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Notes From The Director

by Elaine A. Alexander

Fiscal Matters

After a record budget delay, we finally are able to get claims to the Controller for payment. We know such prolonged waits create an unacceptable hardship for private practitioners and strongly support the efforts of the panel attorneys, the judiciary, and the Administrative Office of the Courts to develop measures to deal with such periods.

We also strongly back efforts to increase the hourly rate, which has been stalled for years and years, literally – especially at the $65 assisted case level. The state fiscal situation does not bode well for immediate relief, but the need for change is urgent.

New Rules and Jury Instructions in the Making

The Judicial Council is working on two projects that will affect our practice sooner or later. First, the Appellate Advisory Committee has published, for public comment, proposed revisions to the part of the Rules of Court governing criminal appeals. The appellate projects are commenting on the proposals, which can be accessed on the court Web site <http://www.courtinfo.ca.gov> under "Invitations to Comment." I see this as an excellent opportunity to address common misunderstandings and make the rules more accessible to newer practitioners.

Second, the Judicial Council Task Force for Jury Instructions (Criminal) has sought comment on a series of instructions proposed for use in criminal cases. This is the second set circulated for public comment; the first came out in 2000. As before, the appellate projects are commenting on the proposals. One reason is that we have a level of expertise in this matter that we think will be valuable to the Task Force. Another is that, although the immediate application of these changes would be in the trial courts, appeals and our clients are inevitably affected.

Petitions for Review in the California Supreme Court

This discussion renews my mini-series on the importance of strong advocacy on appeal. It will consider petitions for review in the California Supreme Court.

Advocacy does not end with an opinion adverse to the client in whole or part. If the case presents a new or often-encountered question of law or an issue on which districts or divisions of the Court of Appeal are in conflict, or if the client needs to exhaust state remedies in order to preserve an argument for subsequent federal filings, the attorney should consider petitioning the California Supreme Court for review.

Contents

The Supreme Court grants review in roughly four percent of the petitions filed. One of the reasons for this low percentage, aside from the sheer volume of petitions in relation to the resources of the court, is that the dominant role of the Supreme Court is supervisory; it promotes justice, not necessarily by ensuring the correct result is reached in each individual case, but by maintaining uniformity in the decisional law and overseeing the development of the law.

Despite the daunting odds, we expect attorneys to weigh the need for seeking review in all applicable cases and to file a petition if it seems (a) appropriate given the criteria for petitions and (b) reasonably necessary to protect the client's interests. If counsel decides not to file a petition, the client must be notified promptly and provided with information on how to file a petition for review in pro per, including the date by which the petition must be filed and the address of the Supreme Court.

Assessing whether to file

The grounds for review in the Supreme Court are found in rule 29(a) of the California Rules of Court. They are: (1) it appears necessary to secure uniformity of decision or to settle important questions of law; (2) the Court of Appeal was without jurisdiction; or (3) the Court of Appeal decision lacked the required majority of the qualified judges. The first is the most common by far.

The likelihood that conflicting appellate authority will prompt review depends on such factors as the age of the conflicting cases and the importance and frequency of the issue. The importance of the question of law will be assessed by considering whether it is an issue of first impression or broad or frequent applicability, differences between California law and other law, amicus curiae participation, and statistics or reports indicating the broad impact of the issue on society, the economy, or the judicial system. Publication increases the likelihood review will be granted, as do concurring or dissenting opinions substantially at odds with the majority reasoning.

The fact the client or attorney disagrees with the Court of Appeal or is unhappy with its reasoning is usually not a sufficient reason for petitioning. (Possible exceptions might include cases when the Court of Appeal has obviously misapplied undisputed law or denied the appellant procedural due process during the appeal. In that rare situation, the California Supreme Court has been known to grant review and, possibly, transfer the case back to the Court of Appeal with directions.)

Exhaustion of state remedies for federal purposes is a strategic legal reason for petitioning. This is a valid consideration if the client has a serious potential federal issue that has been raised adequately in the Court of Appeal. It is not a ground for petitioning on a "just in case something should come up in the federal courts" theory.

Formal requirements for petition

A party seeking review must serve and file a petition for review within 10 days after the decision of the Court of Appeal becomes final. (Rule 28(b).) Under rule 24(a), ¶ 3, in most cases that means the petition must be filed within the window period of 31-40 days after the filing of the opinion. Some decisions, however, are final immediately – for example, the denial of a petition for an original writ, without issuance of an alternative writ or an order to show cause; in that situation a petition for review must be filed within 10 days of the opinion. An exception to this rule is that a habeas denial filed on the same day as a decision in a related appeal becomes final at the same time as the appeal, even if no order to show cause has issued. (*Ibid*.) Even though the finality date is the same, separate petitions for review may be required for the writ and the appeal; counsel should check with the court.

The petition must conform to the provisions of rule 14, which specifies the form of appellate briefs. Rule 28(e) governs the general contents. The cover is white. (Rule 44(c).) Copy requirements are in rule 44(b)(1)(i). Service requirements are in rules 15(c) and (e), 28(b) and (e)(7), and 40(f); see the summary chart on the ADI Web site (www.adi-sandiego.com, under *Attorney Resources*: "ADI's Guidebook for Appointed Appellate Counsel," p. 49).

I repeat a reminder offered in the article on petitions for rehearing: under rule 29(b), the Supreme Court ordinarily will not grant review because of an error or omission in the Court of Appeal opinion unless that error or omission was called to the court's attention in a petition for rehearing.

Substantive content

This part of my discussion starts off with a strong but important negative: *It is inappropriate simply to copy the AOB wholesale, stick on a new cover and an "Issues Presented" section, and pass that off as a petition for review*. We see such petitions all the time, and they represent poor advocacy.[1]

The objective of a petition for review is to obtain review, not reversal or affirmance. If the petition is granted, new briefs on the merits will be filed. Thus, there is no reason to include extended merits briefing in the petition, beyond what is required to make sure the court knows what the issues are and why further consideration of them is needed (for example, why the Court of Appeal's treatment was inadequate). The critical point is to attract the interest of the Supreme Court and persuade it that review is necessary. Since the granting of petitions for review is completely discretionary and counsel is competing with numerous other briefs and petitions for the attention of the justices and their research attorneys, appellate counsel should make the petition as concise, interesting, and compelling as possible. Counsel's persuasive skills should be focused on the message "Why you should hear this case," not "Why my client should win."

For this reason, the petition should not just repeat the arguments already rejected and try at length to persuade the Supreme Court on the merits. It should develop the theme of why review is necessary. It should point out any social or political concerns involved, any implications for the judicial system, and the frequency with which the issues arise. Questions of law become more important when they have consequences beyond the individual case. The petitioner should alert the court to any other pending cases which raise identical or related issues and when appropriate may explain how the instant case highlights the issues more clearly than other pending cases. It of course should point out any conflicts among the Courts of Appeal and dissenting or concurring opinions. The incorrectness of the result reached in the Court of Appeal or injustice to the individual client would be factors to point out, but that will rarely suffice to differentiate that case from most others seeking review.

