– CHAPTER ONE –

THE ABC'S OF PANEL MEMBERSHIP:

BASIC INFORMATION FOR APPOINTED COUNSEL

ADI APPELLATE PRACTICE MANUAL
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— CHAPTER 1 —

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– CHAPTER ONE –

THE ABC'S OF PANEL MEMBERSHIP: BASIC INFORMATION FOR APPOINTED COUNSEL

I. INTRODUCTION [§ 1.0]

This chapter describes some of the responsibilities of counsel appointed to represent indigent clients under the project-panel system. It addresses the relationship between the panel attorney and the project,[1] the duties of counsel during the course of a typical appeal, client relations, the use of associate counsel, classification of counsel and cases and the matching of counsel to specific cases, and compensation for appointed representation.

This manual is purely descriptive and does not create rights or obligations of any kind. The project or the judiciary may revise, delete, or supplement any policy, practice, or procedure at any time in their sole discretion, with or without notice.

II. RELATIONSHIP BETWEEN PANEL AND PROJECT [§ 1.1]

The California panel-project system of appointed appellate representation is unique. It delivers high-quality representation to as many as 10,000 clients a year in a remarkably flexible and cost-effective way. Started in 1983 by Appellate Defenders, Inc., which serves the Fourth Appellate District, the system quickly moved to all six Court of Appeal districts and the California Supreme Court.

A. Project-Panel System [§ 1.1A]

Each Court of Appeal district has a contract with a project (a non-profit corporation created for the purpose of serving indigents on appeal) to administer the system of appointed counsel.[2] Each project is run by an executive director and has a staff

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[1]Appellate Defenders, Inc., is the project for the Fourth Appellate District.

[2]The projects are the First District Appellate Project, the California Appellate Project/ Los Angeles (Second District), the Central California Appellate Program (Third and Fifth Districts), Appellate Defenders, Inc. (Fourth District), and the Sixth District Appellate Program. The California Appellate Project/San Francisco serves the California Supreme Court in death penalty cases.

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of experienced appellate attorneys, ranging in number from, roughly, five to 25, depending on the caseload of the district. It also employs case processors, claims processors, and other support staff to assist with the office's workload.

The project in turn runs a panel of, typically, several hundred private attorneys who have applied to and been accepted on the panel. Described by a very broad brush: The project classifies panel attorneys by their qualifications. These attorneys are selected by the project on a case-by-case basis to receive appointment offers. Each case is evaluated for likely complexity, and the project matches it with an attorney with the appropriate background and record of performance. Project staff attorneys evaluate all work, periodically review and revise panel attorneys' levels, and remove certain attorneys from the panel. They assist attorneys in their handling of individual cases and provide such resource help as manuals, brief and/or issue banks, seminars, educational programs, newsletters, e-mail notices, websites, and hotlines. Under the supervision of the judiciary, the project recommends compensation for the panel attorney in each case, using judicially established guidelines.

In addition to administering the panel, the project assists the court, the Judicial Council of California judicial services,[3] the Appellate Indigent Defense Oversight Advisory Committee, and other parts of the judiciary; provides advice about appellate issues to trial counsel; and helps defendants with problems in filing notices of appeal. Its staff attorneys also directly represent a number of clients.

Panel attorneys are responsible for becoming and remaining familiar with project policies and requirements. These are frequently promulgated by email, websites, manuals (such as this), written materials, and other readily accessible means.

B. Panel Membership [§ 1.2]

The appointed counsel panel provides quality representation to indigent clients by using attorneys in private practice working with the assistance, administrative support, and oversight of a project such as ADI. Panel membership is not intended to, and does not, create any contractual rights or any employment relationship with the project, the Court of Appeal, or any other part of the judiciary. It does not guarantee a member any particular number of cases, or any cases at all, or continuing panel membership. The project and the judiciary have full authority and sole discretion to determine the number and kind of cases, if any, offered individual attorneys and to remove attorneys from the panel at any time, with or without cause and with or without notice.

