expressly so declared”].) Counsel should ensure the punishment imposed was in accordance with the law at the time of the *offense*, rather than at the time of sentencing. (In contrast, if the penalties have *decreased* since the time of the offense, counsel should investigate the possibility of arguing the mitigated punishment should be applied (e.g., *In re Estrada* (1965) 63 Cal.2d 740, 748 [presumed legislative intent is to apply new law to cases not yet final]; *In re Kapperman* (1974) 11 Cal.3d 542 [equal protection requiring full retroactivity in some circumstances]).² In this respect, the law is not symmetrical. Counsel have the responsibility to watch for changes in both directions.)

Increase in minimum restitution fines

Effective January 1, 2012, Penal Code section 1202.4, subdivision (b)(1) was amended to increase the minimum amount of the restitution fine (though not the maximum) from \$200 to \$240 for felonies and from \$100 to \$120 for misdemeanors. The amounts will go up twice again, on January 1 of both 2013 and 2014.

²ADI has offered guidance on favorable changes in the law on numerous occasions, most recently with respect to pre-sentence credits. (See website articles on **Recent Changes in the Law** and the memo **POTENTIALLY FAVORABLE CHANGES IN THE LAW.**)

Counsel should examine every case to ensure the restitution fine imposed was in accordance with the law at the time of the offense. We call counsel's attention to the accompanying memo, which may assist in sorting out the various issues, some of which may be rather subtle.

Amendments to Welfare and Institutions Code sections 731 and 733 to neutralize
In re C.H. (2011) 53 Cal.4th 94

In the case of *In re C.H.* (2011) 53 Cal.4th 94, the Supreme Court held a Division of Juvenile Justice³ commitment is authorized for a sex offense only when the minor also has a current or prior Welfare and Institutions Code section 707, subdivision (b) true finding – and then only if the ward's most recent offense is either an offense enumerated under section 707(b) or a sex offense described in Penal Code section 290.008, subdivision (c). The decision was based on statutory interpretation. The Legislature soon responded by closing the gap the court had identified. By urgency enactment ([AB 324](#)) effective February 29, 2012, it amended Welfare and Institutions Code sections 731 and 733 to provide for the possibility of a DJJ commitment when the minor has committed a section 707(b) offense *or* an enumerated sex offense.

Again, counsel should take care to look for possible ex post facto violations. In cases where the offense was committed before February 29, 2012, counsel should consider arguing where applicable that the client can constitutionally be sentenced only under the old law, as authoritatively interpreted by the California Supreme Court in *C.H.*

E-Service: Use of Commercial Services

ADI is now registered on GreenPath's AttorneyXpress. Panel attorneys using Greenpath can electronically serve ADI that way. Attorneys must be sure to select the appropriate address: criminal case (ADI - Criminal), civil (Appellate Defenders Inc. - Civil), or DLG writs (Appellate Defenders Inc. - DLG Writs).

³The Supreme Court opinion used the term "Division of Juvenile Facilities" or "DJF." As *In re Jose T.* (2010) 191 Cal.App.4th 1142, 1145, footnote 1, explained:

Effective July 1, 2005, the correctional agency formerly known as the California Youth Authority (CYA) became known as the Division of Juvenile Facilities (DJF). DJF is part of the Division of Juvenile Justice, which in turn is part of the Department of Corrections and Rehabilitation. (Welf. & Inst. Code, § 1710, subd. (a); Pen. Code, § 6001; Gov. Code, §§ 12838, subd. (a), 12838.3, 12838.5, 12838.13.)

We ask panel attorneys to let us know when other commercial services become available that they would like to use. Staff attorney Lynelle Hee is our coordinator for such matters. (lkh@adi-sandiego.com)