In addition to or in lieu of review, a request for depublication may be made. (Rule 979.) However, that measure offers no remedy to the individual client, and to the extent it suggests depublication is an adequate substitute for a grant of review, it may actually render a disservice to the client. We urge counsel to be exceedingly cautious and generally to eschew a request for depublication. The court can depublish on its own – and often does – without counsel's request. (Rule 976(c)(2).)

Answer

Rule 28(c) permits, but does not require, the filing of an answer within 20 days of after filing of the petition. An answer may ask the Supreme Court to consider any issue presented to the Court of Appeal but not mentioned in the petition, if review is granted. (Rule 28(e)(2), (5) ¶ 2.)

Disposition

The Supreme Court may grant review by an order signed by at least four justices. (Rule 28(g).) It must act within 60 days after the filing of a petition but may and often does extend its time to rule an additional 30 days. (Rule 28(a)(2).) The total time including extensions may not exceed 90 days after the filing of the last timely petition for review. (*Ibid.*)

The Supreme Court may dispose of the case other than by granting full review. In a "grant and hold"disposition, the Supreme Court grants the petition and holds the case pending decision in another case on which the court has granted review. (Rule 29.2(c).)

In a "grant and transfer" disposition, the court grants the petition and transfers the case back to the Court of Appeal. (Rule 29.4(e).) The court may choose this type of disposition where there is no Court of Appeal opinion, i.e., where a petition for an extraordinary writ is summarily denied or an appeal has been summarily dismissed. The

procedure may also be used where the Court of Appeal opinion fails to cite and discuss controlling authority. Most often, transfer occurs when an intervening relevant decision appears after the Court of Appeal opinion was filed. (See, e.g., *People v. Howard* (1987) 190 Cal.App.3d 41, 45.) If a case is transferred to the Court of Appeal, a party may, within 30 days after the Supreme Court's order, serve and file a supplemental brief in the Court of Appeal. (Rule 29.4(f).) As mentioned above, the "grant and transfer" option offers a rare but not unheard of remedy for those cases where the Court of Appeal opinion is egregiously at odds with established law; the Supreme Court can transfer with instructions to reconsider the opinion in light of named authority.

The court may also deny the petition but decertify the published Court of Appeal opinion. This disposition leaves the opinion as the law of the case but prevents it from being cited as precedent in future case. (Rule 977(a), (b)(1).)

In conclusion, as I have said at the outset and have emphasized throughout this series, advocacy does not end with the AOB. We expect counsel to consider petitioning for review in appropriate cases as part of the "follow-through" obligations inherent in every appellate appointment.

[1]An exception might be when the sole purpose of the petition is to exhaust state remedies for federal purposes.

Appellate Practice Pointers

THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT - A ONE YEAR UPDATE

by Anna M. Jauregui, Staff Attorney

I. INTRODUCTION.

The Substance Abuse and Crime Prevention Act (hereinafter "Act"), also known as Proposition 36, took effect July 1, 2001, following its passage by California voters in the November 2000 election.[1] The Act mandates probation and drug treatment for eligible, nonviolent drug possession offenders. Various issues have surfaced in the process of its application, of which the appellate practitioner should be aware. The following provides an overview of the Act, the development of the case law, and the latest reports on the implementation of the Act.

Note: as is evident from the discussion below, a number of cases concerning Proposition 36 have been granted review. Other cases are cited for which the period in which the Supreme Court may grant review has not expired. The purpose of this article is to alert the reader to various issues related to Proposition 36, but the reader must remain diligent to consider possible further grants of review as well as Supreme Court resolution of issues.

II. THE ACT.

The heart of Proposition 36 is embodied in Penal Code section 1210.1, subdivision (a).[2] It provides:

> (a) Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation. As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program.

Probation is imposed by suspending the imposition of sentence. A court is not limited in the type of probation conditions it may order except to the extent that it may not impose incarceration as a condition. It may impose, for example, participation in vocational training, family counseling, literacy training, and community service. (§ 1210.1, subd. (a).)

In addition to usual fines, the court has discretion to require the probationer, who is reasonably able to do so, to contribute to the cost of placement in a drug treatment program. (§ 1210.1, subd. (a).)

The eligible offender may receive up to one year of drug treatment and six months of after-care. (§

1210.1, subd. (c)(3).) After successful completion of drug treatment, the defendant may petition the court for dismissal of the charges. The court may grant the petition upon finding successful completion of the program and substantial compliance with probation conditions. The conviction is set aside, and the indictment, complaint, or information is dismissed. The arrest and conviction are deemed never to have occurred, and the defendant is released from all penalties and disabilities resulting from the offense with certain exceptions. (§ 1210.1, subd. (d)(1).)

A defendant is not eligible for drug treatment if any one of the five following circumstances apply:

(1) Any defendant who previously has been convicted of one or more prior serious or violent felony convictions . . . unless the nonviolent drug offense occurred after a period of five years in which the defendant remained free of both prison custody and the commission of an offense that results in (A) a felony conviction other than a nonviolent drug possession offense, or (B) a misdemeanor conviction involving physical injury or the threat of physical injury to another person.[3]

(2) Any defendant who, in addition to one or more nonviolent drug possession offenses, has been convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony.

(3) Any defendant who:

(A) while using a firearm, unlawfully possesses any amount of (i) a substance containing either cocaine base, cocaine, heroin, methamphetamine, or (ii) a liquid, nonliquid, plant substance, or hand-rolled cigarette, containing phencyclidine.

(B) While using a firearm is unlawfully under the influence of cocaine base, cocaine, heroin, methamphetamine or phencyclidine.

(4) Any defendant who refuses drug treatment as a condition of probation.

(5) Any defendant who (A) has two separate convictions for nonviolent drug possession offenses, (B) has participated in two separate courses of drug treatment pursuant to subdivision (a), and (C) is found by the court, by clear and convincing evidence, to be unamenable to any and all forms of available drug treatment.

(§ 1210.1, subd. (b).)

III. CASE LAW.

A. Misdemeanor Not Related To The Use Of Drugs.

On August 28, 2002, the California Supreme Court granted review in *People v. Garcia* (2002) 99 Cal.App.4th 38, S0108472, in which the Third Appellate District had examined section 1210.1, subdivision (b)(2), which makes a defendant ineligible "who, in addition to one or more nonviolent drug possession offenses, has been convicted in the same proceeding of a misdemeanor not related to the use of drugs . . . ." The issue on review is whether a defendant is entitled to have the disposition of his conviction for possession of a controlled substance set in accordance with the provisions of the Act, or was that enactment inapplicable because defendant was also convicted of misdemeanor petty theft of the drugs he possessed?

Garcia had pleaded guilty to possession of a controlled substance and misdemeanor petty theft of that same substance. While working as a nurse in a nursing home, Garcia stole the drugs and injected them. He was found unconscious, and alongside him were syringes and drug patches, one of which remained unopened. (*People v. Garcia, supra,* 99 Cal.App.4th 38 at p. 40.)

