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NOTES FROM THE DIRECTOR

by Elaine A. Alexander

All of us at ADI send you best wishes for the year: may you have happiness and health – and lots of reversals (the winning kind), for those of you who are attorneys in our program.

We are enjoying our new suite at 555 West Beech and thank all readers for their patience in dealing with the inevitable delays, misplaced documents, and other glitches associated with the change.

In this article I want to touch on some practical and legal aspects of petitions for rehearing. In one of my recent articles I reminded attorneys of the importance of maintaining a respectful tone in petitions for rehearing and warned that this is an area where the temptation to lash out is high, because of the frustration one naturally feels in losing, especially if the opinion has not dealt with the contentions satisfactorily from the attorney's point of view. In recent months, the issue of petitions for rehearing has resurfaced in different form, this time in connection with preserving issues for later review. Also, I have just been involved in editing an appellate practice manual for the San Diego County Bar Association and have come across a few surprises in the rules that even extremely experienced lawyers may not have been aware of.

Since the topic seems "hot," in this article I'd like to deal with petitions for rehearing generically – when to do or not do such a petition, what the time lines are, what the formal requirements are. To many, this refresher course may seem old hat, but even experienced attorneys can forget an important step or miscalculate a deadline occasionally, and as I've suggested the technical rules are tricky in a few spots. So I'd like to take this opportunity to go through the basics.

To start with the first question – when to do them at all – petitions for rehearing generally are *not* appropriate merely to reargue the points made in briefs and rejected, if it appears the court properly understood the points and supporting authorities and simply disagreed with the conclusion being urged. In addition, they are not appropriate for raising new issues that were not in the briefs. Occasionally a petition for rehearing might be tried when you have come up with a way to rephrase a contention already raised in a new and especially compelling form, but the likelihood of persuading the

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court to go the other way at this point is remote.

A petition for rehearing can be used when a strongly supportive case has just been decided, but that accident of timing is pretty rare. Usually the petition is designed to call the court's attention to an error of material fact, law, or logic in the opinion; a decision based on grounds not briefed, in violation of Government Code section 68081; failure to address an issue or deal with a major authority raised in the briefs; and similar problems.

"Read the Court of Appeal Opinion Carefully, And Be Sure To Petition for Rehearing If There Is Any Chance A Point You Want To Carry Forward Has Not Been Addressed In The Opinion Sufficiently To Preserve It For Later Review."

Naturally, it is imperative to file a petition if correcting the problem in the opinion could materially affect the outcome of the case. Even if the correction would not affect the outcome, it is important the opinion accurately reflect the facts and issues "for the record," so to speak, in the event any aspect of the appeal ever becomes material in a later proceeding. (See, e.g., *People v. Woodell* (2000) 17 Cal.4th 448 [appellate opinion in prior case considered as evidence of underlying fact stated in opinion].) And under rule 29(b)(2) of the California Rules of Court, as a matter of policy a party normally must file a petition for rehearing calling to the attention of the Court of Appeal an error or omission concerning any issue or material fact in an opinion in order to use the issue or fact as a ground for seeking review in the California Supreme Court.

The last basis for rehearing, preserving the issue for later review, can be critical if the issue is an important one which has a reasonable chance of being accepted by the California Supreme Court. It is also critical if you are trying to federalize an issue to be raised on certiorari or federal habeas corpus.

Suppose, for example, you have argued for a certain interpretation of a state statute based on the text and statutory history and then have argued a contrary interpretation would violate the federal Constitution. The Court of Appeal opinion discusses the statutory interpretation question at length and rules against you but fails to address the federal constitutional problem. You do not notice that and file no petition for rehearing calling the court's attention to the omission, but instead file a petition for review rearguing your positions on both points on the merits. At least as to the constitutional issue, the petition for review is likely to be denied on procedural grounds (failure to petition for rehearing under rule 29(c)), rather than the merits.

You now want to petition for certiorari or file a federal habeas corpus petition. Your client is going to be facing a substantial problem of procedural default. To go to federal court, one must have given the state courts a reasonable chance to resolve the federal issue. If the state's highest court may have rejected the petition for review on state procedural grounds (rule 29(b)(2)), then arguably the client has failed to exhaust state remedies or has otherwise procedurally defaulted, and the case may be rejected in federal court without ever getting to the merits.

This has actually happened, even with experienced and top-quality appellate lawyers. The vital lesson: *Read the Court of Appeal opinion carefully, and be sure to petition for rehearing if there is any chance a point you want to carry forward has not been addressed in the opinion sufficiently to preserve it for later review.*

Now for the mechanics. Petitions for rehearing are not available at all if the decision becomes final immediately as to the Court of Appeal because that court no longer has jurisdiction. This happens under rule 24(a) on denial of a petition for a writ without issuance of an alternative writ or order to show cause (unless the petition was one for habeas corpus and the decision on the petition is filed on the same day as the opinion in a related appeal), voluntary abandonment of the appeal by the appellant, and certain other occurrences less commonly encountered in our practice.

For ordinary appeals, habeas corpus petitions decided on the same day as a related appeal, original writ petitions granted or decided after an alternative writ or order to show cause, involuntary dismissals of an appeal, and other decisions not within the

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immediate-finality provisions enumerated in rule 24(a), petitions for rehearing are available, since the decision of the court does not become final until 30 days after the decision is filed. (Rules 24(a), 27(a).)

The time frame for petitions for rehearing is tight. Under rule 27(b), you have 15 days after the opinion or other decision is filed to file the petition. Any answer to the petition is due 23 days after the decision. (Rule 27(c).)

If the Court of Appeal modifies its opinion, the order for modification should state whether the modification changes the judgment. (Rule 24(b).) If (but only if) it does change the judgment, the refiling restarts the 30-day clock on when the decision becomes final. (Rule 24(a).) If the order fails to state whether the judgment is changed and you wish to proceed further with the case, be sure to seek clarification since the date of finality sets the time frame for rehearing and review.

Unless otherwise specified in a particular rule, petitions for rehearing are considered "briefs" for purposes of form, service, number of copies, etc. (Rule 40(k).) Check such rules as 15, 16, 37, 39 et seq. (juvenile and other specialized civil appeals), and 44 carefully. The color of the cover should be orange for the petition and blue for the answer. (Rule 44(c).) A tricky technical matter I just accidentally learned in editing the appellate practice book mentioned above: under rule 44(b), on number of copies, despite its name a petition for rehearing is considered a "brief" rather than a "petition" and so is governed by subpart (ii) rather than (i) of both rule 44(b)(1) (Supreme Court briefs) and rule 44(b)(2) (Court of Appeal briefs). Go figure – but follow it, anyway. In small matters, as well as more major ones such as filing a petition for rehearing to preserve an issue for later review, an ounce of preventive compliance is worth a ton of panicked cure.

APPELLATE PRACTICE POINTERS

CHANGE IN SERIOUS FELONY/STRIKE LAW

by Howard C. Cohen, Staff Attorney

On March 7, 2000, the electorate passed Proposition 21, the main topic of which was prosecution of juveniles. However, the proposition also amended the list of serious and violent felonies (and, ergo, Strikes). Among the changes within Penal Code section 1192.7 was subdivision (c)(18). Formerly, it had utilized language which was consonant with "residential" burglary, e.g., "inhabited dwelling," etc. Now it refers solely to "first degree" burglary. **[Note: the 2001 Deering pocket part continues to refer to language about inhabitation; this language is incorrect. The West version correctly mirrors the proposition itself.]** By referring to first degree vice residential burglary, the statutory amendment now includes some offenders not previously included and now excludes some who were.

