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ADI Newsletter 2.0



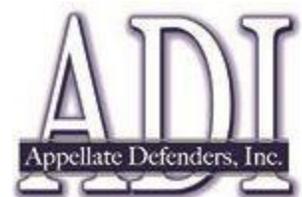
The ADI newsletter relaunch is live. After a not-so-brief hiatus, the newly revamped newsletter features our legal community and offers useful information to help us become more effective appellate advocates together.

If you've been accepting appointed cases in the Fourth District since 2004, you might remember ADI's newsletter, which came out one to four times a year

before being replaced by the Executive Director's News Alerts. Back then, the newsletter included not just the kinds of legal updates and messages from the courts included in the News Alerts, but also articles on appellate procedure, substantive law, and best practices. (Newsletter issues from November 1996 to January 2005 are [archived on ADI's website](#).) This new generation newsletter will be different, with less emphasis on the law per se and more focus on the community of appointed public defenders in the Fourth District. Whether you have been doing appointed appeals for years or have just started out as an assisted attorney or work at ADI, we are all appellate public defenders, fighting for fairness

for people who society at large tends to marginalize. This makes us part of a specialized legal community that we should celebrate and foster. Hence, the relaunch of the ADI newsletter "Appealing Times."

Please feel free to reach out to one of our co-editors Art Martin (abm@adi-sandiego.com) or Elena Min (esm@adi-sandiego.com) with comments, suggestions, submissions, etc.



In the Fourth District



Bench Updates

Over the past year, the Fourth District has seen quite a turnover in Divisions One and Three.

DIVISION ONE

Justice Patricia Guerrero was elevated to the California Supreme Court by Governor Newsom, and subsequently named the successor to Chief Justice Tani Cantil-Sakauye.

Justice Martin Buchanan filled the seat previously held by Justice Benke. Justice Buchanan is a former ADI staff attorney and was the President of ADI's board until he was nominated to the bench. While in private practice, Justice Buchanan transitioned his practice to civil appeals and won a case in the United States Supreme Court. He also previously served on Justice Aaron's staff at the Court of Appeal.

Justice Judith Haller retired at the end of October 2022 after 28 years on the appellate court bench.

Justice Cynthia Aaron will be retiring in January 2023 after 20 years on the bench in the Fourth District.

DIVISION TWO

There are no recent changes among the justices at Division Two.

DIVISION THREE

Division Three has seen even more changes. Since June of 2021, **Justices Richard Aronson, David Thompson, Raymond Ikola, and Richard Fybel** have retired.

Three new justices have joined Division Three in 2022.

Justice Maurice Sanchez joined Division Three in January 2022. He worked at several large civil litigation firms as well as in-house at several corporations. Prior to his appellate bench appointment, he served on the Family Law panel of the Orange County Superior Court.

Justice Joanne Motoike joined Division Three in June 2022. She was appointed to the Orange County Superior Court in 2013 after working at the Orange County Public Defender's Office.

She presided over adult criminal matters before shifting to the juvenile court where she served as the Presiding Judge of the Juvenile Court from 2018 to 2022.

Justice Thomas Delaney joined Division Three in October 2022. Prior to his appellate bench appointment, he was a judge in the Orange County Superior Court since 2014 and most recently presided over the Veterans Court. Before that, he was trial lawyer at a large law firm focusing on mass tort and product liability.

Division Three is still short of its full complement of Justices and continues to rely on superior court judges sitting temporarily on some appellate panels.

Did You Know...



RECENT VICTORIES

ADI features recent Fourth District victories on its website. Reviewing these victories can help sharpen issue spotting skills and give a sense of what kinds of arguments are getting traction in the Fourth District Court of Appeal. Check them out at: http://adi-sandiego.com/news_alerts/recent_victories.asp

INMATE LOCATOR

CDCR's online Inmate Locator makes it easy to find clients who are in prison. Go to: <https://inmatelocator.cdcr.ca.gov/>, and after agreeing to the disclaimer, you can search for inmates by CDCR number or name and find admission date and current location. And if you click on the current location, that facility's webpage opens up and you can find a mailing address. (Note: clicking on the client's name will take you to another page with his or her parole eligibility date.)

In the Fourth District



In this periodic newsletter, we will highlight a few extraordinary victories from the Recent Victories list, including unpublished cases you might not have heard about.

Lately appellate defenders on the criminal defense side have had many wins in SB 1437 cases and other new laws such AB 333 (revising the gang enhancement statute) and SB 567 (adding proof requirements for imposition of an upper term). These are great wins as they have the potential to actually reduce the clients' sentences. In dependency cases, ICWA issues remain the most frequent leading to reversals.

CRIMINAL

Melissa Hill had a huge victory in E073518, with a Division Two panel led by Justice Codrington reversing an LWOP murder conviction based on a *Miranda* violation.