The *Garcia* court referred to the definition of a "misdemeanor not related to the use of drugs" contained in section 1210, subdivision (d). The definition provides: "a misdemeanor that does not *involve* (1) the simple possession or use of drugs or drug paraphernalia, being present where drugs are used, or failure to register as a drug offender, or (2) any activity similar to those listed in paragraph (1)." (*People v. Garcia, supra,* 99 Cal.App.4th at p. 41, italics added.) Applying the usual principles of statutory interpretation, the court evaluated the term "involve." It

determined that when a person steals a drug for the sole reason of consuming it and does so immediately, the theft necessarily "'involves'" the simple possession or use of the drug. It reasoned that the act of possessing and immediately using is a component part of the theft. (*Id.* at pp. 41-42.)

The court found this interpretation consistent with the principle governing construction of the Penal Code, which states that all of the code's provisions "'are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.'" (*Garcia, supra*, 99 Cal.App.4th at p. 42.) It also found that the interpretation furthered the purpose of the Act, which "is to assist those found guilty of nonviolent drug offenses to eliminate their drug problems and become productive members of society." (*Ibid.*) It concluded that section 1210.1 applies to a defendant who steals a drug, amounting to a petty theft misdemeanor, and then immediately consumes it. (*Ibid.*)[4]

Later, the Third Appellate District in *People v. Canty* (2002) 100 Cal.App.4th 903, 907, held that the misdemeanor offense of driving under the influence of drugs does not involve the "'simple possession or use of drugs'" because it requires the additional element of impaired driving.

B. The Five-Year Washout Period.

In *People v. Superior Court (Henkel)* (2002) 98 Cal. App.4th 78, 81-82, 86, the First Appellate District held that the washout period set forth in section 1210.1, subdivision (b)(1) must immediately precede the current drug conviction as oppose to "at any time" before the conviction. That subdivision makes an offender ineligible if there has been a previous conviction of one or more serious or violent felonies unless the nonviolent drug possession offense occurred after a period of five years in which the defendant remained free of both prison custody and the commission of an offense that resulted either in a felony conviction other than a nonviolent drug possession offense or a misdemeanor conviction involving physical injury or the threat of physical injury to another person.

Defendant Henkel was granted probation and drug treatment despite a 1989 strike conviction (§ 1192.7, subd. (c)(18)) and despite that, seven months before his commission of the current offense and more than six years after his release from custody following the strike conviction, he was convicted of felonious willful infliction of corporal injury upon a spouse (§ 273.5). He argued that the five-year washout period applies at any time before the current drug offense. Under his interpretation, the five years would have started after his release from custody in 1994. He did not commit another non-drug related felony for over five years. The Attorney General argued that the washout period must occur in the five years immediately prior to the current drug offense. Since Henkel committed the felonious corporal injury offense only seven months prior to the current drug offense, he would not be eligible. (*Henkel, supra*, 98 Cal.App.4th at p. 81.)

The court acknowledged that the statute was silent on the starting point for the washout period. (*Henkel, supra*, 98 Cal.App.4th at p. 81.) Examining the voter's intent by referring to the Legislative Analyst, the court determined that the use of the word "the" in the phrase "*the* five years before commission of the offense" specifically anchors the required five years to the period immediately preceding the drug offense.[5] (*Id.* at p. 82, italics original.)

The court reasoned that its interpretation was consistent with the general tenor of the argument in favor of Proposition 36 which was "strict" limitations on eligibility which the court understood as excluding any defendant who was more than a simple, nonviolent drug offender. (*Henkel, supra*, 98 Cal.App.4th at p. 82.)

The Second Appellate District and the Fourth Appellate District, Division Two, had reached the same conclusion in *People v. Superior Court (Turner)* (2002) 97 Cal.App.4th 1222, 1225, and *People v. Superior Court (Jefferson), supra,* 97 Cal. App.4th at p. 534, respectively.

C. Discretion To Strike Priors To Render Eligibility.

Pending review is the issue of whether, when a defendant is convicted of a nonviolent drug possession offense but has a prior serious or violent felony conviction and has not remained free from custody for five years prior to the current offense, the trial court has discretion under section 1385 to strike the prior conviction in order to render the defendant eligible for probation and drug treatment, rather than incarceration, under the Act. (*In re Varnell* (2002) 95 Cal.App.4th 205, mod. 96 Cal.App.4th 442a, review granted May 1, 2002, S104614.)

D. Prospective Application.

At odds with each other on the issue of prospective application are *People v. Floyd* (2002) 95 Cal.App.4th 1092, review granted May 1, 2002, S105225, from the Fifth Appellate District and *People v. Fryman* (2002) 97 Cal.App.4th 1315, review granted July 31, 2002, S107283,[6] from the Sixth Appellate District. The issues arising from those cases and pending before the high court are (1) does the Act apply to defendants who were convicted and sentenced prior to the Act's effective date of July 1, 2001, but whose convictions were pending on appeal when the Act became effective, or only to defendants convicted or sentenced on or after July 1, 2001? (2) If the latter, does limiting the application of Proposition 36 in this fashion deny a defendant whose conviction was pending on appeal on that date the constitutional right to equal protection of the law?

Prior to the passage of the Act by the electorate on November 7, 2000, defendant Floyd was convicted of illegally possessing cocaine, and allegations that he had suffered five Strike priors and five prior prison terms were found true. Defendant was sentenced two days after the Act was approved to a total term of 28-years-to-life imprisonment. His appeal was pending when the Act took effect on July 1, 2001.

The Fifth Appellate District rejected Floyd's contention that Proposition 36 should apply to those who were sentenced before July 1, 2001, but whose cases had not yet reached final disposition in the highest court authorized to review them. It held that the Act applied prospectively to convictions occurring on or after July 1, 2001. Applying the principles of statutory interpretation, the court relied on the Act's plain language that it applies to individuals convicted on or after July 1, 2001, and that it is to be applied prospectively. In construing the terms "convicted" and "conviction," it referenced the principle that "one is convicted of a crime, at the latest, when judgment is pronounced and sentence imposed." It found no evidence that the drafters of the initiative or the voters intended the term "conviction" to include affirmance of the judgment on appeal.

Defendant Fryman was convicted before the Act's effective date of July 1, 2001, but the judgment was not final on that date. He claimed that, because the judgment was not yet final,[7] the Act applied retroactively to him. (*Id*. at p. 1325.) The Sixth Appellate District recognized the common law rule that a defendant is accorded the benefit of mitigation of punishment adopted before his criminal conviction becomes final unless the Legislature clearly expresses a contrary intent. (*Ibid*.) It also recognized the *Estrada* principle of retroactive application where there is no "savings clause." (*Id.* at p. 1325, citing *In re Estrada* (1965) 63 Cal.2d 740, 748.) The court quickly dismissed defendant's contention by referring to section 8 of Proposition 36, which makes it expressly prospective. (*Fryman, supra*, 97 Cal.App.4th at p. 1325, citing *In re DeLong* (2001) 93 Cal.App.4th 562, 567 ["With respect to its effective date, Proposition 36 provides: 'Except as otherwise provided, the provisions of this act shall become effective July 1, 2001 and its provisions shall be applied prospectively.' (Prop. 36, § 8.)"];[8] see also *People v. Legault* (2002) 95 Cal.App.4th 178, 181 [§ 1210.1 applies prospectively to convictions occurring on or after July 1, 2001, and conviction includes sentencing].)