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[3]Formerly Administrative Office of the Courts.

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1. Conflicts interfering with panel membership [§ 1.2A]

The projects' policies on conflicts are similar, though not necessarily identical. In general, because a panel attorney is in private practice and is not an employee of the project, the attorney may engage in other kinds of practice, provided the work does not create a conflict of interest. ADI treats as a conflict any work of any kind with a prosecuting agency or civil equivalent such as County Counsel, or a court. It does not matter what cases the work might entail, whether the attorney is paid, or what the geographical area is.

A panel attorney may, for example, do criminal defense or dependency or civil trial work and retained appeals. He or she may do motion work for a criminal defense attorney or a dependency attorney representing parents or children or a civil attorney. ADI would regard as a conflict, however, the same work for a district attorney, police, or County Counsel office (even one out of state); serving as a volunteer pro tem judge; employment as a regular instructor for a court or a sheriff's department.[4] Although this bright-line policy goes beyond the ethical requirements of the State Bar, ADI uses it to protect its cases from even being challenged for the appearance of possible conflicting loyalties.

ADI also uses a strong presumption that an attorney who handled trial proceedings in a given case should not be appointed on the appeal. (See *People v. Bailey* (1992) 9 Cal. App.4th 1252, 1254-1255; see 2011 ADI ethics article, *Arguing One's Own Ineffective Assistance of Counsel*.[5])

2. Differences with staff attorney; ultimate responsibility for case [§ 1.2B]

As is true for most districts, the appointed attorney is the sole counsel of record in ADI cases[6] and has full, final, and personal responsibility for handling them. The attorney continues to bear this responsibility when delegating work to associate counsel or law

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[4]This list is illustrative and is not intended to be exhaustive.

[5]http://www.adi-sandiego.com/news_alerts/pdfs/2011/Arguing_ones_own%20IAC_May_2011.pdf

[6]The Sixth District has a different system, in which the Sixth District Appellate Program is counsel of record and associates the panel attorney for the appeal. Because the accompanying text describes the ADI system, counsel should check with SDAP for differences in handling a Sixth District case.

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clerks (see §§ 1.79-1.82, *post*, on responsible use of such assistance) or when consulting with a project staff attorney.

The project provides assistance and advice from experienced and highly trained appellate attorneys. Appointed counsel should follow the project attorney's guidance unless counsel has a strong reason, based on the best interests of the client, to reject it.

If a difference of opinion arises between appointed counsel and a project staff attorney on the best way to handle a case, appointed counsel should listen to and give considerable weight to the staff attorney's opinion but need not yield if not persuaded. It is often helpful to step back and try to state the other person's position in the strongest possible light, then try to close the gap on the points of disagreement. If the differences persist, the appointed attorney can ask the staff attorney to get a second opinion from another staff attorney or to refer the question to the project executive director. Ultimately the appointed attorney, as counsel of record, must follow his or her own professional judgment.

3. Steps to take when attorney is unable to handle responsibilities of case [§ 1.2C]

Panel attorneys, as counsel of record, must ensure their cases are covered when they are unable to handle them. If the attorney will be unable, for a variety of reasons, to handle the basic responsibilities of the case in the long term, the attorney must notify the project about being relieved. The project is happy to work with attorneys in such a situation to find substitute counsel. This is a responsible approach that protects the client and the attorney's own reputation with the project and the court.

For temporary coverage, such as vacations and short illnesses, continuances are often the best solution. If that is not feasible, it is advisable to have standing arrangements with another attorney of equivalent experience to cover workload during absences. Panel attorneys should not count on the assigned staff attorney to cover for them.

ADI panel attorneys should consult and comply with the ADI newsletter articles on this subject.[7]

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[7]See July 1996, August 1999, and April 10, 2012, newsletters, starting at http://www.adi-sandiego.com/news_alerts/index.asp

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4. Duty to keep informed and in contact, to maintain active State Bar membership [§ 1.2D]

Panel attorneys are responsible for all information the project makes available to them via e-mail, the website, mailings, telephone, or any other methods of communication. They must maintain a valid e-mail address. In the Fourth District, this is the way ADI makes case offers and sends news alerts to the panel.