The client was given *Miranda* warnings and answered some generic questions but then started indicating he wanted a lawyer. But the interrogating detectives repeatedly distracted him away from the idea and kept hounding him to "tell the truth." After the client's *fifth* request – "I'll just go with the lawyer, man" – the detectives began packing up to go but continued to badger the client,

Outstanding Victories in Fourth District Appeals

Featuring big wins by criminal and dependency panel members.

and showed him the search warrant for his parents' house, saying it would be torn up looking for evidence. They then asked if he wanted to talk "some more." The client said yes, the detectives readvised him, and he confessed to killing his friend for insulting him. As Melissa argued and the Court of Appeal agreed, this was not okay.

The Attorney General argued only the final two of the defendant's five requests for a lawyer were unambiguous (so it's okay!), but the court found all five were clear and unequivocal, including the first one: "Can I get like a lawyer then so I could, you know . . . feel more comfortable . . .?"

The Court bolsters the ruling with analysis of a case "defendant relies heavily on but the People do not mention in their respondent brief." (If you get a respondent's brief that does this, jump on it in your reply!) While the AG argued the defendant "re-initiated" the interrogation after the fifth request for a lawyer, the court of appeal cited the recent case of *People v. Johnson* (2021) 12 Cal.5th 544 for the principle that a valid "re-initiation" by a suspect cannot be "the product of" the authorities' prior unlawful interrogation as it indisputably was here. Since the other evidence of the defendant's culpability was relatively weak, and the confession included the "motive for and

Outstanding Fourth Appellate District Victories

(continued)

CRIMINAL (CONTINUED)

means of the crime,” a prejudice analysis under *Chapman* compelled reversal.

Bob Boyce had a big victory based on ineffective assistance of counsel and a defendant’s statement to police officials after a years-long battle through the justice system in D077020.

In 2016, the client was convicted of sex offenses against his niece and sentenced to 61 years to life. The judgment was affirmed on appeal in 2018, with a panel of Division One justices ruling the sole claim on appeal – that a *Mirandized* statement to police 11 months after the client’s arrest should have been excluded – had been forfeited by a failure to object.

Rather than let the issue go, Bob took the case into habeas proceedings, arguing the client received ineffective assistance when trial counsel arranged for a polygraph test and follow-up interview and then failed to attend those events. After the habeas was denied in the trial court, the Court of Appeal issued an order to show cause and an evidentiary hearing was held.

Ultimately, a panel led by Justice Guerrero found trial counsel’s practical abandonment of the client at the polygraph and follow-up interview to be ineffective assistance, as the trial lawyer himself agreed that was not a good thing to do. Since the contents of the interview played a prominent role in the prosecutor’s argument in a case that

turned on the credibility of the accuser and defendant, the court found the ineffective assistance was prejudicial and reversed the convictions.

Finally, in E075454, **Joshua Siegel** hit the grand slam of appellate victories, winning an insufficient evidence claim in a double murder life without parole case – Joshua’s client will be walking out of prison without the possibility of a retrial.

The client was seen on video driving a car trailing another one with two gang members in it, one of whom was the client’s boyfriend. When that car parked near a liquor store, the client u-turned and slowly drove toward the liquor store as her boyfriend walked that direction. The boyfriend walked past a person standing on the corner, then turned back toward him and shot him. That person survived and thought the shooter may have demanded money. As the boyfriend ran back to the car he arrived in, he passed two people on the sidewalk. At that point, the other gang member driving that car got out, shot those two people dead, and drove out of the neighborhood with the client following. The client was prosecuted and found guilty as a direct aider and abettor of two counts of murder and one of attempted murder.

But in an opinion written by Justice Menetrez, the court of appeal agreed with Jason’s argument that any finding of intent to kill, as required for the verdicts

rendered, had to be based on “speculation and unreasonable inferences” rather than solid, credible evidence. The gang participation conviction, which the jury instructions tied to murder and attempted murder, was also reversed for insufficient evidence.

Did You Know...



CALIFORNIA APPELLATE DEFENSE COUNSEL (CADC)

Joining California Appellate Defense Counsel (CADC), a nonprofit professional association run by its members, offers a great way for panel attorneys to connect with others doing the same usually solitary legal work. Along with local chapter meetings, an annual conference full of MCLE-qualifying presentations (online in 2023), and a quarterly newsletter, CADC’s [website](#) includes a state-of-the-art brief bank and discussion forums.

Definitely worth checking out!

Outstanding Fourth Appellate District Victories

(continued)

DEPENDENCY

Sean Burleigh scored a significant victory for her client in G060783. Division Three reversed the exercise of jurisdiction over one of mother's children (her 16-year-old son who attended boarding school during the school year) due to lack of sufficient evidence. The Court agreed with Sean that nothing in the record evidenced the teenager faced substantial risk at the time of the jurisdiction hearing given no evidence of recent physical abuse by mother or that the boy suffered or was at risk of any emotional distress, and he was happy living with mother and wanted to go home.

