OCTOBER 2014 – ADI NEWS ALERT

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This alert[1] covers:

- **Joinders** — Merely saying counsel joins issues in another party's brief "to the extent they may benefit my client" is seriously improper advocacy; joinders need to be specific and tailored to the client.

- **Oct. 21 program on oral argument (choice of live or webcast)** — A Ninth Circuit judge, a Court of Appeal Justice, and an experienced civil appellate practitioner will offer insights. Register to go to the San Diego County Bar Association or to get the webcast.

- **Motion practice article update is online** — Anna Jauregui-Law's article on Motion Practice has been updated to include important new rules and procedures for confidential records. (Exhibit article is also updated.)

- **Panel portal update** —- Submission of claims through portal is running smoothly. Issues with printing are being addressed.

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JOINDERS — Counsel should join other parties' arguments with specificity, not with a mere "I join to the extent the issues may benefit my client"

If there are several parties in a single appeal with compatible positions, counsel may divide briefing responsibilities among them and then join each other's arguments. This approach is highly encouraged, because it promotes judicial economy. It is approved by the California Rules of Court. (Rule 8.200(a)(5); 8.360(a); 8.412(a).)

Joinder must be done thoughtfully, not casually. Some issues may apply identically to each party, and then a simple joinder is sufficient, provided the original briefing is fully satisfactory for one's own client. Many issues, however, will require individualized argument on such matters as whether it was properly preserved, how it applies to the particular client, how it may have prejudiced him or her, what remedy is appropriate, etc.

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

Counsel's responsibility is to represent the individual client as effectively as possible, and that includes any matters in which counsel joins.

An egregiously improper form of joinder is the unfortunate boilerplate that pops up now and then: counsel joins other parties' points "to the extent they may benefit my client." Period. No elaboration then or in later briefing as to what those issues are and how they apply to the client. This approach suggests counsel expects the *court* to decide what benefits the client and how. It is an abdication of counsel's own responsibility to do exactly that. In *People v. Bryant* (2014) 60 Cal.4th 335, issued August 25, a unanimous Supreme Court made this point emphatically:

> It is not the task of the opposing party or this court to sort out what claims [apply] . . . to the other defendants who did not identify with particularity the specific claims they wished to join . . . . Appellate counsel for the party purporting to join some or all of the claims raised by another are obligated to thoughtfully assess whether such joinder is proper as to the specific claims and, if necessary, to provide particularized argument in support of his or her client's ability to seek relief on that ground. If a party's briefs do not provide legal argument and citation to authority on each point raised, the court may treat it as waived, and pass it without consideration. Joinder may be broadly permitted, but each appellant has the burden of demonstrating error and prejudice. We strongly disapprove of this seriously improper tactic.

(Slip opn.[2] at p. 16, citations and internal quotation marks omitted.) *ADI agrees*.

Counsel should indeed preserve their clients' interests in relevant issues raised by others in the case – but do it right. If the brief joined in was filed earlier, counsel must specify what the points joined are and fill in any needed argument to make the arguments effectively for the client. If the other brief has not yet been filed, the opening brief may note the possibility of a later joinder, but when the document to be joined is filed, counsel must then submit whatever filing is required – joinder letter or supplemental brief[3] – to present the issue properly. Otherwise, it may be deemed waived, as *Bryant* warns.

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[2] http://www.courts.ca.gov/opinions/documents/S049596.PDF

[3] Some courts require the original AOB to be stricken and the additional issue raised as part of a single new AOB. Check with the project or the clerk's office. ADI's Fourth Appellate District Practice pages give guidance on this matter.

PROGRAM ON ORAL ARGUMENT –- Experts offer tips on this often-difficult aspect of appeal

Many appellate attorneys lack confidence in their ability to handle oral argument, that unique and unpredictable phase of an appeal when the advocates and the judges are face-to-face. Some help is coming: On October 21, 2014, 12:00 noon to 1:00 p.m., the SDCBA will offer a simultaneous live presentation and webcast, featuring Ninth Circuit Judge Margaret McKeown, Court of Appeal Justice Alex McDonald, and leading civil appellate practitioner Kevin Green. Topics to be covered include:

Advocacy:	Executing the very different roles of opening, responding, and rebuttal.
Questions:	Adjusting to the bench temperature and the panelist who suddenly awakens.
Presentation:	Respecting the customs and unwritten rules of thumb for arguing state and federal appeals.

The announcement accompanies this alert. Registration for the live presentation is **here**.[4] Registration for the webcast is **here**.[5]

ARTICLE ON MOTION PRACTICE – Updated article includes important changes necessitated by new rules on confidential and sealed records

Anna Jauregui-Law's comprehensive Motion Practice in the Fourth Appellate District Pertaining to Criminal and Juvenile Cases[6] has been updated. It accompanies the alert. This edition includes a Table of Contents with hyperlinks from the table to the text. A "Return to Table of Contents" button is at the bottom of each page.

This revision is especially important because of the many changes to the rules on confidential and sealed records that went into effect last January. (See article on Selected Changes to California Rules of Court,[7] pp. 3-12; ADI web page on Confidential Records.[8])

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[4]https://www.sdcba.org/index.cfm?pg=events&evAction=showDetail&eid=17445&evSubAction=listMonth&calmonth=201410

[5]https://www.sdcba.org/index.cfm?pg=events&evAction=showDetail&eid=18509

[6]http://www.adi-sandiego.com/news_alerts/pdfs/2012/Motion_Practice_2.pdf

[7]http://www.adi-sandiego.com/pdf_forms/SELECTED_CHANGES_TO_CALIFORNIA_RULES_OF_COURT_EFFECTIVE_JANUARY.pdf

[8]http://www.adi-sandiego.com/practice/conf_records.asp

Anna's extremely useful and practical article on De-Mystifying the Exhibit Review Process in Criminal Cases[9] has also been updated.

PANEL PORTAL – Submission of claims going smoothly; printing issue is being addressed

The electronic submission of claims through the new Panel Portal has been operational for about half a month now. (The period for submitting new paper claims is past.) Panel attorneys seem to be adapting smoothly. ADI staff is rapidly gaining efficiency, now that the transitional period of double (or triple) entry of data is passed. They have been working overtime and weekends to keep up with claims and minimize delays, and we hope that will soon no longer be necessary.

We are aware of issues with the way comments print out and are addressing those as a high priority matter. ADI thanks everyone for patience, understanding, and cooperation during the last few weeks. We think the resulting efficiencies and additional functionality will be well worth the ironing-out-the-bugs period.

We hope to add other features to the portal, as our budget permits, which will enable panel attorneys to see their ADI appointments history, submit changes of address and certain forms, receive and accept case offers, and so forth.

[9] http://www.adi-sandiego.com/news_alerts/pdfs/2010/EXHIBIT-REVIEW-UPDATED-2010.pdf