

SEPTEMBER 2020 — ADI NEWS ALERT

This alert¹ covers:

Updates on coronavirus measures.

- [General status](#): Updated guide to coronavirus emergency measures applicable to Fourth District cases.
- [Oral argument mechanics](#): Professional backgrounds encouraged; other tips offered for making a more effective presentation remotely.

[All-state webinar](#): Project directors and CADC to present September 16 webinar on status of appellate practice at this time.

New laws

- [Conservatorship of O.B. opinion](#) by California Supreme Court resolves issue for dependency attorneys by reiterating that sufficiency of the evidence must be determined on appeal in reference to the trial burden of proof, including “clear and convincing” standard where applicable.
- [People v. Stamps opinion](#) by California Supreme Court says retroactive application of new legislation permitting striking of prior serious conviction could lead to undoing a plea bargain.
- [New Penal Code section 1369.5](#) makes competency reports confidential, requiring vigilance by appellate counsel to ensure compliance with rules on confidential records and filings.

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

Coronavirus emergency measures: current situation

General status update now on website

ADI staff attorney Cindi Mishkin has updated her [report on the status of coronavirus emergency measures](#). The report is posted on the ADI website home page. In brief, superior courts are gradually reopening, with considerable caution. Counties are making plans for resumption of jury trials. Courts of Appeal remain open for limited services.

Oral arguments are remote. Division One uses the WebEx platform. Division Two uses BlueJeans. Division Three is telephonic at present but plans to transfer to BlueJeans in October. Contact the court if you want to request telephonic only, because of concerns about Internet connections or for other reasons.

The California Supreme Court no longer requires paper copies for any filing. All cases, including review-granted cases, are now using TrueFiling.

Oral argument mechanics

Division One has specifically asked counsel appearing for oral argument to use a professional background, such as law library books or office fixtures or certificates, or a blank or blurred background. Free virtual backgrounds are available on all the platforms in use by Fourth District courts. Divisions Two and Three have expressed no preference, but ADI encourages counsel to follow the preferences of Division One in all courts. It enhances the attorney's credibility and minimizes distractions caused by the presence of objects and sights out of place for a court appearance. We call attention to the Fourth District's advice on [Remote Appearance Etiquette](#), including the use of professionally appropriate attire.

As for other mechanics of remote argument, we urge counsel to rehearse, testing out lighting and camera angles to create an appropriate setting for your argument. Some attorneys have appeared with part of their head cut off in the picture or with lighting behind them, leaving their face in darkness.

On June 3 ADI presented an MCLE program on remote oral argument. The three panelists told of their experiences with remote argument, reported lessons they had learned, and offered tips for an improved appearance. The [recorded presentation](#) is on our website. Self-study credit of one hour is available for watching the recording. (Participatory credit was available to those who watched it live.)

All-state webinar featuring a roundtable of project directors and other representatives

The panel organization California Appellate Defense Counsel and the projects are jointly presenting a roundtable webinar discussing the present state of appellate practice in California, during the coronavirus pandemic. It is open to all appellate project panel attorneys, not just CADC members. Here is a copy of the announcement:

You are invited to a Zoom webinar

When: Sep 16, 2020, 12:00 PM Pacific Time (US and Canada)

Topic: CADC Roundtable with the Project Directors

Please join us for a roundtable discussion with the directors of the state appellate projects to get updates on the state of appointed appellate practice. This program will qualify for one hour of general participatory MCLE credit.

Register in advance for this webinar

https://us02web.zoom.us/webinar/register/WN_UlqeAM74TyW_6E2kmZIWSA

After registering, you will receive a confirmation email containing information about joining the webinar.