Sean also successfully fended off the agency's motion to dismiss based on mootness after the termination of jurisdiction over the boy reasoning mother faced a risk she would be added to the Child Abuse Central Index and even though mother could be included on the index based on her younger child's dependency proceeding. The mootness issue is currently before California Supreme Court in a different case - *In re D.P.* (S267429).

Neale Gold for father, **Valerie Lankford** for mother, and **Lelah Fisher** for the children won significant victories for their respective clients in D079473. Division One found insufficient evidence to support removal of two children from their parents and reversed the dispositional orders as to both parents. The rationale was father was the victim of physical and verbal abuse by mother, called the police during one incident, and reported additional incidents to the social worker. While on the stand, the social worker was unable to identify any safety risk if the children were placed with father at the disposition hearing, and the agency had begun permitting the parents to visit together. In addition, there were alternatives to removal, such as mother moving out the home with the maternal great-grandmother providing daycare or supervising mother with the children during the day while father worked, which the juvenile court failed to consider.

Moreover, although mother was the offending parent, her aggression was directed towards father, not the children, she had successfully parented the children on her own without incident for a period of time after the agency's involvement, she voluntarily left the family home, and she was making progress with services and had visited the children with father without incident.



Congratulations to the attorneys for these extraordinary victories on behalf of their clients!

“What Do You Do For a Living?”

Remember when dinner parties and social gatherings were plentiful before the pandemic? What did you say when someone asked, “What do you do?”

A Dependency Defender Perspective



We have probably provided a variety of answers, but what do we say about the specifics of our work? How do we describe our work in a way that gives it meaning rather than scorn from others given that dependency cases typically begin because a parent has been accused of doing something not so nice to a child.

First, we are the defenders of families. The dependency system exists to protect children and also to protect families. Sometimes the latter goal can be forgotten. As dependency attorneys, our work is to ensure that families are protected, so that children are not needlessly separated from their parents, siblings, or relatives and those relationship are preserved whenever possible.



Second, we are the defenders of constitutional rights. Most people know that the U.S. and California Constitutions provide us with certain rights. But constitutions are mere pieces of paper until the rights set forth in those documents are invoked. So the guarantees of, for example, equal protection and due process are meaningless until asserted by people or challenged in the courts. And oftentimes, as appellate attorneys, we are the ones who identify denial of such rights and ensure such protections are alive and well in practice and not just on paper.

Third, we are checks on the government's conduct. Child welfare agencies can wield an enormous amount of power. They can remove children from their homes, they can place them with strangers, they can decide which families to help and to what extent, and they can make recommendations that affect whether families can reunify and whether parental relationship are forever severed.

The juvenile courts also have the difficult role of making decisions affecting the lives of children on a daily basis and with huge caseloads. So we are the ones who challenge agencies and courts when they have overstepped their authority or their actions are inconsistent with the laws and rules intended to protect children and families. Thus, our role is to ensure that the power of the government does not go unchecked.

So the next time you are at a dinner party and asked what you do for a living, remember the important role we serve in the judicial system!



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ADI welcomes the newest members of the 4th Dist. panel of appointed defenders

CRIMINAL DEFENSE

- Charles Anderson
- Elizabeth Campbell
- Nate Crowley
- Stephanie Lickel
- Sam McGovern
- Alan Siraco

DEPENDENCY

- Anna Rak

ADI Staff Updates

• Retirements

Executive Director **Elaine Alexander** retired in January 2022 after 49 years of service to ADI, the longest serving executive director of any appellate project.

Staff Attorneys **Neil Auwarter** and **Dave Rankin** retired after long and distinguished careers at ADI. Neil retired in 2021 and Dave in February 2022.

Administrative Assistant **Xochitl Zumaya Cruz** retired in April 2022. Documents Coordinator **Carl Dershem** retired in July 2022. He worked at ADI for over 24 years and was crucial in ensuring ADI continued to operate through the pandemic office closure.

• Promotions

Lynelle Hee was promoted to Executive Director in March 2022 after an open search for candidates. Prior to her promotion, Lynelle was a criminal defense staff attorney at ADI for 20 years.

Cindi Mishkin was promoted to Assistant Director in April 2022. She has been a criminal defense staff attorney with ADI for more than 25 years.

• New Hires

New Staff Attorneys **Elena Min**, **Savannah Montanez**, and **Pauline Villanueva** joined ADI in February, March, and May 2022, respectively. Elena focuses on dependency work, whereas Savannah and Pauline focus on criminal defense work.

Legal Administrative Assistant **Tierra Johnson** joined ADI in July 2022 and has been serving as ADI's new receptionist.

Paralegal **Roya Enami** joined ADI in September 2022. Roya was an attorney in her native Iran before moving to the U.S. and obtaining her paralegal certificate.