In the first category are burglaries prior to 1977 in which the burglar was armed with a deadly weapon. In the second category, and most important to us, are those individuals who burgled a residence in the daytime prior to 1983. Prior to 1983, a daytime burglary, whether residential or otherwise, was second degree. From June 1982, i.e., passage of Proposition 8, until March 7, 2000, any residential burglary, including a daytime residential burglary, was serious (and ultimately a Strike) solely because of its residential character. From March 7, 2000, only first degree burglaries are included, so convictions for pre-1983 daytime residential daytime (second degree) burglaries are no longer "serious" within the meaning of 1192.7. **IF** an appeal is not final and a true finding or admission has been made for a second degree "residential" burglary, an issue may exist. Whether an issue may exist will depend upon a number of factors, including but not limited to: whether there was admission as part of a plea bargain; if so, whether there was a countervailing, legitimate tactical purpose; when the finding or admission was made, e.g., how soon before March 7, 2000, etc. We should be careful in attempting to spot this type of enhancement or strike and be especially careful to argue the ameliorative effect of the amendment.

SPEAKING OF APPRENDI

by Peggy O'Neill, Staff Attorney

By now you have probably heard of the United States Supreme Court case *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]. The *Apprendi* decision has been referred to as a "largely overlooked" decision and, at the same time, the "blockbuster" of the United States Supreme Court's 1999-2000 term. Currently, with dozens of cases in the circuit, district, and state courts, *Apprendi* seems to be living up to its reputation with respect to the latter. In fact, it is anticipated *Apprendi* will drastically impact trial and sentencing proceedings in federal and state courts throughout the country. (Chemerinsky, *Supreme Court Review: A Dramatic Change in Sentencing Practices* (Nov. 2000) 36 Trial 102.)

The Apprendi Decision

In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 120 S.Ct. at pp. 2362-2363.) The defendant in *Apprendi* pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose, which carried a penalty range of 5 to 10 years under New Jersey law. Under the terms of the plea agreement, the state reserved the right to request the court to impose a higher term under that state's hate crime law, which permitted an enhanced term if the judge found by a preponderance of the evidence that the offense was racially motivated. The judge applied the hate crime enhancement and imposed a 12-year term.

In deeming the New Jersey statutory scheme in *Apprendi* invalid, the United States Supreme Court reaffirmed its opinion in *Jones v. United States* (1999) 526 U.S. 227 [119 S.Ct. 1215, 143 L.Ed.2d 311]: The Due Process Clause of the Fifth Amendment, and the notice and jury trial guarantees of the Sixth Amendment, require that in a federal prosecution, any fact, other than a prior conviction, that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. (*Apprendi v. New Jersey*, *supra*, 120 S.Ct. at pp. 2355, 2362-2365.) Under the Fourteenth Amendment, the same is true for cases involving the application of state law. (*Ibid.*) In other words, a judge can no longer impose punishment greater than that authorized by the jury's verdict, even if the additional punishment is deemed an "enhancement" rather than an element of the offense. (*Id.* at p. 2363.)

The United States Supreme Court further clarified *McMillan v. Pennsylvania* (1986) 477 U.S. 79 [106 S.Ct. 2411, 91 L.Ed.2d 67], which upheld a Pennsylvania sentencing statute that required the sentencing judge to impose a minimum sentence based on finding by a preponderance of the evidence that the defendant possessed a firearm during the commission of the offense, remained good law. However, in *Apprendi* the Supreme Court limited *McMillan's* holding to cases that do not involve the imposition of a sentence beyond the statutory maximum. (*Apprendi v. New Jersey, supra,* 120 S.Ct. at p. 2361, fn. 13.)

Federal Courts

Several federal circuit courts of appeals have held the jury trial protections provided by *Apprendi* apply in drug cases where punishment is increased beyond the statutory maximum for the underlying conviction, based on the type and quantity of drugs involved. (*United States v. Doggett* (5th Cir. 2000) 230 F.3d 160, 165 [*Apprendi* applied where statute provided for a 20-year sentence or life sentence based on drug quantity involved]; see also *United States v. Angle* (4th Cir. 2000) 230 F.3d 113, 124; *United States v. Nordby* (9th Cir. 2000) 225 F.3d 1053, 1061; *United States v. Sheppard* (9th Cir. 2000) 219 F.3d 766, 768-769.)

Any allegation of *Apprendi* error is evaluated under the plain error standard. (*United States v. Swatzie* (11th Cir. 2000) 228 F.3d 1278, 1283-1284; *United States v. Nordby*, *supra*, 225 F.3d at p. 1061; *United States v. Sheppard*, *supra*, 219 F.3d at p. 769.) Under the plain error standard, the defendant must establish "(1) there was 'error'; (2) the error was 'plain'; and (3) that the error affected

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'substantial rights.' (Citation.)" (*United States v. Nordby*, *supra*, 225 F.3d at p. 1061.) If these requirements are met, then the appellate court may exercise its discretion and reverse the judgment "only if the error (4) 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' (Citation.)" (*Ibid.*)

A number of circuit courts of appeals have declined to apply *Apprendi* in cases where the enhancement involved did not increase the defendant's sentence beyond the maximum prescribed for the underlying offense. (See *United States v. Pounds* (11th Cir. 2000) 230 F.3d 1317, 1319 [*Apprendi* did not apply where every conviction under statute carried a life sentence]; *United States v. Chavez* (8th Cir. 2000) 230 F.3d 1089, 1091 [*Apprendi* not applicable given the statutory maximum for the underlying drug offenses was a life sentence]; *United States v. Keith* (5th Cir. 2000) 230 F.3d 784, 787 (*per curiam*) [*Apprendi* not applicable because the drug quantity finding did not increase sentence beyond maximum for underlying offense]; *United States v. Hernandez-Guardado* (9th Cir. 2000) 228 F.3d 1017, 1026-1027 [enhancement for creating a substantial risk of death or serious injury did not expose the defendant to more than the maximum for his conspiracy conviction]; *United States v. Smith* (7th Cir. 2000) 223 F.3d 554, 565-566 [difference between a 30-years-to-life term and mandatory life term was not the kind of "increased punishment" that warranted protection under *Apprendi*].)

"[D]efendants have the constitutional right to have each element of a crime, including those constituting a higher degree of the crime, submitted to a jury and proven beyond a reasonable doubt. (Mendoza, supra at p. 930 (dis. opn. of Kennard, J.)."

California Cases

In California, *Apprendi* has surfaced only in a couple of dissenting opinions. (*People v. Mendoza* (2000) 23 Cal.4th 896, 930-931 (dis. opn. of Kennard, J.); *People v. Harvest* (2000) 84 Cal.App.4th 641, 657 (dis. opn. of Poché, J.); but see *United States v. Jones* (9th Cir. 2000) __F.3d __ [2000 WL 1664426] [calling into doubt the validity of *People v. Bright* (1996) 12 Cal.4th 652, 669, which held premeditation is a sentencing factor providing for a greater base term].)

In *Mendoza*, Justice Kennard mentioned *Apprendi* in her dissenting opinion, noting that defendants have the constitutional right to have each element of a crime, including those constituting a higher degree of the crime, submitted to a jury and proven beyond a reasonable doubt. (*Id.* at p. 930 (dis. opn. of Kennard, J.).)