The *Fryman* court further examined the question of what occurrence serves as the point for distinguishing prospective from retrospective application. (*Fryman, supra,* 97 Cal.App.4th at p. 1326.) After examining the plain meaning of the statute and the legislative history, it concluded the point of reference is the date of conviction (*id*. at pp. 1326-1327) and conviction means the adjudication of guilt (*id*. at p. 1328).

Because defendant's conviction occurred before the effective date of the Act, the reviewing court found that under this analysis he would be ineligible. (*Fryman, supra,* 97 Cal.App.4th at p. 1329.) The court also compared the analysis of the Second Appellate District case, *DeLong I, supra,* 93 Cal.App.4th 562, which dealt with the same issue and concluded that "convicted" means "'adjudication of guilt *and* judgment.'" (*Fryman, supra,* at pp. 1328-1319, citing *DeLong I, supra,* 93 Cal.App.4th at p. 570, original italics, and also citing in accord *In re Scroggins* (2001) 94 Cal.App.4th 650, 657, and *People v. Legault, supra*, 95 Cal.App.4th at p.181; see also *People v. Cano* (2002) 97 Cal.App.4th 1216, 1218, fn. 1.)[9]

E. Equal Protection.

In response to Fryman's claim that the two classes of offenders created by the date-of-conviction scheme violated equal protection, the Sixth Appellate District in *Fryman* examined the following issues: whether those convicted before July 1, 2001, whose judgments are not yet final,

and those convicted after July 1, 2001 are similarly situated; if so, what is the standard of scrutiny; and has a violation of equal protection of laws taken place? (*Fryman, supra,* 97 Cal.App.4th at pp. 1329-1341.)

As to the first issue, the court applied the principle that there must be "'some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified.'" (*Fryman, supra,* 97 Cal.App.4th at p.1330, citing *People v. Nguyen* (1997) 54 Cal.App.4th 705, 714.) After examining the purpose and scope of the Act,[10] the *Fryman* court found the two groups sufficiently similar to warrant judicial scrutiny of the distinction. (*Fryman, supra,* 54 Cal.App.4th at p. 1330*.)*

In resolving the second issue, the reviewing court determined that the "classification-by-date-of-conviction scheme," in other words, the disparity in treatment, infringes on the defendant's fundamental interest in liberty and triggers review under the strict scrutiny standard. (*Fryman, supra,* 97 Cal.App.4th at pp. 1331-1333; see *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155-1156 [if the distinction involved infringes on a fundamental interest, it is strictly scrutinized and is upheld only if it is necessary to further a compelling state interest].) *Fryman* pointed out that the scheme singles out one group for incarceration and the other group for probation, resulting in a dramatic impact upon defendant Fryman (25 years to life vs. probation). (*Fryman, supra*, 97 Cal.App.4th at p. 1333.)

Fryman rejected the Fifth Appellate District's conclusion in *Floyd* that there was a rational basis for distinguishing between the two groups. The *Floyd* court had found the distinction reasonable and rational, because the initiative's delay in the effective date of the Act was necessary to establish programs and to avoid overloading of those programs. (*Fryman, supra,* 97 Cal.App.4th at p.1333.) *Fryman* found this practical-considerations approach specious. The court noted that, since the Act has been in effect for some time, the programs are presumably now funded and operational. It viewed the concern of overloading programs as based on pure speculation, since there was no evidence to support that claim. (*Fryman, supra,* 97 Cal.App.4th at p. 1337.) The *Fryman* court questioned whether such speculation provides a rational basis for keeping a defendant incarcerated for 25 years-to-life. (*Ibid.*) It then logically rejected the notion that preventing overloading represents a compelling state interest or that keeping this class of offenders incarcerated is necessary to serve that interest. (*Ibid.*) The court ultimately concluded that equal protection was violated and determined that nonviolent drug offenders convicted before July 1, 2001, whose judgments are not yet final, are eligible under the Act. (*Fryman, supra,* 97 Cal.App.4th at p. 1341.)

F. Conflict Between The Act And The Three Strikes Law.

In a footnote, the *Fryman* court expressed the apparent conflict in the Act and the Three Strikes law in regards to probation. It pointed out that the Three Strikes law prohibits probation to a Strike defendant (see §§ 667, subd. (c)(2); 1170.12, subd. (a)(2)), while the Act does not as long as the Strike defendant does not fall within one of the Act's five exclusions. (*People v. Fryman, supra,* 97 Cal.App.4th at p. 1323, fn. 6.) The court also noted that both statutes have similar provisions, that is, the "'notwithstanding any other law'" language in the Three Strikes law and the "'notwithstanding any other provisions of law'" phrase in the Act. (*Ibid.*)

The *Fryman* court resolved the conflict in favor of the Act. (*Fryman, supra,* 97 Cal.App.4th at p. 1323, fn. 6.) It reasoned that the "'notwithstanding'" language in the Strikes statute could not have been intended to prevail over the Act, which did not exist when the Strikes law was enacted. It further noted that the Act's language was passed in light of the existing Three Strikes law. Citing to the principle that the Legislature is deemed aware of law already in effect and to have enacted the new law in light thereof, the court concluded that under the circumstances and based on the reasons and purposes of the Act, the electorate intended the Act to apply to Strikes offenders. (*Ibid*.) A contrary view would render portions of the Act meaningless and ineffective, a consequence which the courts are to avoid in construing statutes. (*Ibid.)*

G. Appeal Following Completion of Drug Treatment and Dismissal of Conviction.

Section 1210.1, subdivision (d)(1) provides for the setting aside of the conviction and dismissal

of the charging document upon successful completion of treatment and compliance with probation conditions. Additional benefits that follow are that the arrest and conviction are deemed never to have occurred and the defendant is released from all penalties and disabilities resulting from the offense. (*Ibid*.) However, the benefits do not flow in the following situations:

> (2) Dismissal . . . does not permit a person to own, possess, or have in his or her custody or control any firearm capable of being concealed upon the person or prevent his or her conviction under Section 12021.
>
> (3) . . . . Regardless of his or her successful completion of drug treatment, the arrest and conviction on which the probation was based may be recorded by the Department of Justice and disclosed in response to any peace officer application request or any law enforcement inquiry. Dismissal . . . does not relieve a defendant of the obligation to disclose the arrest and conviction in response to any direct question contained in any questionnaire or application for public office, for a position as a peace officer . . . , for licensure by any state or local agency, for contracting with the California State Lottery, or for purposes of serving on a jury.

(§ 1210.1, subd. (d)(2), (3).)

These provisions were examined in *People v. DeLong* (August 22, 2002, B152019) ___ Cal.App.4th ___ [2002 Cal.App. Lexis 4529] (*Delong II*), in which the defendant, despite her success in drug treatment and dismissal of the conviction under Proposition 36, sought to appeal the judgment by raising evidentiary trial issues and challenging the denial of a *Wheeler* motion. The People argued that the appeal was moot because the conviction had been dismissed. (*Id*. at p. *5.)