Attorneys are responsible for keeping the project, the Judicial Council services, all courts in which they have active cases, and all current clients informed of any changes in contact information, tax identification, and other key administrative matters affecting them. (Attorneys must notify the project and Judicial Council services with the official change of address form.[8] The change of address form itself does not constitute adequate notice of a change in tax identification information, but must be accompanied by an IRS Form W-9.[9])

Appointed counsel must maintain active California State Bar membership throughout the life of any court-appointed appeal. They must notify the project if their active status changes, including temporary suspensions for failure to pay dues or certify MCLE compliance.

5. Professional liability insurance [§ 1.2E]

Each project provides professional liability coverage for panel attorneys' work on that project's cases. A copy of the relevant provision of that policy is available on request. Renewal of such coverage and payment of any deductible are within the project's sole discretion.

To safeguard coverage, it is essential that appointed counsel notify the project of any suit, threat of suit, or facts that might lead to suit. The project must report this information to the carrier immediately. A delay in communicating may result in refusal of coverage by the underwriter.

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[8] http://www.courts.ca.gov/4201.htm

[9] http://www.irs.gov/pub/irs-pdf/fw9.pdf

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C. Assisted Cases [§ 1.3]

If a case is designated as assisted, the record will be sent to the project. In dependency fast-track cases, the panel attorney and the project staff attorney each get a copy of the record, so that they can be working simultaneously. (Cal. Rules of Court, rule 8.416(c)(2)(B).) The assisting staff attorney may review key parts of the transcripts, then send appointed counsel the record (if the panel attorney did not initially get a copy) and documents from the project's file and any other information that may be helpful – for example, a list of potential issues, cautionary advice on matters that might be troublesome, sample briefing if available, and suggestions on how to approach the case.

After input from the project, the appointed counsel will read the record and draft an opening brief, perhaps consulting with the project staff attorney at various times. Counsel will submit the draft to the staff attorney, who will offer suggestions on adding, deleting, or modifying arguments. Suggestions may be made concerning style, form, grammar, or citations, but the project attorney should not be expected to edit or rewrite the brief; the draft should therefore represent a finished product as much as possible. Drafts must be typed or computer-printed and must be double-spaced. In some cases the staff attorney will want to see one or more revised drafts before the final brief is filed.

After the opening brief is filed, appointed counsel and the project attorney will consult on such matters as the respondent's brief, a reply brief, oral argument, and a petition for rehearing and review. The staff attorney evaluates appointed counsel's work and recommends compensation. An ADI panel attorney can obtain a copy of the evaluation by attaching a request form to the opening brief. The form for requesting an evaluation is on the ADI website.[10]

The Appellant Indigent Defense Oversight Advisory Committee has adopted a policy that severely restricts the use of associate counsel in assisted cases. Only in rare instances will the project director waive these restrictions. (See § 1.79 et seq., *post*, on appropriate use of associate counsel.)

D. Independent Cases [§ 1.4]

If the case is independent, appointed counsel should receive documents from the project's file either when counsel is appointed or when the record is forwarded. With

[10] http://www.adi-sandiego.com/pdf_forms/evaluation.pdf.

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some exceptions, such as some guilty pleas,[11] the record will be sent to counsel without a staff attorney's prior review. Appointed counsel is encouraged to consult with the assigned project attorney about issues arising in the case. As with assisted cases, the staff attorney evaluates the work and recommends compensation. A copy can be obtained by attaching a request[12] to the opening brief.

E. "Modified" Assisted or Independent Cases [§ 1.4A]

Some assisted cases are denominated "modified assisted." While the project staff attorney will still review drafts of the opening brief, the staff attorney may elect not to review the record before mailing or may review only limited portions, as the circumstances of the case dictate. The case remains formally "assisted" and is paid at that rate.

