SEPTEMBER 2019 — ADI NEWS ALERT

This alert[1] covers:

• Warning: List *Anders* issues in all Division One *Wende* briefs!

• Section 1170.95 appeals: ask for sample briefs and consult memo on completing the record.

• Adhere to our IAC guidelines.

Warning — change in policy: list *Anders* issues in all Division One no-issue briefs

In the June 2018 news alert[2] we warned counsel about a published order, *People v. Garcia* (2018) 24 Cal.App.5th 314, a *Wende* case where counsel used an unorthodox way of describing *Anders* issues. The order denounced the brief, then went out of its way to warn about listing *Anders* issues at all. The order concluded no law requires such a listing, and "an Anders listing is not necessarily helpful to the reviewing court or to an appellant." (Id. at p. 325.) It didn't forbid *Anders* issues and admitted they could be useful, but was mostly negative toward them.

To muddy the picture, at the same time we discovered a number of unpublished *Wende* opinions in the same division sharply criticizing counsel for not including *Anders* issues. Attempting to thread the needle, the ADI news alert suggested counsel presumptively include the issues, but still make a case-by-case determination based on the client's interests. We said the brief should acknowledge the legitimate concerns of the justices whose preference was not chosen and try as far as possible to accommodate their concerns.

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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.

[2]http://www.adi-sandiego.com/pdf_forms/2018_6_June%201_news_alert.pdf

Apparently this approach was not adequate: recently we have become aware of fairly harshly worded opinions out of Division One criticizing counsel for leaving out *Anders* issues, even though the attorneys tried to follow our "solution." All are by the same justice.

By informal Westlaw count, we discovered for the first time that this justice does a *substantial majority* of the division's *Wende* cases. Because it now appears the odds are strong in a Division One *Wende* case that *Anders* issues will be expected, we are advising counsel in Division One to include them in all *Wende* briefs in that court. To avoid the type of reaction generated in *Garcia*, counsel should be sure to follow the recommended forms for describing an *Anders* issue. Ask your buddy for samples. Cases in Divisions Two and Three continue to allow the less rigid approach offered in our June 2018 alert.

We also continue to tell dependency counsel that inclusion of *Anders* issues in a no-merit *Sade C.* letter is a nearly absolute requirement. The court will not read the record and, except in Division Two, will not invite a pro per brief. It will not write an opinion. The only chance for the client – vanishingly remote, to be sure – is to intrigue the court with an unbriefed issue.

Section 1170.95 appeals: ask for sample briefs and consult article on completing the record

If you accept an appeal from a denial of a Penal Code section 1170.95 petition, please contact your ADI buddy to determine whether sample briefing is available for the issues in your case. We have six test cases on the constitutionality of SB 1437 and have been collecting briefing on other aspects of SB 1437 petition denials.[3]

Our guide to Demystifying record completion in Penal Code section 1170.95 appeals,[4] co-authored by ADI staff attorneys Cindi Mishkin and Jill Kent, is on our practice articles page. It will assist in ensuring you have a complete record.

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[3]As an additional resource, you may want to contact Kate Chatfield, who is also collecting briefing and has created a google folder to help those working on SB 1437 cases. Katechatfield@gmail.com.

[4]http://www.adi-sandiego.com/news_alerts/pdfs/2019/2019_August_PC_1170-95_Record_Completion.pdf

Reminder of ADI IAC policies

It's been a while since we offered a brief refresher on ADI's policies for raising ineffective assistance of counsel issues. The basics include:

• **Use the relevant standard – *Strickland v. Washington* (1984) 466 U.S. 668**. Appellate scrutiny is highly deferential to trial counsel's judgment. The two-pronged *Strickland* inquiry asks (a) whether counsel's actions were outside the realm of reasonableness and so deficient as to undermine the adversarial process and the likelihood of a just result, and (b) whether as a result of counsel's unreasonable actions the defense suffered such serious prejudice as to deprive the defendant of a fair trial. The test is not whether the defense was successful or whether appellate counsel would have done it differently or can criticize the approach in some way.

• **Contact trial counsel.** This is a cardinal step, rarely to be omitted. Counsel may have had tactical reasons that appellate counsel cannot discern – for example, may have concluded that going into a certain area would risk revealing priors or potential charges not yet known to the prosecution, may have known a potential defense witness was hostile to the defendant and would offer damaging evidence, may have been told the defendant did not want to raise a mental defense, etc. This requirement applies even if the IAC issue is not primary but instead is of the "fallback" kind (e.g., "The failure to object is not an obstacle to raising the issue on appeal; if it is, that would be IAC"). Giving a heads-up to trial counsel is a matter of professional courtesy and improves trial-appellate relationships. Email is often the most effective method of communication, given the frequent need for trial counsel to be in court.

• **Proceed by habeas corpus unless the error and/or the lack of a valid tactical purpose clearly appear on the appellate record.** It is rare when ineffective assistance of counsel is unequivocally shown on the face of the record. You almost always will need to point to matters outside of the record, such as trial counsel's statement as to tactical purposes or lack thereof and/or evidence that would have been highly useful had counsel pursued it. (E.g., *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267-268.) Habeas is unnecessary for most "fallback" IAC arguments.