In *People v. Harvest*, *supra*, 84 Cal.App.4th 641, the only other California case discussing *Apprendi*, Justice Poché relied on *Apprendi* in his dissent from the majority's holding that court-ordered victim restitution is not punishment. Justice Poché questioned "California's procedure of permitting a punitive sanction, whose upper limit is not defined by statute but by the extent of the victim's loss. . . ." (*Id.* at p. 657 (dis. opn. of Poché, J.).) Citing *Apprendi*, Justice Poché doubted whether such an upper limit, determined at a hearing "with the barest of evidentiary and procedural formalities, can be squared with the due process provisions of our federal Constitution." (*Ibid.*)

Apprendi and Recidivist Statutes

The Ninth Circuit Court of Appeal recently rejected a defendant's claim that the district court unlawfully increased his sentence in violation of *Apprendi* because it considered aggravated prior convictions which were neither alleged in the indictment nor proven beyond a reasonable doubt. (*United States v. Pacheco-Zepeda* (9th Cir. 2000) 234 F.3d 411, 413.) The Ninth Circuit specifically rejected the defendant's argument that *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350], which held defendants do not have a constitutional right to a jury trial on a prior conviction allegation, no longer has precedential value given *Apprendi*. (*United States v. Pacheco-Zepeda*, *supra*, 234 F.3d at p. 414.) The court acknowledged the reservation expressed in *Apprendi* that *Almendarez-Torres* was arguably "incorrectly decided" but concluded "at most, that *Apprendi* casts doubt on the continuing viability of *Almendarez-Torres*." (*Ibid.*)

Thus, the Ninth Circuit interpreted *Apprendi* as broadly holding ". . . that all prior convictions — not just those admitted on the record — were exempt from *Apprendi*'s

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general rule. . . ." (*United States v. Pacheco-Zepeda, supra*, 234 F.3d at p. 415.) Unless and until the Supreme Court overrules *Almendarez-Torres*, the prosecution is not required to allege the prior convictions in the indictment, submit them to a jury, and prove them beyond reasonable doubt. (*Ibid.*; see also *United States v. Martinez-Villalva* (10th Cir. 2000) 232 F.3d 1329, 1331-1332 [*Apprendi* did not require the prosecution to charge the prior conviction in the indictment].)

However, while it is true the United States Supreme Court clearly stated in *Apprendi* that due process and Sixth Amendment procedural protections are mandatory only when the fact to be proved is "[o]ther than the fact of a prior conviction. . . ," the opinion appears to have confined this exception to just that — the *fact* of the prior conviction. In endorsing recidivism as a legitimate sentencing consideration, the court noted it is arguable that *Almendarez-Torres* was incorrectly decided and that its new rule would logically apply if the prior allegation were challenged today. (*Apprendi v. New Jersey*, *supra*, 120 S.Ct. at p. 2362.) The Supreme Court explained it stopped short of overruling *Almendarez-Torres* because it was unnecessary given that case's distinction as a "narrow exception" to its new general rule. (*Ibid.*) The court went on to add the due process and Sixth Amendment concerns at issue in *Apprendi* were mitigated in *Almendarez-Torres* for *two* specific reasons: 1) "the certainty that procedural safeguards attached to any 'fact' of [a] prior conviction," and 2) the fact that the defendant "did not challenge the accuracy of that 'fact.' " (*Id.* at p. 2363.) Thus, because the court emphasized *both* factors, it appears unreasonable to conclude the due process and Sixth Amendment requirements under *Apprendi* are eliminated in *all* cases just because *one of the factors* – the statute or enhancement at issue involves a prior conviction – is present.

New Challenges à la Apprendi

There remain many unresolved questions regarding the application of *Apprendi* at both the state and federal level. "Two of the most important unresolved questions concern whether the decision can be applied to sentences within the prescribed range and whether the decision can be applied retroactively." (Chemerinsky, *supra*, 36 Trial at p. 104.) With respect to the first question, *Apprendi* has had wide and varied application in federal drug cases. (See *ante*.) An early indication from federal courts which have addressed the latter question is that *Apprendi* does not apply retroactively to cases on collateral review. (*Talbott v. Indiana* (7th Cir. 2000) 226 F.3d 866, 869; *In re Joshua* (11th Cir. 2000) 224 F.3d 1281, 1283; *Sustache-Rivera v. United States* (1st Cir. 2000) 221 F.3d 8, 15.)

"Two of the most important unresolved questions concern whether the decision can be applied to sentences within the prescribed range and whether the decision can be applied retroactively." (Chemerinsky, supra, 36 Trial at p. 104.)

In addition to these questions, the possible extensions of *Apprendi* should also be considered. One tenable argument is that the ruling of *Apprendi* – that a defendant has a constitutional right to have every fact which increases his sentence beyond the statutory maximum be submitted to the jury and proven beyond a reasonable doubt – is based on a quite sweeping principle which requires *any* fact that actually increases the sentence be submitted to a jury and proven beyond a reasonable doubt. Federal law so far (supported to some extent by *Apprendi* and *Jones*'s own language and the decision in *McMillan*) has given *Apprendi* a more restrictive interpretation, but the underlying *logic* of *Apprendi* does not necessarily support that restriction. Any limits on the application of *Apprendi* need to be logical and principled. It could be argued that the restrictions applied by the federal courts thus far fail to meet that criterion because similarily situated defendants may be treated differently.

For example, suppose the sentencing range for the underlying offense is three, four, or five years. In one case, the judge finds the defendant was armed with a weapon during the commission of the offense and uses California Rules of Court, rule 421(a)(2) to impose the upper term – one year more than he would have received without the finding. Another defendant convicted under the same statute receives the upper term under rule 421(a)(8) because the crime involved planning and sophistication; a one-year weapon enhancement under Penal Code section 12022 must also be imposed. Under

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the federal courts' current interpretation, the first defendant would not have a constitutional right to a jury trial on the armed finding (because his five-year sentence does not exceed the statutory maximum for the underlying crime), but the second defendant would – even though they both receive one year of additional punishment because of the factual finding as to the use of a weapon. Why in principle does one case require rigorous constitutional protections such as a jury trial and proof beyond a reasonable doubt and the other not?

This argument can also be applied to factual findings that a judge uses to choose consecutive sentences. Upon further analysis of *Apprendi*, new challenges to sentence enhancements and prior conviction allegations under California Three Strikes Law open up. *Apprendi* itself expressed a willingness to reconsider *McMillan* as well as *Almendarez-Torres*. (*Apprendi v. New Jersey*, *supra*, 120 S.Ct. 2361& fn. 13 at pp. 2361-2362.)

Even if *Apprendi* is given the more restrictive interpretation, new arguments may appear. One would be that *Apprendi* abrogates the California Supreme Court's decision in *People v. Wims* (1995) 10 Cal.4th 293, 305, which held the failure to properly instruct on the elements of the weapon enhancement under Penal Code section 12022, subdivision (b) did not violate the defendant's Sixth Amendment right to a trial by jury. The court in *Wims* concluded the weapon enhancement is a sentencing factor rather than an element of the offense. However, in light of *Apprendi* the relevant inquiry is, arguably, whether the factual finding increased the punishment beyond that authorized by the jury's verdict. In *Wims*, the defendant's six-year sentence consisted of the *upper* term of five years for his second degree robbery conviction under Penal Code sections 212.5 and 213 (two-three-five years), plus one year for the weapon use enhancement. This sentence exceeds the maximum punishment authorized by the jury's verdict, five years. Therefore, it could be argued that, under *Apprendi*, the defendant was entitled to have this enhancement tried before a jury and proven beyond a reasonable doubt. If, however, the defendant had received a term other than the upper term (e.g., two or three years), then under the restrictive interpretation *Apprendi* would not apply, because the one-year enhancement would not increase the punishment beyond the maximum prescribed for the underlying offense, five years.