Some independent cases are denominated "modified independent." They are formally "independent" and are paid at that rate, but some staff attorney involvement is contemplated, such as review of a draft of the opening brief or parts of the record. This classification is used for training attorneys for complex and serious cases, getting to know an experienced attorney new to the panel, ensuring quality control when needed, etc.

III. TYPICAL RESPONSIBILITIES OF APPOINTED COUNSEL [§ 1.5]

Counsel typically will have the responsibilities described in the following sections when handling an appointed appeal.

A. Appropriate Administration of Office and Files [§ 1.6]

Counsel of course must keep track of all cases to which he or she is appointed. Efficient internal office organization is essential. Counsel must keep orderly files where the relevant materials such as filings and correspondence can reliably be found, where counsel's thoughts about the case and work product are maintained, and where accurate time records (to the nearest 0.1 hour) are kept.

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[11] Judiciary policy encourages the projects to retain a substantial number of *Wende* (no arguable issues) cases as project staff cases. (*People v. Wende* (1979) 25 Cal.3d 436; see also *Anders v. California* (1967) 386 U.S. 738.)

[12] http://www.adi-sandiego.com/pdf_forms/evaluation.pdf

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Effective calendaring is imperative. Some redundancy, such as a computerized calendar *and* a paper one, can be an invaluable safety net. Counsel should also monitor filings, due dates, and court actions through the court website.[13] Automatic e-mail notification of major developments – filing of record and briefs, calendar notice, disposition, and remittitur – is available on request; each page has a footer entitled "Click here to request automatic e-mail notifications about this case." Counsel should register for notification in all of their cases and also visit the site periodically to track case activity for which no e-mail notification is available.[14] Indeed, the strong ADI expectation is that the panel attorney *will* register; the attorney must be prepared to justify failure to do so. This resource is, of course, a backup – not a substitute for accurate records personally kept by the attorney.

B. Initial Contact with Client and Trial Counsel [§ 1.7]

Communication with the client is covered extensively in § 1.39 et seq., *post*, on client relations. Generally, counsel must contact the client upon getting the case and must promptly answer letters. Soliciting the client's suggestions on the appeal is not just good public relations: it is an integral part of the competent investigation of an appeal. The client may be aware of matters outside the record and often can shed valuable light on issues.

Trial counsel likewise can offer valuable insights into potential issues. Trial counsel can provide impressions of the case (e.g., the victim's demeanor on the stand, the judge's attitude) and can alert the appellate attorney to matters outside the record (e.g., motions made that have not been transcribed, jurors' statements about the case, and potential adverse consequences from appealing).[15]

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[13] http://appellatecases.courtinfo.ca.gov. Some cases may not be posted for reasons of confidentiality.

[14]Caveat: If a concurrent writ petition is filed and the Court of Appeal assigns that proceeding a new number, counsel must register for e-mail notification under that number, as well as the appeal number.

[15]It is essential to solicit trial counsel's explanation if the appellate attorney thinks ineffective assistance of counsel might be an issue. ADI policy also requires appointed counsel to consult with the ADI attorney before raising or investigating ineffective assistance of counsel, regardless whether the issue is being for considered for the direct appeal or for a habeas corpus investigation. Consultation with ADI helps prevent abuse of the issue and facilitates proper handling of the critical first contact with trial counsel. The requirement does not apply for a "fallback" IAC argument ("No objection was

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C. Record Review and Completion; Correction of Notice of Appeal Problems [§ 1.8]

1. Transcripts [§ 1.9]

Counsel must review the transcripts meticulously. (The process of record review is covered extensively in § 4.11 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection.") In doing so it is helpful to make careful notes as to relevant facts and possible issues. The record may be tabbed with removable stickers for reference, but counsel should not mark or underline it. It belongs to the client and normally will be sent to him or her when the appeal is over. (This subject is covered more fully in § 1.60 et seq., *post*, on client records.) In addition, it conceivably could be lodged or introduced as an exhibit in a future collateral proceeding.