New laws

***Conservatorship of O.B.* (2020) 9 Cal.5th 989 on sufficiency of evidence to support finding of fact under clear and convincing evidence standard**

The California Supreme Court has resolved a problem that has long vexed dependency attorneys: the tendency of some appellate courts to refuse to consider the higher burden of proof (clear and convincing evidence) often protecting dependency clients in the trial court, when analyzing a challenge to the sufficiency of the evidence on appeal. These courts insist the burden of proof “disappears” on appeal, and the only issue on appeal is whether the evidence was “substantial.”

ADI published an [article](#) about this matter in 2012. We took the position the question whether evidence is “substantial” cannot be answered independently of the burden of proof, because the appellate court’s role is to determine whether a reasonable trier of fact could have found the applicable burden of proof was met. Just as an appellate court must decide whether a reasonable trier could find the “beyond a reasonable doubt” standard was met in a criminal case (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557), in a dependency case, when the trial burden is clear and

convincing, the appellate court must ask whether the trier reasonably could find that standard was met. The article showed the California courts had split on the question, with some taking the “burden of proof disappears” route and others using a “reasonable application of the burden of proof” approach – with no courts addressing the inconsistency.

Conservatorship of O.B. (2020) 9 Cal.5th 989 adopted the position urged in the article. It was a conservatorship case, to which the clear and convincing standard applied in the trial court. The Court of Appeal used the “disappears” formula. The Supreme Court reversed, finding that standard to be erroneous and explicitly mandating the “reasonable application of the burden of proof” standard:

[A]n appellate court evaluating the sufficiency of the evidence in support of a finding must make an appropriate adjustment to its analysis when the clear and convincing standard of proof applied before the trial court. In general, when presented with a challenge to the sufficiency of the evidence associated with a finding requiring clear and convincing evidence, the court must determine whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this standard of proof.

The court overruled numerous cases applying the “disappears” rule. We hope this decision will help dependency attorneys challenging sufficiency of the evidence in the future.

***People v. Stamps* (2020) 9 Cal.5th 685, on striking prior serious felony convictions**

In *Stamps*, the Supreme Court assessed an appeal involving the retroactive application of S.B. 1393, giving the trial court discretion to strike a prior serious felony conviction. It agreed the law is retroactive to cases not yet final when it became effective, within the meaning of *In re Estrada* (1965) 63 Cal.2d 740. It also said no certificate of probable cause is necessary to invoke the statute on appeal. Despite these favorable holdings, the court also held, ominously, that modification of the sentence under S.B. 1393 could entitle the People to seek to withdraw the plea, with all the adverse consequences that could carry for the defendant. (See [ADI Appellate Practice Manual](#), § 4.99 et seq. on withdrawal of plea as potential adverse consequence.)

The decision whether to chance the consequence belongs to the *client*, after thoughtful consultation with the attorney, who should analyze for the client the likelihood and magnitude of both benefits and risks from pursuing this remedy. Consultation with trial counsel could be vital here.

New Penal Code section 1369.5 on confidentiality of competence reports

Penal Code section 1369.5 became effective on January 1, 2020. It provides:

(a) A document submitted to a court pursuant to this chapter, including, but not limited to, Sections 1369, 1370, 1370.01, 1370.1, and 1372, is presumptively confidential, except as otherwise provided by law.

(b) A document described in subdivision (a) shall be retained in the confidential portion of the court's file. Counsel for the defendant and the prosecution shall maintain the documents as confidential.

(c)(1) The defendant, counsel for the defendant, and the prosecution may inspect, copy, or utilize the documents, and any information contained in the documents, without an order from the court for purposes related to the defense, prosecution, treatment, and safety of the defendant, and for the safety of the public.

(2) A motion, application, or petition to access the documents shall be decided in accordance with subdivision (h) of Rule 2.551 of the California Rules of Court.

Counsel should be vigilant about treating these reports as confidential and complying with rule 8.45 et seq. in all filings. They should also be alert to the possibility superior court clerks will not be aware of the new rule and will fail to segregate the confidential reports from the rest of the appellate record or otherwise comply with the rules; counsel should call the court's attention to any problem as soon as it is detected.