The imposition of concurrent or consecutive terms may affect the applicability of *Apprendi*. For example, if a defendant suffered a conviction for an offense punishable by four, five, or six years and a second offense punishable by three, four, or five years, the maximum term authorized by this verdict would be seven years and four months (i.e., upper term of six years plus one-third of four years). If the sentencing court imposed concurrent terms, then the imposition of an additional one-year for a weapon allegation under Penal Code section 12022, subdivision (b) would not exceed the statutory maximum for the underlying offense. This circumstance might not require the factual elements of the weapon enhancement be submitted to a jury and proved beyond a reasonable doubt. On the other hand, if the defendant received consecutive terms and the upper limit for the first offense, the total sentence would equal the maximum authorized by the verdict. Then the imposition of an additional one year for the weapon enhancement arguably would be subject to the *Apprendi* requirements because the sentence imposed (eight years, four months) would exceed the maximum authorized by the jury's verdict for the underlying offenses. The defendant would then have the right to a jury trial on the enhancement.

In the context of Three Strikes, an argument can be made that the *Apprendi* rule is violated in certain cases where the defendant receives a 25-years-to-life Three Strikes sentence by operation of Penal Code section 1192.7, subdivision (c)(8). Under this provision, a defendant's current offense or prior conviction can qualify as a strike based on a finding the defendant personally inflicted great bodily injury or personally used a firearm during the commission of the offense. Unless this finding is submitted to a jury and proven beyond a reasonable doubt, arguably the imposition of a Three Strikes sentence violates the defendant's federal constitutional rights. The issue in such a situation is not the *fact* of the prior conviction, which is the explicit exception recognized in *Apprendi*, but the factual circumstances underlying the prior. (The same argument could apply if the prior

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conviction was alleged as a strike under Penal Code section 1192.7, subdivision (c)(23) [personal use of a dangerous or deadly weapon].)

A defendant should raise the factual issue and request a jury trial on it in order to preserve a claim under *Apprendi*. The defendant in *Almendarez-Torres* did not challenge the fact of his prior conviction or otherwise contest the issue, and in that circumstance, the Supreme Court upheld his enhanced sentence and carved out a unique exception to the general constitutional right to a jury trial. (*Apprendi v. New Jersey*, *supra*, 120 S.Ct. at p. 2362.)

Conclusion

While it is not clear to what extent *Apprendi* will impact federal and state trial and sentencing procedures, a few things are certain. *Apprendi*'s impact will be sweeping and profound. In addition, *Apprendi* will surely be confronted head-on in the California Supreme Court's decision in *People v. Epps*, which will address the issue of whether a judge or jury determines prior conviction allegations. (*People v. Epps* (1999) 73 Cal.App.4th 1332, review granted Nov. 17, 1999, S082110, review expanded on Apr. 18, 2000, to include the issue whether the 1997 amendments to Penal Code section 1025 granted the defendant the right to a jury trial on prior conviction allegations.) While *Apprendi* continues to be interpreted, keeping current on *Apprendi* issues is a must for effective criminal appellate advocacy. We must think creatively when identifying and developing potential issues, always remembering to consider whether *Apprendi* affects the case.

STRAIGHT FROM THE MOUTHPIECE
ORAL ARGUMENT - SOME INSIDE TIPS

Not to oversimplify things, but two categories of cases are of concern when it comes to appellate argument: (1) cases which were set for oral argument and should not have been; and (2) cases in which oral argument is waived, but which should have been argued. An appellate court does not want to spend inordinate amounts of time on cases where the issues are clear and the court is simply a way station on the appellant's journey to the Supreme Court. This is not to say any appellate court discourages oral argument or that oral argument should be waived in a case where it would materially advance the interests of the defendant.

In the past, waivers seemed to occur more frequently where the case contained only one, simple issue. This pattern has apparently changed in the last six to seven years as argument now is being waived in more multi-issue cases. It is possible some cases are not orally argued because appointed counsel are fearful or reluctant to do oral argument. It should go without saying that you should not waive oral argument simply because it adversely affects your comfort level or because you do not like oral argument. If fear or some other difficulty presents a problem with respect to oral argument, you may arrange for someone else to argue.

The court has the power to set the case for oral argument on its own motion and sometimes does so. In Divisions One and Three of the Fourth District, however, the court will generally set argument on its own motion only where concern about the issues or questions about the case rise to a certain level. Otherwise the court tends to defer to tactical decisions of appellate counsel.

In Division Two it is easier for the court to set the case on its own motion, because the court has different letters it sends out with the tentative opinion. One letter (the number one letter) says the attorney will be notified within 30 days of oral argument. That notification means the case should be argued and the attorney should follow through appropriately. The other letter (the number two letter) states the briefing adequately covers all the issues and the court does not believe further argument is necessary. In such cases argument is deemed waived unless counsel confirms the request for argument within 12 days of the letter's date. But receiving letter number two does not mean counsel should automatically waive oral argument, for several reasons. To begin with, the court's perception that the case is clear and fully briefed is just that—the court's perception. If you think the case should be orally argued, then go ahead and argue it. Also, the tentative opinion mailed to counsel is by the author. Thus, there is the possibility the tentative opinion could be the dissent. (I was told the policy is to send the number one letter if the tentative opinion is the dissent. But mistakes are

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possible, so beware).

Even if the tentative is for reversal or modification of the judgment in your favor, do not assume this will be the status of the case when you appear at oral argument. Something may have changed between the time the tentative was prepared and the calendar is called. For instance, the justices may have conferenced about the tentative and changed their minds. If you relax and think you have won after reading a favorable tentative, you may find yourself in for a surprise at argument. Remember, you may "tentatively" trust the tentative opinion, so go to court prepared for anything.

Of course, when the tentative is in your favor, you would normally not request oral argument. But the Attorney General might, and the justices may have changed their minds by the time you reach the podium. However, I am informed that the court has never sent out the number two letter, then done a 180 degree turnaround of the opinion after a waiver.

So let's say you have set your case for oral argument. What can you do to argue your case more effectively? In Division Two, counsel should respond to the tentative opinion. Do not just stand up and ask the court if it has questions. After all, there is a tentative opinion and it is safe to assume that if the court had questions it would have sent you the number one letter. Focus on the basis for the court's decision and try to see if you can make an argument which persuasively undermines the court's reasoning, but do so respectfully. There may have been an important point you feel the court missed. Or maybe an argument you believe is really important, the court disposed of in a paragraph. If you think the court has underrated one of your issues, do not give up. Tentative opinions can and have been turned around. Remember that sometimes an issue simply does not strike the court in the same way you view it.

No matter which division, the court will respect your decision to argue a case if you have something worthwhile to add to the briefing. The court expects you to advocate your client's position zealously (or else it would not have approved your appointment). But do not come in and start reading the brief, because that tactic is generally futile and it certainly is boring. The justices have read the briefs and the opinion has been drafted, so this strategy is not going to advance materially your client's interests. You should have covered the facts fully and correctly in the briefs. If you feel there is some point you did not cover well, then at oral argument you can emphasize certain details or discuss deficits in the briefing.

What can you do to argue your case more effectively?

Do not try to talk about every aspect of every issue you raised in a multi-issue case. Distill the case down to the essence of the most important issue or issues. In addition, make sure you understand the issues you have raised well enough to know the difference between arguments raised to preserve them or just because they are arguable, and issues which are crucial to the court's decision. It is in the latter category that oral argument has the greatest likelihood of benefitting your client.