In evaluating the mootness issue, the reviewing court pointed out that under subdivision (d), "a conviction . . . is 'deemed not to have occurred' for some purposes *but not others,* and a defendant is released from some *but not all* disabilities resulting from the conviction." (*DeLong II, supra,* 2002 Cal.App. Lexis 4529 at p. *16, italics in original.) Therefore, the conviction would still exist and the defendant continue to "suffer a besmirched name and the stigma of criminality." (*Id*. at p. *20.) The court also noted the disparity between two classes of defendants. There would be those who successfully complete their drug program, fulfill the probation conditions, have their convictions set aside, but continue to suffer unavoidable collateral consequences, and yet are precluded from appealing on the basis of mootness. And then there are those defendants, who fail in the program and in complying with probation conditions, and yet they are permitted to appeal their cases. (*Id*. at p. *21.) The court rejected the notion of mootness. (*Ibid*.)

H. Revocation of Probation.

Under the Act, revocation of probation is controlled by subdivisions (e)(2) & (3). Subdivision (e)(3) prescribes the procedures when the cause for revocation is drug-related. For a first-time revocation based on drug-related conduct as specified in subdivision (e)(3)(D), the trial court may not *revoke* probation *unless* the state *also* proves by a preponderance of evidence that the probationer poses a danger to the safety of others. This limitation curtails the trial court's general power to revoke probation. (*People v. Murillo* (E030638, October 23, 2002) __ Cal.App.4th __ [02 D.A.R. 12221, 12222-12223](hereafter *Murillo*).) However, the trial court retains the power to *modify* the conditions of probation. (§ 1210.1, subd. (e)(3)(D).) For a second revocation based on drug-related conduct, the trial court shall revoke probation if the state proves by a preponderance of evidence either that the probationer poses a danger to the safety of others *or* is unamenable to drug treatment, but if the court may not revoke, it may modify the probation conditions. (§ 1210.1, subd. (e)(3)(E); see also *Murillo*, *supra*, 02 D.A.R. at pp. 12222-12223.) For a third violation based on drug-related conduct, if proven, the defendant is not eligible for continued probation under section 1210.1, subdivision (a). (§ 1210.1, subd. (e)(3)(F).) These standards apply to a probationer who was granted probation before the Act became effective if the alleged drug-related violation of probation occurred after the effective date. (*Murillo*, *supra*, 02 D.A.R. at p. 12223.)

I. Summary.

Six issues have emerged since the Act became effective: (1) mootness of an appeal following successful completion of drug treatment and dismissal of the conviction, (2) the scope of the five-year washout period, (3) the disqualifying eligibility factor of a misdemeanor not related to

the use of drugs, (4) a court's discretion pursuant to section 1385 to strike priors in order to render an offender eligible, (5) prospective application of the Act, and (6) the corresponding equal protection issue should the Act be construed to create two classes of offenders based on the date of conviction.

IV. THE ACT'S EFFECTIVENESS.

According to the The Drug Policy Alliance, the Act's lead watchdog, it is still too early to assess the overall effectiveness of the Act. The Alliance reports, however, that thousands of offenders are receiving treatment; the treatment system has grown dramatically; and the public health approach to drug addiction is taking a firm grip across the state. (*Proposition 36 One-Year Progress Report,* California Proposition 36 (July 1, 2002) http://www.prop36.org/one year _ report.html.)

The California Department of Corrections has reported that the state's population of women inmates has declined 10 percent in the past year and has attributed this in large part to Proposition 36. (*Early Reports Indicate Prop. 36 is Working as Intended,* California Proposition 36 (May 1, 2002) http://www.prop36.org/pr050102.html.)

Despite the Act's promising outlook, the Drug Policy Alliance has also reported areas in need of improvement such as diversity of treatment. Potential improvements would include programs for pregnant and parenting women, multi-lingual programs, and access to methadone or other narcotic replacement therapies. (*Proposition 36 One-Year Progress Report, supra*.) The California Bar Journal recently reported that an unexpectedly high number of substance abusers are hard-core substance abusers requiring intensive care and that hard-core abuse has posed a problem for counties which do not have sufficient spaces in residential treatment facilities. (Flaherty, K.H., *Prop. 36 Presents New Challenges* (July 2002) California Bar Journal, at p. 21.)

One may anticipate that these types of problem areas will be examined by The Department of Alcohol and Drug Programs, which is responsible for annually evaluating the effectiveness and fiscal impact of the programs funded, including the implementation process, review of incarceration costs and changes in the crime rate, prison and jail construction, and welfare costs. (See http://www.adp.cahwnet.gov/SACPA/prop36.shtml.) The University of California at Los Angeles will also be part of the evaluation process. It was selected to conduct a five-year study to evaluate the effectiveness of the Act. (*About Prop 36*, California Proposition 36, http://www.prop36.org/about.html [home page].)

V. CONCLUSION.

The Act is changing the way drug offenders are treated by the courts. It is allowing the courts to provide alternatives to address the core drug problems of offenders. As expected, various issues are surfacing in the implementation of the Act, which the courts in time will iron out. Hopefully, the Act will fulfill its promise to reduce drug addiction rates and crime by diverting offenders to drug treatment and save California taxpayers millions of dollars by reducing jail and prison populations.

ENDNOTES

1 Uncodified section 8 of the Act states, "Except as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provisions shall be applied prospectively. " (Ballot Pamp., Gen. Elec. (Nov. 7, 2000) text of Prop. 36, § 8, p. 69.)

2 All statutory references are to the Penal Code unless otherwise noted. Section 3063.1 parallels the provisions of section 1210.1 but relates to the treatment of parolees who commit nonviolent drug possession offenses or violate the conditions of parole.

3 Because a juvenile adjudication is not a "conviction," a juvenile adjudication for a serious or violent felony will not trigger ineligibility. (*People v. Westbrook* (2002) 100 Cal.App.4th 378, 383-384.)

4 In another case, *People v. Superior Court (Jefferson)* (2002) 97 Cal. App. 4th 530, 537-538, the Fourth Appellate District, Division Two, impliedly held that the misdemeanor offense of a customer soliciting for prostitution was unrelated to the drug possession offense, making the defendant ineligible.

5 The analysis stated specifically that "Offenders with one or more violent or serious felonies on their record, and thus subject to longer prison sentences under the Three Strikes

law, would not be sentenced under this measure to probation and drug treatment, unless certain conditions existed. Specifically, during the five years before he or she committed a nonviolent drug possession offense, the offender (1) had not been in prison, (2) had not been convicted of a felony (other than nonviolent drug possession), and (3) had not been convicted of any misdemeanor involving in jury or threat of injury to another person." (Ballot Pamp., Gen. Elec., supra, analysis by the Legislative Analyst of Prop. 36, pp. 23-24.)

