

## DECEMBER 2013 – ADI NEWS ALERT

BY

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This alert<sup>1</sup> covers:

- Electronic service and filing are moving forward, as all three divisions of the Fourth District agree to accept electronic-only service copies of a petition for review, e-service on the AG is becoming mandatory, and the AG will soon no longer require or send paper documents.
- To avoid delays, pay attention to details of claims.
- Reminder of associate counsel policy.
- Be in touch with developments in the trial court.
- To save possible time and money, ask the staff attorney whether ADI already has a copy of the record before mailing it for a *Wende* or *Sade C.* review.
- Dependency attorneys should be alert to the possible need for minor's counsel.

### ELECTRONIC FILING AND SERVICE MOVE FORWARD

#### **A. Court of Appeal's service copy of petition for review now may be entirely electronic**

Petitions for review now may be served electronically on the Court of Appeal via e-filing. Unlike *e-submissions*, which require the rule number of paper copies,<sup>2</sup> with *e-filing* no hard copy is required.<sup>3</sup> A single electronic (PDF) copy is sufficient. The Fourth District now accepts e-filing of these documents:

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

<sup>2</sup><http://www.courts.ca.gov/9408.htm#tab18464>

<sup>3</sup><http://www.courts.ca.gov/9408.htm>

Abandonments\*  
Certificate of Interested Persons or Entities (not applicable to ADI cases)  
Change of Address\*  
Civil Case Information Statement (not applicable to ADI cases)  
Requests for Dismissal with No Briefs Filed\*  
Request for Oral Argument  
Stipulation for Extension of Time (not applicable to ADI cases) - up to 60 days  
Substitution / Association of Counsel <sup>4</sup>  
Service Copies of Supreme Court Petitions for Review

\* Also requires advance notice to ADI.

**B. Service between the Attorney General's Office and panel: (1) mandatory electronic service with AG is coming; (2) AG service program will soon be purely electronic – no paper.**

Two major steps in electronic service between panel attorneys and the Attorney General are planned.<sup>5</sup> First, electronic service with the San Diego AG is becoming mandatory, as ADI will soon be “drafting” panel attorneys into the electronic service program, at the rate of 50 attorneys a month. Second, for those in the program, all service will soon be electronic – no paper copies.

**(1) Mandatory participation in electronic service with AG is coming**

We have been advising panel attorneys for a long time that electronic service will eventually be mandatory, and now the time is coming. Panel attorneys will be added to the e-service group at the rate of 50 a month. Attorneys may volunteer by contacting staff attorney Lynelle Hee at [lkh@adi-sandiego.com](mailto:lkh@adi-sandiego.com). Others will be “drafted.” Lynelle Hee will notify individuals when the time comes.

This change should pose little difficulty to panel attorneys, because for many months now they have been required to serve ADI electronically and to send an electronic copy to the court via e-submission. Indeed, our expectation is that this change will make life simpler.

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<sup>4</sup>In cases with court-appointed counsel, court approval is necessary to effect a substitution. *Appointed counsel should not sign a substitution*. See November 2011 news alert on ADI’s and the court’s substitution policy.  
[http://www.adi-sandiego.com/news\\_alerts/pdfs/2011/Nov\\_2011\\_alert.pdf](http://www.adi-sandiego.com/news_alerts/pdfs/2011/Nov_2011_alert.pdf)

<sup>5</sup>These changes do not affect dependency cases. ADI is working with the various County Counsel in the Fourth District on electronic service.

## **(2) Service soon to be solely by electronic means – no paper**

Very soon, panel attorneys in the e-service program for criminal and delinquency cases no longer have to serve the Attorney General's Office with hard copies, and the AG will no longer provide hard copies to panel attorneys. Once ADI and the AG execute revised memorandums of understanding on this and provide them to the court, ADI will notify panel attorneys to start the new regimen.

The reason for the AG to provide panel attorneys with hard copies of briefs and petitions and other major pleadings has been that panel attorneys generally must provide copies to clients,<sup>6</sup> and many do not have access to computers. Given the current need to restrict public expenditures as much as possible, however, we now have concluded that printing the client's copy of major documents is a far lesser burden than requiring paper copies. *ADI therefore considers it to be a reimbursable expense.* The saving to the state in photocopy, postage, and storage far outweighs that expense.

Our policy thus will be: Panel attorneys may print out one hard copy of a petition or brief for the client. They may report it as a "photocopying" expense, not to exceed 10 cents a page. **If** the client requests other items in the file, he or she is entitled to them, and that expense will be reimbursable in the same way.

### **TO AVOID DELAYS, PAY ATTENTION TO DETAILS OF CLAIMS**

Staff attorneys and claims processors at ADI have noticed an increasing need to contact panel attorneys for supporting details on their claims. For example, if the client communication item exceeds the 3.5-hour guideline, the panel attorney should provide *upfront* the number and frequency of calls, letters, etc. – and, as the time claimed increases, efforts at client control. If the staff attorney has to ask for such supporting information, the claim will be delayed.

Similarly, ADI claims processors note that sometimes, when they ask a panel attorney to correct several errors, the resubmitted claim fixes only one of the errors. Each time the case is resubmitted by the panel attorney, it goes to the back of the queue.

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<sup>6</sup>This is part of the ethical duty to keep the client reasonably informed of developments in the case. (Bus. & Prof. Code, § 6068, subd. (m); Rules Prof. Conduct, rule 3-500; [ADI Manual](#), § 1.41 et seq.) Some clients, nevertheless, ask that copies *not* be sent to them. (*Id.* at § 1.44.)