In cases containing cutting edge issues or where the law is unclear, expect to argue. In such instances the court often wants argument as well. If during argument the justices do not ask any questions or engage you in dialog, do not assume this means the court finds your case uninteresting. It may be that the facts are clear to them, but resolution of the issue is indistinct or difficult.

Do not lose sight of the fact that argument can hurt your client as well. How? Well, the court has a certain perception of the facts and procedure of a case by the time the case is ready for argument. On occasion, counsel's argument will alter the court's perception or will bring up some matter outside the record which may be detrimental to the client. Or counsel may alert the court to some fact outside the record, such as a stipulation between the parties, which harms the tentative resolution of the case. The court may not necessarily understand the importance of certain facts which, when made clear to it at oral argument, causes the case to take a turn for the worse. Thus, it is important to know the weak points of your case and how argument may negatively affect your client.

Another mistake is to discuss the case in a

Story Continued on p. 10.

very narrow sense and not understand the court's focus on the case, which may be broader and affect more defendants. While protecting your client is always the paramount concern, if the issue applies to more than one defendant, then the court is going to take more interest in the case. Why not take advantage of that fact for the sake of your client?

One question that occurs to an attorney in deciding whether to set a case for argument is whether doing so will delay the decision. In Division Three, the court is current on cases set for oral argument, which means the case may be decided earlier if argument is requested. However, the court will not be pleased if an attorney sets a case for oral argument and then cancels argument at the last minute. The court has no way of knowing whether the attorney is merely attempting to advance the case ahead of other cases or had some other reason for setting it for argument. Remember your credibility in this case and all future cases is at stake and trying to manipulate the system may hurt your reputation. Your decision whether to set a case for oral argument should be based on what is best for your client in all respects, and there are other ways to deal with a case which needs to be resolved quickly. For instance, you may file a motion to expedite or a motion for bail pending appeal. In appropriate cases, a writ petition may be submitted.

In Division Two, setting the case for oral argument may slow the wheels a bit. The tentative opinion has issued by the time you consider whether to request argument, so if you waive oral argument, the opinion will generally be filed rather quickly. But any delay occasioned by setting the case for argument may not be that great, because the court is current on its cases.

Finally, remember that just like appointed counsel, the courts like interesting arguments and cases. The courts like to expound on the law and make decisions regarding novel issues. So if you have a cutting edge issue, go to orals and argue it. You'll be glad you did.

*Portions of the information contained in this article were provided by some gracious individuals in each division of the Fourth District. Their observations provide a valuable glimpse into considerations surrounding oral argument in the Fourth District. Every effort has been made to set forth correctly the information received.

In The News

NEW MALPRACTICE INSURANCE AVAILABLE FOR PANEL ATTORNEYS

The appellate projects maintain professional liability insurance, which covers panel attorneys for acts and omissions that may give rise to legal malpractice claims during the course of their representation in appointed criminal and dependency appeals. However, panel attorneys who handle other legal cases are not covered by the appellate projects' insurance policies.

California Appellate Defense Counsel (CADC) has recently obtained "Limited Practice" professional liability insurance, underwritten by syndicates at Lloyd's of London, to cover panel attorneys against legal malpractice claims arising out of cases in which they have not been appointed by the appellate projects. This policy is aimed at providing malpractice coverage for panel attorneys who also maintain a "limited practice" of privately retained cases, in addition to appointed appeals.

Because this policy only covers claims which may arise in an attorney's practice outside the projects, the annual premiums are much more affordable than comparable coverage under standard policies. The actual cost varies with the limits of liability and deductible each attorney applies for and with the proportion of each attorney's caseload which is outside of the appellate projects.

Attorneys must be members of CADC to obtain coverage under this group policy. For additional information, including a copy of the policy and an application, contact Martha Sikora, CADC, 909 Marin Village Parkway #584, Alameda, CA 94501, or E-mail Richard Rubin at <lawrlr@aol.com>.

MARK YOUR CALENDERS FOR CADC'S ANNUAL CONFERENCE

CADC'S eighth annual conference and seminar will be held Friday and Saturday, March 30 and 31, 2001, in San Francisco.

On Friday, March 30, CADC will hold an annual open board membership meeting at 1:00 p.m. Plans are being made for dinner that evening. Our education program will be on Saturday March 31. Afternoon breakout sessions will cover dependency, death penalty, and current issues in criminal appeals.

Mark your calendars and be on the alert for registration materials to be sent early this year.

RULE CHANGE ALERT

Effective January 1, 2001, the Judicial Council adopted amendments to the California Rules of Court. Among other changes, amendments were adopted to rules pertinent to our practice, including California Rules of Court, rules 39.1A, 39.1B, and 56. The entire list of amendments to the California Rules of Court is published in Volume Number 34 of the Official Advance Sheets and at the Judicial Council's Website: <http://www.courtinfo.ca.gov/rules/amendments.htm>.

COMPLETING THE RECORD

Although there has been some divergence in the past, all three divisions of the Fourth District Court of Appeal are now in agreement on the procedure to follow when a record needs both correction under California Rules of Court, rule 35(e) (completion of normal record on appeal) and augmentation under rule 12 (addition to normal record on appeal). In this circumstance, all divisions want counsel to file a combined augment motion under rule 12, requesting both the improperly omitted materials and the additional materials in one document. Hopefully, this change will simplify practice in the Fourth District.

PAUL E. BELL MEMORIAL FELLOWSHIP WINNER

There were many fine applicants for the Paul E. Bell Memorial Fellowship for the year 2000, funded by Federal Defenders. The applications were received and evaluated by Executive Director Elaine Alexander and a committee of team leaders of Appellate Defenders, Inc., who forwarded their recommendations to the Awards Committee of the Board of Directors. The Awards Committee awarded the year 2000 fellowship to Ms. Marta Stanton.

Ms. Stanton is an undergraduate of University of California, Los Angeles, and attended law school at University of California, Hastings College of the Law, San Francisco, where she graduated Order of the Coif and was a member of the Hastings Constitutional Law Quarterly.

After admission to the bar in 1991, she first practiced in civil law, but during the past two years has been practicing criminal appellate law for both California Appellate Project—Los Angeles and Appellate Defenders, Inc.

Ms. Stanton reported that the curriculum at the conference was very intense with great emphasis on focusing on the facts with the use of dramatic language using a storytelling mode. The lecturers also encouraged oral argument in almost every case with the added advice that advocates should present themselves as engaging likeable personalities rather than merely "talking to a brain," that is, engaging in mere erudite renditions.

Again, congratulations to Ms. Stanton for the well-deserved award!

ADI APPELLATE TRAINING COLLEGE:

BROWN BAG LUNCH SERIES

Appellate Defenders, Inc., is hosting a monthly series of one and one-half hour brown-bag lunches based on the lectures and materials utilized at the Appellate Training College held last spring in San Francisco. MCLE credit is offered and pre-registration is not required. Unless otherwise posted, the series will held on the second Tuesday of each month at noon. Seminar locations and date confirmations will be posted on the ADI web site and sent via E-mail to panel attorneys with registered E-mail accounts. There will be a one-hour lecture followed by a half-hour question and answer session. ADI tentatively plans to videotape the series and make copies available to out-of-area panel attorneys for a nominal fee. Please call Patrick DuNah at (619) 696-0284 x 31 or Joyce Meisner at (619) 696-0284 x 61 if you have any questions.