6 Briefing in *Fryman* has been deferred pending a decision in *Floyd*.

7 A judgment is not final in this context, i.e., in determining the retroactive application of an amendment to a criminal statute until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. (See *Fryman, supra,* 97 Cal.App.4th at p. 1325, fn. 8, citing *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5.)

8 Later, another issue arose in *Delong*. The earlier appellate decision shall be referred to as *Delong I* and the later as *Delong II*.

9 The *Fryman* court nevertheless concluded that the *Delong I* interpretation of the Act "has a somewhat illogical ramification." (*Fryman, supra,* 97 Cal.App.4th at p. 1329.) That is, "[p]ut more simply, under *DeLong I*, applying the Act makes it applicable." (*Ibid*.) Even under the *DeLong I* analysis, though, defendant Fryman was not eligible. (*Ibid*.)

10 The purpose "is to save money by ending wasteful spending on incarcerating nonviolent drug offenders and to enhance public safety and health by diverting offenders to drug treatment." (*Fryman, supra*, 97 Cal.App.4th at p.1330.) "[T]he Act was designed to have is 'wide reach' and 'far ranging application.'" (*Ibid*., citing *DeLong I, supra*, 93 Cal.App.4th at p. 569.)

Understanding *Cruz/ Vargas* Release Provisions

by Neil Auwarter, Staff Attorney

So called *Cruz* or *Vargas* "waivers" are an increasingly popular tool used in trial courts. (See *People v. Cruz* (1988) 44 Cal.3d 1247, 1254, fn. 5; *People v. Vargas* (1990) 223 Cal.App.3d 1107.) Under these agreements, also known as "return provisions," a defendant is released after pleading guilty, with the agreement that if the defendant fails to appear on the date of sentencing or violates any other agreed term, the court may impose an increased sentence.

Traditionally, return provisions were viewed as a merciful accommodation to allow defendants to get their affairs in order prior to commencing a prison sentence. Increasingly, though, prosecutors and trial courts appear to have realized that defendants - particularly those with active substance abuse problems - are often so anxious to be released, even temporarily, that they will agree to release provisions carrying enormous penalties should they fail to appear for sentencing or otherwise fail to perform.

However, because *Cruz* and *Vargas* provisions are widely misunderstood and misapplied, they can be a fruitful source of appellate issues. The most pervasive misunderstanding regarding *Cruz* and *Vargas* waivers is that they are synonymous. In fact, they differ substantially in their origin and in their legal consequences. The California Supreme Court in *People v. Cruz*, *supra*, 44 Cal.3d at pages 1249, 1253, held that a return provision initiated by the trial court amounted to disapproval of the plea agreement and that the provision violated Penal Code section 1192.5. (All references to statutes shall be to the Penal Code.) Section 1192.5 is an often ignored statute providing that when a trial court approves a plea agreement, it must advise the defendant that its approval is not binding and that if the court imposes a sentence greater than provided by the plea agreement the defendant may withdraw his guilty plea. The court in *Cruz*

noted that a trial court may impose a valid release provision by having the defendant waive his or her section 1192.5 right to withdraw the plea. (*Cruz*, *supra*, 44 Cal.3d at p. 1254, fn. 5.) Trial courts soon began crafting return provisions to include a waiver of the defendant's section 1192.5 right to withdraw the plea, and this type of provision has become known as the "*Cruz* waiver."

Subsequently, in *People v. Vargas*, *supra*, 223 Cal.App.3d 1107, 1112-1113, the Court of Appeal held that if a return provision is *negotiated by the parties as part of the plea agreement*, *rather than being initiated by the trial court*, then the increased sentence is not a disapproval of the plea but rather is part of the plea agreement. Thus, the court held such a return provision does not implicate section 1192.5 and is enforceable without the defendant having been offered the opportunity to withdraw his plea. (*Ibid.*) Since a *Vargas* provision is part of the plea agreement and does not entail a waiver of the defendant's section 1192.5 right, the term *"Vargas* waiver" is actually misnomer.

The rules set out in *Cruz* and *Vargas* have been followed by appellate courts in assessing the validity of return provisions imposed in connection with guilty pleas. (See *People v. Casillas* (1997) 60 Cal.4th 445 [return provision negotiated by the parties upheld under *Vargas*]; *People v. Jensen* (1992) 4 Cal.App.4th 978 [judicially imposed return provision invalidated under *Cruz* where trial court had not given defendant opportunity to withdraw plea under section 1192.5].) For a good, recent discussion distinguishing between a *Cruz* waiver and a *Vargas* provision, see *People v. Masloski* (2001) 25 Cal.4th 1212, 1217-1223.

The most obvious difference in the consequences flowing from these two types of provisions is that if a trial court has attempted to impose a *Cruz* release provision without obtaining the defendant's section 1192.5 waiver, the provision is unenforceable. In other words, if the court imposes an increased sentence pursuant to the return provision, the increase amounts to a disapproval of the plea, which entitles the defendant to withdraw the plea under section 1192.5. Where the trial court imposes an increased sentence under an invalid *Cruz* waiver, the most likely remedy is simply to invalidate the *Cruz* provision, resulting in imposition of the sentence provided by the plea agreement.

A less obvious difference between *Cruz* and *Vargas* is that since a *Cruz* waiver is not part of the plea agreement, errors stemming from a *Cruz* waiver can probably be attacked on appeal without a certificate of probable cause ("CPC"). Under section 1237.5 and California Rules of Court, rule 31(d), a CPC is necessary to appeal the validity of a guilty plea but not to appeal on grounds occurring after entry of the plea which do not challenge its validity. Since, by definition, a *Cruz* waiver is not negotiated as part of the plea but is imposed by the court after the plea, the CPC requirement should be inapplicable to errors in the structuring and implementation of a *Cruz* waiver. Still, it is advisable to obtain a CPC when any doubt exists as to whether a claim on appeal is an attack on the plea. But where a CPC request is refused or where it is too late to seek a CPC, one may argue that no CPC is needed to appeal on a *Cruz*-related issue.

A less common variation on *Cruz* and *Vargas* provisions is the *post-sentencing* release provision. Under this arrangement, the trial court purports to impose one sentence and then releases the defendant until a specified date with the agreement that the defendant will receive an increased sentence if he or she fails to appear or otherwise violates the release provision. This type of agreement is unauthorized because a judgment becomes final and is not subject to increase the moment the judgment is recorded in the minutes. (*People v. Karaman* (1992) 4 Cal.4th 335, 345-346, 350; *People v. Gooch* (1995) 33 Cal.App.4th 1004, 1007.) Further, an increase in sentence after the judgment is final is not merely erroneous; it is an act without fundamental jurisdiction over the defendant. (*Karaman*, *supra*, at p. 345.) The significance of this is, first, that the error may be corrected at any time (see *In re Harris* (1993) 5 Cal.4th 813, 842) and, second, that a defendant's agreement to such a provision does not equitably estop him from challenging it (see *People v. Nguyen* (1993) 13 Cal.App.4th 114, 122).