Obviously, this process delays that claim. Repeatedly having to address one claim also unnecessarily delays other attorneys' claims.

Attention to detail when the claim is *first* submitted helps make the process operate the way it should.

### **APPROPRIATE USE OF ASSOCIATE COUNSEL**

Every few years we find it useful to remind panel attorneys of the policies on the appropriate use of associate counsel. The [ADI Manual](#), § 1.2B, states the overall guiding principle:

The appointed attorney is the sole counsel of record in ADI cases and has full, final, and personal responsibility for handling them. The attorney continues to bear this responsibility when delegating work to associate counsel or law clerks . . . or when consulting with an ADI staff attorney.

The specific associate counsel policy is outlined in §§ 1.79-1.82. It is attached in full. The overarching policy is that the attorney of record at all times has complete personal responsibility for the case. This includes, specifically:

- (a) meeting all deadlines,
- (b) reviewing the record for potential issues,
- (c) making sure the record on appeal is adequate,
- (d) filing a satisfactory brief and such other pleadings and documents as may be required, and
- (e) making personal appearances.<sup>7</sup>

ADI expects an attorney's work at all stages to reflect his or her own experience and other personal qualifications. If an attorney commonly receives complex independent appointments, for example, the quality of legal analysis and writing should be that expected of a highly-ranked attorney, regardless whether fairly new associate counsel or a law clerk has made contributions to the drafting and research.

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<sup>7</sup>The news alert of April 2012 described this expectation in more detail:  
[http://www.adi-sandiego.com/news\\_alerts/pdfs/2012/APRIL\\_2012\\_ADI\\_NEWS\\_ALERT.pdf](http://www.adi-sandiego.com/news_alerts/pdfs/2012/APRIL_2012_ADI_NEWS_ALERT.pdf)

There is an inevitable quantitative aspect to these standards. For instance, an attorney cannot “review the record for potential issues” if the time spent by the appointed counsel personally reviewing the record is inadequate to assure all potential issues in the record have been spotted and considered. While associate counsel may certainly assist in record review by performing such functions as writing a summary of the case and facts, ultimate delegation of the supremely important responsibility of issue-spotting to another is unacceptable. Similarly, making decisions about reply briefs, oral argument, petitions for rehearing and review, etc., cannot be made unless appointed counsel is familiar with such filings as the respondent’s brief and opinion. And promotion of healthy attorney-client relationships normally requires that important substantive communication with the client should be through appointed counsel. ADI examines every category for which associate counsel or law clerk time is claimed, to help determine whether appointed counsel has been sufficiently engaged to fulfill our expectations.

The Appellate Indigent Defense Oversight Advisory Committee has added its own restrictions:

- (a) Counsel appointed on an *assisted* basis may not use associate counsel without extraordinary permission from the project director.
- (b) An attorney claiming time spent by associate counsel must declare and itemize that time, identifying the attorney by name and State Bar number.

From (b), it follows that, for associate time to be claimed as attorney time, the associate must be an active member of the California State Bar at the time the services are performed.

### **STAY IN TOUCH WITH DEVELOPMENTS IN THE TRIAL COURT**

We strongly encourage appellate counsel to stay in touch with what is going on in the trial court while an appeal is going on. We are accustomed to thinking of an appeal as a review of a static event, fixed in the past. While most of the time this is an accurate image, there are exceptions. A juvenile case, for example, is a dynamic proceeding, with the trial court retaining active jurisdiction pending appeal. If the defendant is on probation, his or her status may change any time during the appeal. Orders issued during the appeal may profoundly affect the nature of the appeal, mooting some issues and creating new ones. Examples of acts of continuing jurisdiction may include recalls of a sentence under Penal Code section 1170(d), credits adjustments under section 1237.1, corrections of unauthorized sentences or clerical errors, orders under section 1016.5, etc.

In theory, the trial court should notify the appellate court and counsel of developments that may affect the appeal. Rule 8.340(a)(1) requires the clerk to prepare an automatic augmentation of any amendment to the abstract of judgment or order made pending appeal. Rule 8.410(b)(2) requires notice to the reviewing court and all parties of amendments to the judgment or orders issued by the juvenile court pending appeal. In real life, superior court clerks rarely remember to do this.

Appellate counsel should attempt to maintain contact with trial counsel or at least periodically to check with the lower court if possible changes might occur. Counsel must know the procedural status of the case in order to protect the client's interests most effectively.

### **ASK ADI BEFORE SENDING OFF A RECORD FOR A *WENDE* OR *SADE C.* REVIEW**

A quick check can save time and money: before packing up transcripts to send ADI for a *Wende* or *Sade C.* review, ask the staff attorney whether ADI might have a copy already. Attorneys in fast-track cases know the project gets its own copy under rule 8.416(c)(2)(B). In other cases, if we get the record before the appointment is made, we may scan the record, especially if it is not long. If ADI already has the record, sending it is an obviously unnecessary and unreasonable expenditure of time and money.

### **BE ALERT TO NEED FOR MINOR'S COUNSEL**

Counsel in dependency cases should be alert to the possibility minors may need appellate counsel to protect their interests. We have seen cases in which there were multiple non-appealing minors with conflicting positions and no counsel for *any* of them. Minors' trial counsel in some counties are more conscientious than others about fulfilling their duties under rule 5.661. Any attorney, or ADI, or any individual may call the court's attention to the need for minor's counsel. If counsel for a parent or other party feels more comfortable notifying ADI to evaluate the situation and make a request if needed, we will willingly assume that responsibility.