LECTURE TOPICS

February 13, 2001: Location: ADI's Law Library. Topic: *Approaching a case / record completion*: Amanda Doerrer: Techniques for starting and sizing up a case efficiently and effectively; presenting California Rules of Court, rule 35(e) letters, and motions for augment and judicial notice.

March 13, 2001: Location TBD: *Issue spotting and evaluation*: Elaine Alexander/Howard Cohen: How to look for issues and to choose among them; weighing weak issues and considering filing a *Wende/Anders* brief; standards of review and prejudice; application of the waiver doctrine.

April 10, 2001: Location TBD: *Evidentiary Issues*: Randall Bookout/Michelle Rogers: Review of issues including: admissibility, corroboration, foundation, confession, other-crimes, and expert testimony.

May 15, 2001: Location TBD: *Issues in jury selection and misconduct*: Patrick DuNah/ Amanda Doerrer

June 12, 2001: Location TBD: *Jury instructions*: Howard Cohen/Joyce Meisner: Discussion of elements of offense, LIO's, cautionary instructions, allocation of burden of proof; responses to jury questions; sua sponte and requested instructions.

July 10, 2001: Location TBD: *Research*: Cheryl Geyerman/Peggy O'Neill /Panel Attorney: Review of advanced techniques and available alternatives; research materials a panel attorney's office should contain.

August 14, 2001: Location TBD: *Statements of appealability, case, and facts*: Anna Jauregui

September 11, 2001: Location TBD: *Writing an effective argument*: Ronda Norris/Cindi Mishkin: Framing of headings and issues, elements and organization of argument, order of presentation, use of authority, persuasiveness and clarity of writing.

October 9, 2001: Location TBD: *Review of respondent's briefs, reply briefs*: Neil Auwarter

November 13, 2001: Location TBD: *Oral argument*: Cynthia Sorman

December 11, 2001: Location TBD: *Petitions for rehearing and review, certiorari*: Leslie Rose

January 2002: Location TBD: *Writs*: Carmela Simoncini: Preparation of petitions for writ of habeas corpus, coram nobis/vobis, mandate, etc.; and raising ineffective assistance of counsel issues.

February 2002: Location TBD*: Project/ Panel Relations*: Elaine Alexander.

Areas Of Interest

Dependency Notes

by Cheryl A. Geyerman, Staff Attorney

Representing Parents

Making it easy for the parent to communicate with you is extremely important. If you are not often available when the telephone rings, then set a time for them to call you or vice versa. Often, after usual work hours, lunch hours, or before work hours are the best times for a client to call. However, the client does not always get to a telephone right on time, so plan to be available at that number an hour or two before and after the time you have set, if possible.

Potential *Sade C.* Situations

In *Sade C.* situations, more than a call to the ADI supervising attorney on the case is needed. In order to evaluate the case, we need statements or summaries of facts, what you discussed with the trial counsel, and what the parent told you.

Divisions One and Two: Send us, preferably by fax, a statement of case and facts.

Division Three: Send us, preferably by fax, a summary of the pertinent case posture and facts.

In all divisions, accompany this information with a comprehensive letter discussing the investigation done on the case, and the issues considered and reasons for rejecting them (including authorities consulted), the opening brief due date. A large percentage of *Sade C.* reviews result in briefed issues. This could be avoided if trial counsel were consulted after a careful review of the record, and questions were asked about the conduct of the case. Trial counsel have a responsibility to communicate with appellate counsel; if at all possible, do not let them off the hook. Please do the investigation before calling ADI for a *Sade C.* review.

It should be unnecessary to say appointed counsel should read the record thoroughly before asking the project to do a *Sade C.* review.

Zealous Advocacy

The best practice is to file a reply brief if you are not going to go to oral argument. An attorney who frequently neither files reply briefs nor asks for oral argument is not providing the zealous advocacy we expect. (See article on oral argument, *ante*, pp. 8-10.) We also expect attorneys to consider and file petitions for rehearing and review when appropriate. (See article on rehearing, *ante*, pp. 1-3.)

Statement of Case and Facts

Over the years, some justices around the state have voiced concern about the length of the statement of facts in dependency briefs, even while other justices acknowledge these cases are fact driven. The complainants have noted much extraneous information in the statements of facts, including lengthy descriptions of hearings that are not relevant to the appeal and lists of continuances and reports that are unreleated to any issue.

Some have argued in response to this criticism that because the respondent/County Counsel tends to write lengthy statements of facts, in order to counteract a "poisoning" of the entire case the appellant should write a commensurate statement of facts. However, two mistakes do not cancel each other out, but rather compound the problem. Counsel should strive to craft a statement of facts that highlights relevant information in a way that sets up the issues best for the client. Reply briefs can be used to correct misstatements or distortions in the respondent's brief.

Another explanation might be lack of time. Because of the expedited nature of the case, counsel may write the facts as the record is read, without a strong focus on what the issues are going to be, and may have little time to revise because of the speed with which the cases go through the appellate process. A case with a record of 1,000 pages

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is expected to be completed as fast as a case with 300 pages. On the other hand, some extensions are granted based on the need to review a lengthy record.

This problem affects the entire dependency panel. If the dependency attorneys want to optimize the effectiveness of their briefs (and also the chances of getting paid for the work they do), it would be advisable to move much of the factual evidence to the argument. In many of the briefs I review, the evidence is carefully presented in great detail in the statement of facts, and just referred to or summarized in the argument. I think it is much more effective to place the detail in the argument itself and provide a summary in the statement of facts. This practice also helps to confine the details to those most critical to the issues.

Minor's Counsel

Recent cases have shown how important a minor's counsel can be in a dependency case. One case was reversed at oral argument once changed circumstances were confirmed; minor's counsel changed her position to support reversal as she had said she would under those circumstances.

Representing minors with conflicting permanent plans can be hazardous. If one child is going to be adopted and others are not, counsel who represents all of them may have a conflict. If you find yourself representing multiple minors in this type of situation, please contact ADI as soon as you realize there is a possible conflict. Often, you can remain on the case representing one of the minors and ADI can quickly recommend appointment of another attorney for the other minors.

Division Three of the Fourth District holds settlement conferences for dependency cases if parties request them. Oral argument is also extremely important in these cases. Appellate counsel, including minor's counsel, have authority to settle cases on appeal. While counsel for the parents must consult with the parents as in any case, the minor's counsel is in a more autonomous position unless the child is 14 years or older. In all cases, of course, the minor's wishes must be expressed to the court, even if the counsel does not believe those wishes are in the minor's best interests.

As recent case law has held, minor's counsel should not hide behind the Minor's Counsel's Guidelines On Appeal. Unfortunately, we have seen briefing in which the minor's counsel essentially says his or her hands are tied because of the guidelines. However, the guidelines are not rigid and indeed emphasize the need for an independent look at the case. Dependency cases are not static; consideration of the ever-changing circumstances is necessary.

Changes are coming in Welfare and Institutions Code section 317, concerning representation of minors, effective July 1, 2001. Rule changes concerning this statute are in the commentary period into February 2001. Link to the rule comment site through ADI's website, and make your comments known, if this is an area that interests you.

As a reminder, the court in Division Three finds briefing by the minor helpful. It wants a strong and independent minor's counsel. In Division Two, if you are submitting more than a mere joinder, it needs to be a brief with a yellow cover. All divisions want the minor's counsel to be up on the current circumstances, for the most part personally observed. Some minor's counsel have noted they did not visit the child as "adequacy of the home was not an issue." However, whether the child had a beneficial relationship to the parent was an issue, and contact with the child was important. A minor's counsel told me when she went to visit a child, a car went by, and the child cried, "It's mommy, it's mommy!" She knew then the child had a strong connection with the mother and would have not discovered this connection but for the visit.