Some trial courts have managed to create enforceable post-sentencing release provisions simply by flipping the order of the two-tiered sentence, i.e., imposing the greater sentence first, with an agreement to later reduce the

sentence if the defendant complies with the release provision. This provision is generally enforceable because the rule of judgment finality is less absolute where sentence *reductions* are concerned. Under *People v. Karaman*, *supra*, 4 Cal.4th at page 353, a trial court may impose a prison term and then stay execution of the judgment, permitting the court to *decrease* the sentence at any future time until the sentence is executed. Once the sentence is executed, i.e., the defendant is committed to prison, the court has an additional 120 days to reduce the sentence pursuant to section 1170, subdivision (d). (*Karaman*, *supra*, 4 Cal.4th at p. 353.)

A further refined sub-variety of the post-sentencing *Cruz* or *Vargas* provision is a release subject to terms *including supervision by the probation department*. Where this occurs, it can be argued that the release is, in fact, a grant of probation since the statutory definition of probation is "the suspension of imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer." (§ 1203, subd. (a).) The significance of this is that a grant of probation carries certain rights probably not available to a defendant released on a non-probationary *Cruz* or *Vargas* provision. For example, a probationer is entitled to an evidentiary hearing where revocation is sought. Further, there are statutory limits on the permissible grounds for revoking probation. (See, e.g., § 1203.2 [prohibiting revocation of probation for non-willful failure to pay restitution].)

In sum, if one's client received an increased sentence for running afoul of a purported *Cruz* or *Vargas* release provision, take heart: an issue may be lurking as to the propriety of the sentence ultimately imposed.

CALJIC NO. 17.41.1 IS HELD CONSTITUTIONAL BUT VIEWED AS INTRUSIVE ON THE DELIBERATION PROCESS

by Anna M. Jauregui, Staff Attorney

Recently, the California Supreme Court determined that CALJIC No. 17.41.1 does not violate a defendant's federal and state constitutional right to trial by jury or the state constitutional right to a unanimous verdict. (*People v. Engelman* (2002) 28 Cal.4th 436.) Notwithstanding, the Supreme Court criticized the instruction and, invoking its supervisory power, directed that it not be given in trials conducted in the future. (*Id*. at pp. 446-449.) The court reasoned that the instruction had "the potential to intrude unnecessarily on the deliberative process and affect it adversely – both with respect to the freedom of jurors to express their differing views during deliberations, and the proper receptivity they should accord the views of their fellow jurors." (*Id*. at p. 440.)

The instruction advises jurors that "should . . . any juror refuse[ ] to deliberate or express[ ] an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." (CALJIC No. 17.41.1 (1998 new) (6th ed. 1996).) The risks attendant the instruction, as identified by the court, include juror misunderstanding of the instruction because it is vague and potential misuse by jurors to browbeat other jurors. (*Engelman, supra*, ___ 28 Cal.4th at p. 447.) The language "any other improper basis" allows jurors to provide their own interpretation of what is improper juror conduct. (*Ibid.*) Simple disagreement can be viewed as improper. Mere disagreement has the potential to direct jurors to reveal the secrecy of deliberations and to draw the trial court unnecessarily into delicate and potentially coercive exploration of the subject matter of deliberations. (*Ibid*.) The court pointed out that the law does not require that the jury be instructed with specific terms of the instruction and that other instructions typically given in a trial adequately guard against juror misconduct. (*Id*. at p. 449, citing CALJIC Nos. 0.50, 1.00, 1.03, 17.40, 17.41, 17.42, 17.43.)

Associate Justice Marvin Baxter concurred with the holding of no constitutional infirmity but strongly disagreed with the majority for exercising its supervisory power to cease the instruction's use in trials on the ground of a "hypothesized risk that the instruction could be misunderstood or misused." (*Engelman, supra*, 28 Cal.4th at p. 450.)

Problem Criminalist From San Bernardino

by Beatrice Tillman

Appellate Defenders was recently informed by the San Bernardino County District Attorney's Office, pursuant to their obligation as established in *Brady v. Maryland,* that criminalist Kalpesh Mistry of the San Bernardino County Sheriff's Department lied during several trials/ preliminary hearings regarding his academic qualifications. Mr. Mistry testified as an expert, and in some but not all cases, he claimed to have a masters degree in biochemistry. He does have a bachelor of science degree in biology. He is no longer employed with the sheriff's crime lab. If you have a case involving this criminalist where he lied about his academic credentials, please contact the assigned attorney at ADI.

Welcome ADI's Newest Staff Attorney

Lynelle Hee

Lynelle Hee joined the Appellate Defenders, Inc. staff in early September. A native of Los Angeles, she received her Bachelor of Arts from University of California at Irvine. She graduated with honors from University of San Diego School of Law in May of 1993. She spent the next six years working as a deputy public defender for the San Diego Public Defender's office. In May 2001, she joined the ADI panel. Lynelle is married and has two young children.

Record Citation– Some Dos and Don'ts

by Neil Auwarter, Staff Attorney

ADI was recently reminded by Court of Appeal personnel that the justices have strong views on the adequacy of citations to the record in appellate briefs. While justices profess to be generally satisfied with the quality of appellate briefing in criminal cases, record citation is apparently an exception. Here are some specific recommendations for appellate counsel:

Do: Cite the record accurately, making sure the matter referred to in the brief actually appears at the page(s) cited in the record. This comment seems like a no-brainer, but it is one that bears repeating in light of the court's current dissatisfaction.

Do: Cite the record for each important fact in the brief. The reader should be able to go quickly to the record to verify every important factual point in the brief. Including only occasional cites for facts you judge to be important is not adequate.

Don't: Overuse "page-range citation," e.g., citing R.T. pp. 225-237 in support of facts. Page-range citation is often appropriate, and even essential, where a specific factual point is covered on multiple transcript pages. But it is not appropriate to use a long page-range citation for a series of important facts when the reader may need to track down individual factual points in the record.

Do: Remember that the court takes the attorneys' characterization of the facts with a grain of salt, so our briefs must be peppered with detailed and accurate record citations to permit the court to determine for itself the facts essential to the case.

COMPENSATION CLAIMS SPEEDING UP THE PROCESS

by Lori Oltoff

Claims may be the last thing with which an attorney wants to deal after concluding rigorous briefing, but they are indeed necessary to be paid. Claims that include brief but comprehensive explanations are generally processed quicker and help ensure proper compensation for work completed. Here are some suggestions to make claims creation and processing flow much more smoothly.

- When billing for communications time, include a numerical total of phone calls and letters between counsel, defendant, family, and trial counsel.

- If the preliminary record is read, explain why.

- If more than two extensions were necessary and filed, ADI staff can glean the reasons from the extension requests themselves. However, our task is made easier – and the claim expedited – if an explanation accompanies the claim itself.

- When billing for motions other than requests for extensions or augmentations (a request pursuant to California Rules of Court, rule 35(e) is an "other" motion), list each separately and subtotal the time.

- If there were difficulties in writing a brief beyond what may be evident from the briefing itself, clarify what the difficulties were and how they may have contributed to the time claimed.

- Sufficiently detailed clarification is beneficial when billing for time related to other petitions and travel.

- For "Other Services," it is especially important to provide specific descriptions and to subtotal the time.