• **Always contact ADI when considering an IAC argument, unless it is a simple "fallback" IAC issue.** The assigned staff attorney can ascertain whether you are applying *Strickland* correctly, inquire as to the prejudice aspect of your issue, explore the need for expert support, strategize with you as to the best way to approach trial counsel, etc. We impose this consultation requirement because an IAC issue has a unique potential for harm if raised improperly. An inappropriate IAC issue harms the cooperative relationship between appellate and trial counsel, unnecessarily attacks the professional reputation of trial counsel, devalues IAC as an issue in the eyes of the court, undermines the credibility of the appeal, and casts the appellate attorney in a bad light. A simple fallback issue does not require ADI consultation, although it is of course available.

These ideas are fleshed out in earlier news alerts. See, e.g.:

- August 1999 newsletter:[5] Two related articles are included:

  Raising IAC Claims, Or: Trial Counsel Is Your Friend, by Carmela Simoncini (pp. 7-11): "The decision to raise the issue should be well considered to avoid the risk of distracting the court from the client's strongest points, alienating your natural ally (trial counsel), and exposing the client to potential prejudice. Thoughtful discretion in preparation of the appeal where a meritorious claim does exist will work to guarantee the client a better result on appeal as well as on remand. You will also be providing effective assistance of counsel on appeal."

  Appointed Counsel Should Consult ADI Before Raising IAC Claims, by Elaine Alexander (pp. 11-12): "All appointed attorneys on ADI cases – independent or assisted – are advised and strongly encouraged to consult with an ADI staff attorney before going forward with a claim of IAC."

- July 2004 newsletter:[6] *Ineffective Assistance of Counsel Issues*, by Elaine Alexander (pp. 2-3): "The constitutional doctrine of ineffective assistance of counsel is important to appellate advocacy. It should stay that way and not be devalued by uncritical allegations made in disregard of the basics, as outlined here. All appellate

[5] http://www.adi-sandiego.com/news_alerts/pdfs/bef2005/1999_august.pdf

[6] http://www.adi-sandiego.com/news_alerts/pdfs/bef2005/2004_july.pdf

counsel have the obligation to apply the proper legal standards, pursue the correct remedy, adequately investigate, contact trial counsel appropriately, seek the required guidance from ADI, and most of all protect the client's interests by not blundering into areas that offer little potential benefit and may pose unforeseen hazards."

- January 2005 newsletter: *Ineffective Assistance of Counsel Claims "Fallback" Style*, by Elaine Alexander (p. 2): "The fallback argument does not require all of the precautions I mentioned in the last newsletter [July 2004, above]. At this stage, at least, habeas corpus is not contemplated. Although as a matter of courtesy trial counsel should be notified the argument is being made, it is not necessary to contact ADI in order to insert it in the brief . . . . Although some abbreviations of the usual process are permissible, counsel still should take care to present the ineffective assistance of counsel issue sufficiently to ensure the court will consider it and to preserve it for later proceedings."

Essential for evaluating IAC issues is a knowledge of what makes issues arguable to begin with. So we mention some materials on that subject in connection with our IAC reminders. One is the April 2008 news alert[7] on marginal issues by Elaine Alexander: "[I]t is . . . important for counsel to appreciate that raising unarguable issues does not even potentially benefit the client, and it imposes wasteful costs on the system, consuming the resources of opposing counsel and the court. We therefore need to ensure that counsel both know and use appropriate criteria for evaluating and selecting issues. ADI thinks a constructive approach to this recent and ongoing concern is to review these criteria and discuss their application in practice. The accompanying memo analyzes the law and relevant strategic and ethical considerations."

The accompanying memo referred to is *To Brief or Not to Brief: Marginal Issues*:[8]

> One of the most important responsibilities of appellate counsel – perhaps the most important – is issue selection, which includes (1) identifying potential issues to raise, (2) assessing their legal merit, and (3) determining which issues, among those that are arguable, should be raised. This topic is treated extensively in the ADI California

[7] http://www.adi-sandiego.com/news_alerts/pdfs/2008/April-2008-News-Alert.pdf

[8] http://www.adi-sandiego.com/news_alerts/pdfs/2008/AA-Arguable-issues-memo-final.pdf

Criminal Appellate Practice Manual (ADI Manual), chapter 4,[9] "On the Hunt: Issue Spotting and Selection." The focus in this memo is primarily on the second phase, weighing the merits of issues. In particular, it looks at marginal issues – inherently weak ones – in the context of a case with no stronger issues. These cases require a judgment call as to whether the issues should be briefed on the merits or simply listed as unbriefed issues in a no-merit filing. (P. 1)

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The ultimate test for an arguable issue is whether a reviewing court could reasonably accept the argument and find the client entitled to some kind of relief, in light of (a) relevant law, (b) the facts in the case, and (c) applicable appellate standards for reviewing judgments. If no reviewing court could reasonably do so, the issue is frivolous. All of these conditions for arguability must be satisfied. (P. 9.)

[9] http://www.adi-sandiego.com/panel/manual/Chapter_4_Issue_spotting.pdf?20195