"Minor's counsel should not hide behind the Minor's Counsel's Guidelines On Appeal."

If evidence outside the record is to be presented, please consult the guidelines. Proper appellate procedure should be followed by submitting the evidence as provided for by court rules.

Because of an alert minor's counsel, a new issue has emerged under Welfare and Institutions Code section 366.26, subdivision (c)(1)(C), in which it is apparent the minor

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is not in the usual family home, but in a group home with closed circuit cameras and staff. If you want to know more about this issue, please call Cheryl Geyerman or Carmela Simoncini.

Statutory Changes

Be aware that several dependency statutes have been amended or added. Review the newest versions as you get cases from the new year. Statutory review will be a part of the dependency session presented at Division One's seminar March 24, 2001.

Caseman Corner

By: Ernie Palacio, Legal Administrator

In this first ADI newsletter issue of the year, we will be inaugurating a new periodic feature column, "Caseman Corner," dealing with the topic of ADI case management and case processing. We will discuss the nuts and bolts of how ADI goes about its business – primarily from a support staff perspective. Although it will not have the same flair or glamour as columns dealing with cutting edge legal issues, it is nonetheless one in which the panel has expressed interest.

This introductory column will provide a little "caseman" background and provide an overview of ADI mail processing.

ADI relies heavily on two particularly valuable resources for caseman activities. First and foremost is our caseman support staff consisting of administrative assistants, case processors, file clerks, and paralegals; primary duties and individual case responsibilities specifically rest on the assigned terminal digit processor (TDP). All staff are involved in various aspects of case management, including handling case related communications from the courts, the AOC, clients (and family members), panel attorneys and, of course, ADI staff attorneys.

The other resource is ADI's case management computer program. Ours is a DOS-based custom program which we have had in use since early 1992 and was designed from scratch specifically for ADI use. Although it has been in use for many years, we continue to upgrade it by adding new features or revising existing ones to continue to make it a very effective tool. As with most case management programs, it contains complete case, client, and counsel information. It incorporates evaluation and billing features, and it also allows us to generate efficiently some of the more standard case form letters sent out by ADI. In the program, ADI also maintains a complete history of the case from the time the notice of appeal is received from the court to when the case file is closed and archived (or as long as we continue to

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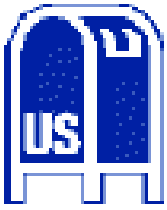
receive information relating to the case). This case history includes information regarding any and all documents and communications recorded as having been received or sent during the life of the appeal. We are able to keep track of due dates and deadlines for upcoming filings in addition to tracking internal ADI deadlines (such as for sending out transcripts, processing compensation claims, etc.) From our case management program, we also generate twice weekly "tickler" calendars for staff to assist in the monitoring of recorded due dates and deadlines. Also, because we utilize standardized codes to docket various types of documents sent and received, we are able to generate statistical studies when needed. The use of this program has enabled ADI to continue to better serve our clients, the panel, and the courts, even though our staff has appreciably decreased in size over the last few years while our caseload has not.

Processing Of Incoming Mail



At any given point, ADI's fileroom contains roughly 3,000 open case files in varying degrees of activity. Each file contains an extensive record of case documents and communications received from the courts, all counsel, the client, and other interested parties. As a result, ADI receives a very high volume of case related mail on a daily basis. Processing ADI's daily mail involves a multi-step procedure which will be described below. Although ADI receives case documents and communications in many different ways, most are processed following the same steps. Fax transmissions and other urgent, time sensitive deliveries are processed using the same multi-step procedure, but in expedited fashion.

The vast majority of incoming mail is received via regular postal "snail" mail which is typically delivered in the afternoon. Upon receipt, the fileroom unseals envelopes and date-stamps all case mail, taking care to avoid unsealing envelopes marked "confidential" and making sure that stapled or paper clipped documents for different cases contained within the same envelope are properly separated. As the documents are date-stamped, they are sorted by terminal digit processor assignment and are forwarded to the TDP for review and docketing. Because of this sorting process, it is essential that all case documents list the Court of Appeal number. Otherwise, the document must be temporarily set aside and the missing case number individually looked up in our case management system before being forwarded to the TDP. This omission thus adds a brief delay to the processing of the document.

Once opened and date-stamped, the mail is forwarded to the TDP staff for the next processing stage. In addition to ensuring that the document is promptly and accurately docketed in the case management program, the TDP will also review the document to determine if any other immediate TDP action is necessary. For example, if a filed appointment order has been received from the court, the TDP will immediately generate and send ADI's appointment confirmation letter to appellate and trial counsel and to the client. A second example would be the sending of a notification letter to appellate counsel and the court (when applicable) to inform them of a just-received client's change of address. Another level of review conducted at this stage involves the updating of applicable due dates and deadlines.

Once the document is processed by the TDP, the document is returned to the fileroom for file retrieval. If the file is located in the fileroom, it is pulled and the document is attached to the outside of the file. If a file is not in the fileroom, a routing slip is attached to the document, listing the staff attorney assignment. The files and documents are then sorted by assigned staff attorney and distributed to individual staff attorney offices. Files which are still unassigned and unappointed are returned to the TDP.

The time of day processed mail is distributed to the staff depends on the time the mail is received by the office and the length of processing time which varies depending on the volume and type of documents received for the day. Since it generally takes approximately four hours from start to finish to process the mail, it is distributed to staff very late in the afternoon or early the following morning.

Over the years, this multi-step process has proven to be a tried and true formula for handling, managing, and monitoring efficiently a formidable volume of case mail received on a daily basis by the office.

Links In The Law
ADI's Web Site

FINDING MCLE COURSES ON THE INTERNET

by Amanda F. Doerrer, Staff Attorney

Did you keep up with your MCLE hours during the past three years? Many attorneys did not and with the reinstatement of the MCLE requirement, those attorneys are now scrambling to accumulate MCLE credits. Well, just how does an attorney with a full-time law practice find the time to attend numerous MCLE courses? By surfing the Web of course!

Numerous Web sites offer on-line MCLE courses. These courses are offered in a variety of formats: text format (where you simply read an article, take a test, and send in a check), audio format (allowing you to actually hear a recorded seminar), streaming video format (just like watching a VCR) and on-line live MCLE webcasts (watch and hear a lecture as it is being presented in a remote location). Generally visitors to sites offering either audio or video seminars will need to download a free copy of the RealPlayer and/or Microsoft's MediaPlayer to hear and view the programming. Links to these progams are on ADI's Website.

The advantage? Most on-line courses can be taken on your schedule. Courses range in price from free to upwards of $200, depending upon the amount of case materials offered, the number of credit hours given, and the provider. Additional bonus: some live webcasts count as "participatory" CLE.

The following is a listing of a handful of the many providers with a brief description of the courses offered. A more complete listing is available on ADI's Web site under "Attorney Resources." CAVEAT: Before paying for an on-line CLE, check with the site to see if they are a qualified provider for CLE in California.

ABA CLE <Http://www.abanet.org/cle/home.html> The American Bar Association offers a variety of CLE opportunities. Listen to free lectures from nationally known lecturers, hear recordings of monthly one-hour teleconferences, and access on-line discussions.

California State Bar <Http://www.calbar.org> The state bar partnered with the Tecan <http://www.teacan.com> group to provide on-line MCLE courses. The cost is $25 per credit hour. Course materials include links to full-text cases and statutes. Some courses are in audio format, and others are text based.