- Written explication is crucial when a particular category claimed exceeds the guidelines.

- Do not neglect to include a completed "Use of Previous Briefing" form when applicable.

- Expenses such as travel, computer research, paralegal or clerk time, and any miscellaneous services claimed, including but not limited to certifications, fees, and experts, need comprehensive explanations as well.

- Receipts are ordinarily required for airfare, rental cars, accommodations, and other relatively high expenses. Because expert expenses are usually high as compared with ordinary expenses, a receipt or other documentation is ordinarily required.

- If a claim includes associate counsel time, the courts require associate counsel's name and state bar number on an itemized attachment indicating the breakdown of that time.

- Paralegal and law clerk time should be itemized as well.

- In some cases the space provided on the claim sheet for a particular category may be less than sufficient. When this occurs, counsel may refer to area "J" (located on the third page) and conclude remarks there.

Tackling some claims may seem a daunting and laborious task, but taking a moment to add thoughtful and thorough explanations to them will make it easier for us to justify paying you the full amount you claim and help expedite your duly earned payments.

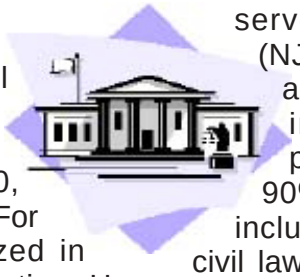
Happy Claiming!

Fourth Appellate District Court News

Meet the Newest Court of Appeal Associate Justice: Justice Richard Fybel

by Howard Cohen, Staff Attorney

Justice Richard Fybel was born and raised in Los Angeles. An avid baseball fan, he recalls taking part in fundraising as a Little Leaguer when the Dodgers came to Los Angeles. Amongst his friends he counts Maury Wills, the Dodger shortstop of the '60s. (Editor's Note: Wills brought base stealing back as an integral part of major league baseball.) He attended the University of California, Los Angeles, first as an undergraduate, gaining a B.A. in political science in1968, and then law school (J.D., 1971: Law Review, Order of the Coif). Through his years at U.C.L.A., he worked at Safeway as box boy, clerk, and eventually, night manager. During law school, he also worked as an intern for a local office of the Air Force Judge Advocate General.



After graduation from law school and until 1981, he practiced at Nossaman, Waters, Scott, Kreuger & Riordan, achieving partnership in 1977. From 1981 to 2000, he was a partner at Morrison & Foerster. For almost 30 years, Justice Fybel specialized in cases involving complex civil business litigation. He handled cases involving significant issues relating to contracts, banking, labor, and real property. Justice Fybel devoted substantial time to the representation of financial institutions in class actions and a broad range of clients in cases involving contract, energy, trade secret, and labor issues. Justice Fybel also had extensive experience in Alternative Dispute Resolution, including mediation and arbitration.

In addition to his litigation work, Justice Fybel was the Managing Partner of Morrison & Foerster's Los Angeles office from 1988 to 1993, the firm-wide Managing Partner for Personnel in 1993, and the firm-wide coordinator for lateral partner hiring from 1994 to 1996. From 1996 through 1998, he was a member of the Board of Directors of the firm. In July 1997, Justice Fybel moved to the Orange County office of the firm.

From June 1990 to June 1991, he served as the Chair of the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association. In 1998, Justice Fybel was the President and member of the Board of Directors of the U.C.L.A. Law Alumni Association.

In 1999, Justice Fybel wanted a new challenge and sought an appointment to the bench. The main motivating factors were a continuing strong interest in the law and a desire to make a contribution to public service. Justice Fybel was appointed a superior court judge in March 2000. Lest anyone believe that the justice has come to the appellate court only knowledgeable in civil law, his experience in the superior court belies such a misconception. He served in the North Justice Center (NJC) [Fullerton] where he endured a "very steep learning curve" and in his tenure as a trial judge presided over criminal matters 90% of his time. His assignments included felony preliminary hearings, civil law and motion, court and jury trials in criminal and civil cases, pretrial conferences, NJC Master Misdemeanor Calendar, and NJC Felony Master Calendar. He also served as an officer of the Board of Trustees of the Orange County Public Law Library.

Justice Fybel has had a strong interest in the appellate law. On February 8, 2002, Governor Davis' appointment of Justice Fybel as an Associate Justice of the Court of Appeal was confirmed by the Commission on Judicial Appointments. Justice Fybel enjoys participating in the development of the law as well as in the broad spectrum of the kinds of cases reviewed by the appellate bench. He is thrilled to work with talented judges, research attorneys, and judicial assistants and relishes the process of testing the strength of arguments, theories and ideas. In contrasting trial and appellate benches,

Justice Fybel emphasizes the difference in the decision-making process. In the trial court he delighted in his "ground floor" experience where he interacted daily with defendants, victims, counsel, and jurors. He also found himself basically on his own in his rulings, such as on jury instructions. In contrast, in the appellate arena, though farther removed from the human personalities, he has more time to be contemplative and utilize the expertise of his judicial staff. Justice Fybel has been well impressed with criminal law appellate practitioners; he has found they present the factual record in a balanced manner and their oral arguments have been of the highest quality.

Justice Fybel finds oral argument very useful. For the most part, the utility of oral argument is a function of the preparation of counsel and the court. Generally, he will have questions in mind for the argument, for example, what do counsel think about a particular aspect of the case or why is a purported error prejudicial or harmless. Both as the justice assigned to draft a summary memorandum and as a another member of a panel, he will likely question counsel unless counsel first address his concerns in their presentations without the need for his broaching his query. In preparing for an oral argument before Justice Fybel, an attorney will be well advised to ask him- or herself what is the toughest question I can anticipate, what are the strengths and weaknesses of my issues, and what do I have to address to persuade the court.

Even after his appointments to the trial and appellate courts, Justice Fybel has remained very active in community affairs. He serves as a mock trial judge for the Constitutional Rights Foundation, U.C.L.A. School of Law, and Chapman Law School; as a speaker in programs for students and parents sponsored by the Orange County Education Department, including Drive S.A.F.E.; and as a member of a U.C.L.A. Law School Committee on selection of recipients for scholarships for under-represented minority students.

Justice Fybel lives in Newport Beach with his wife, Susan. They have two adult children. Though his extended family had been somewhat dispersed, for the first time in quite some time, the justice's parents, brothers, and children all now reside in Southern California.

Reminder From Division Two

by Dave Rankin, Staff Attorney

Division Two of the Fourth Appellate District wants to remind all appellate counsel that when seeking a request for an extension of time, attorneys must state good reasons for the request. This is especially true when requesting additional time to file a reply brief. It's not enough just to merely state: "I need more time to finish the brief." Division Two wants to know particularly why the attorney has not yet been able to complete the brief.

Change of Address Reminder

Please remember, when sending change of address notifications, in addition to serving Appellate Defenders, the Attorney General, (or County Counsel), clients, co-appellant's counsel if any, and the Court of Appeal, appellate counsel should also serve the superior court. Recently, there have been situations where supplemental records have been mis-delivered because a panel attorney had not sent a change of address notification to the superior court.