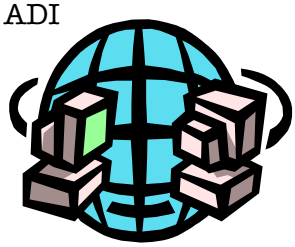
CLE On-line <Http://www.CLEonline.com> The site presents threaded, hypertext discussions on various topics. Because courses are in text format, there is no need to install additional software (such as RealPlayer or Media Player) to participate. Prices range from $25-$59.

California Daily Journal <Http://www.dailyjournal.com> The self-study articles printed in CDJ's monthly newspaper are available on their web site. No special software is required. Simply read the article, complete the test, and mail in the test with your check. Courses are $20 per credit hour, and the site offers credits in a number of areas.

Hieros Gamos <Http://www.hg.org/seminars.html> This spectacular legal web site provides access to hundreds of hours of audio seminars. The site also offers links to courses from other providers.

Rutter Group <Http://www.rutteronline.com> A division of the WestGrop. The site offers CLE in a variety of topics. The courses are presented in audio or video format (RealPlayer software required), and the course materials are provided in Adobe format. The courses cost between $30 and $360; however, visitors can purchase a yearly pass of unlimited access for just under $400.

This is just a small sampling of the many MCLE providers available on-line. A longer list of providers, as well as links to download the free software for audio and video players, is on the ADI Website. Go to Attorney Resources and click on the link to "MCLE." Good Luck!



DIVISION THREE WELCOMES NEW ASSOCIATE JUSTICE

On December 22, 2000, Eileen C. Moore was confirmed to sit as associate justice at the Court of Appeal, Fourth Appellate District, Division Three. Justice Moore graduated cum laude from the University of California, Irvine in 1975 and received her juris doctorate from Pepperdine University in 1978 with an American Jurisprudence Award for Civil Procedure.

Although Justice Moore's appointment to the Court of Appeal was only one month ago, Justice Moore possesses extensive experience in the California court system. Justice Moore sat as a superior court judge in Orange County Superior Court from 1989 to the present, presiding over civil trials, civil law and motion calender, and family law cases. For the last five years, she has presided over criminal trials. Additionally, Justice Moore has appellate judicial experience based upon her work in the appellate department of the superior court and her one year assignment to Division Three in 1993. In 1993, the Orange County Women Lawyers honored Justice Moore as Judge of the Year.

Prior to her law career, Justice Moore was a registered nurse and served as a second lieutenant in the Army Nurse Corps during the Vietnam War. As a combat nurse in Vietnam, she received a Vietnam Service Medal and a National Defense Service Medal.

Justice Moore has been an active member of the California Judges Association, has served as president of the Robert A. Banyard Inn of Court from 1992-1994 and as a committee member on the California Judicial Council's advisory committee on interpreters for the deaf, and has chaired the Orange County Family Violence Council. Justice Moore also is a lecturer at the University of California at Irvine's school of management and is on the faculty at the Center for Judicial Education and research.

An active community member, Justice Moore has participated in a variety of volunteer projects, such as the stay-in-school program and the Operation Jumpstart program, and has acted as a mock trial judge for numerous organizations.

A REMINDER TO THE UNWARY - COURT TIMELINESS

by Joyce Meisner, Staff Attorney

A reminder to the unwary: all three divisions appear to be current in their case loads. Now that Division Three has caught up and cleared its criminal backlog, it may soon be cracking down on extension requests.

In the dependency context, to help assist in the timely resolution of appeals from orders or judgments terminating parental rights and to keep all parties "on board" with the 250-day rule, counsel are reminded these appeals need to be briefed as expeditiously as possible. Extensions in dependency cases are not granted pro forma, and extensions are granted only in cases of "exceptional showing of good cause." (See Cal. Rules of Court, rules 39.1A(a), (g) & (i) [Division Two***]; 39.2A(a), (f) & (h) [Division One] and 39.2(a), (f) & (h) [Division Three].) If counsel anticipate problems completing dependency cases within the requirements set forth by the California Rules of Court, they should strongly consider holding off on taking new case offers.

Also, to help compliance with the 250-day rule, in Division Three, please use the following address when sending briefs to County Counsel. The correct address is: P.O. Box 1379; Santa Ana, CA; 92702-1379.

***Note that California Rules of Court, rule 39.1A was amended, effective January 1, 2001. The list of amendments to the California Rules of Court, as adopted by the Judicial Council of California and effective January 1, 2001, is published in Volume Number 34 of the Official Advance Sheets and at <http://www.courtinfo.ca.gov/rules/amendments.htm>.

CALIFORNIA APPELLATE PRACTICE SEMINAR * March 24, 2001

Sponsored by The Court of Appeal Fourth Appellate District, Division One and The San Diego County Bar Association. All lectures at the Mission Valley Marriott Hotel.

Program Agenda

8:30 a.m. Registration and Continental Breakfast.
9:00 a.m. Introduction and Welcome:
Kathryn E. Karcher, Chair Appellate Court Committee.
9:05 a.m. State of the Court Address: Presiding Justice Daniel J. Kremer.
9:30 a.m. Writing Briefs and Petitions: Questions and answers. Survey incorporation. Associate Justices Alex C. McDonald & Terry B. O'Rourke.
10:30 a.m. Break.
10:45 a.m. Oral Argument: Questions and answers. Survey incorporation.
Associate Justices Richard D. Huffman and Patricia D. Benke.
11:30 a.m. Ethics and Civility in Appellate Advocacy: Questions and answers.
Presiding Justice Kremer and Associate Justice Judith L. Haller.
12:00 p.m. Lunch W/Keynote Speaker:
-1:15 p.m. Associate Justice Marvin R. Baxter, California Supreme Court.

AFTERNOON BREAKOUT SESSIONS - Choose one of two 45-minute sessions.
1:30 p.m-2:15 p.m.

(1) Appellate Skills - Nuts and Bolt:
Associate Justice Huffman, Clerk/Administrator Stephen M. Kelly and two appellate practitioners (Crim.-Randall Bookout; Civil - Michael H. Fish).
(1) Working with the Clerk's Office;
(2) Importance of Knowing Court Rules;
(3) How to Read a Record Effectively;
(4) Standards of Review; and
(5) Oral Argument Video.

(2) Juvenile Dependency Process and Current Issues:
Associate Justice Gilbert Nares and two appellate practitioners (County Counsel - Gary C. Seiser; Appellate Defenders, Inc. - Cheryl A. Geyerman).

1:30 p.m.-2:15 p.m.

(1) Civil Writ Practice:
Associate Justice James A. McIntyre, Supervising Appellate Court Attorney (Writs) Cheryl Shensa and appellate practitioner (Kathryn Karcher).

(2) Post-Decision Process (Crim.):
Associate Justice Benke and two appellate practitioners (AG-Laura W. Halgren; Appellate Defenders, Inc.-Howard C. Cohen).

2:15 p.m.-3:00 p.m.

(1) Post-Decision Process (Civ.):
Associate Justice Haller and an appellate practitioner (William S. Dato).

(2) Criminal Writ Practice:
Presiding Justice Kremer, Managing Appellate Court Attorney Mary A. Eikel and two appellate practitioners (AG-Gary W. Schons; Crim.-Lynda A. Romero).

3:00 p.m. Break.
3:15 p.m. Technology and the Appellate Court:
Associate Justice Joanne C. Parrilli, Court of Appeal, First Appellate District.
4:00 p.m. General Question and Answer Session: The Court *En Banc*
Justice Baxter and Justice Parrilli.
4:30 p.m. Adjournment.