Counsel also is responsible for ensuring an adequate appellate record, for the purpose of identifying and documenting all potential issues. (See *People v. Barton* (1979) 21 Cal.3d 513, 519-520; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 393-394.) The topic of record correction and completion is covered extensively in § 3.12 et seq. of chapter 3, "Pre-Briefing Responsibilities: Record Completion, Extensions of Time, Release on Appeal"; see also § 4.12 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection."

Some courts specify additions to the normal record through local rules or miscellaneous orders. These rules and orders are generally available on the court website.[16]

2. Superior court file and exhibits [§ 1.10]

Record review may require inspection of the superior court file and exhibits. Such a step might be important if the record is hard to understand, if counsel has trouble discovering issues, or if either the client or trial counsel has referred to events not in the transcripts. The superior court file may contain documents not in the transcripts, such as pretrial motions, notes from the jury, letters of recommendation submitted at sentencing, communications about or from the client, and orders made after judgment. A number of counties now make superior court files available online.

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required, and if it was, counsel was ineffective for not raising it").

[16]http://www.courts.ca.gov/courtsofappeal.htm. For the Fourth Appellate District, court-specific orders for additions to the normal record and the processes of record completion are described at http://www.adi-sandiego.com/practice/fourth_dist.asp.

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If necessary, appointed counsel should review exhibits, such as diagrams, maps, photographs, documents proving prior convictions, and physical evidence.[17] Counsel should make copies of relevant documents and arrange for transmission to the Court of Appeal of any exhibits the court should inspect.[18] (Cal. Rules of Court, rules 8.224, 8.320(e), 8.407(f).) If reviewing an audio or video recording, counsel should take appropriate equipment. Exhibits are part of the record, and so briefs may cite to exhibits as well as a transcript. (Rules 8.320(e), 8.407(f).)

Court-specific processes of reviewing superior court records in the Fourth Appellate District are described on the ADI website pages on Fourth District practice.[19] Anna Jauregui-Law's article on *Demystifying the Exhibit Review Process*[20] likewise gives comprehensive guidance for Fourth Appellate District cases.

Long-distance travel by an appointed attorney to the superior court may be unnecessary. Counsel should contact trial counsel first, to see whether he or she can provide copies of missing documents or provide other information. Also, files for cases tried at a branch court can usually be sent to the county's main courthouse for review, if arrangements are made in advance. Exhibits may not be transferable, however: check with the court. Another possibility might be to transfer the superior court file to the Court of Appeal.

If counsel's office is far from the county where the case was tried, a project staff attorney or other staff member might be able to review the file and exhibits on behalf of counsel, but not all projects offer this service. The assigned staff attorney is the best source of information on local practice.

3. Notice of appeal problems [§ 1.11]

Normally the project handles notice of appeal problems, such as untimeliness or inadequacy in form or content, before appointment of counsel. Occasionally the problem surfaces later, however, and appointed counsel may face the responsibility of correcting

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[17]It is helpful to call the exhibit room at the superior court to make advance arrangements for such review. Some courts require an appointment.

[18]Some courts provide forms for requesting transmission of exhibits.

[19]http://www.adi-sandiego.com/practice/fourth_dist.asp

[20]http://www.adi-sandiego.com/news_alerts/pdfs/2010/EXHIBIT-REVIEW-UPDATED-2010.pdf

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it. Counsel should consult the assigned staff attorney. (See § 2.90 et seq., "Procedural Steps for Getting Appeal Started," in chapter 2, "First Things First: What Can Be Appealed and What It Takes To Get an Appeal Started.")

If counsel determines there are multiple notices of appeal from the same proceedings, counsel should discuss with the project whether the appointment orders cover all necessary aspects of the case and whether consolidation might be appropriate.[21]

D. Remedies in Trial Court [§ 1.11A]

On occasion, counsel should or must seek a remedy in the trial court, as a precondition to, or alternative to, raising an issue in the appellate court. These uses of trial court remedies are exceptions to the general rule that the filing of a valid notice of appeal vests jurisdiction in the appellate court and divests the trial court of jurisdiction until issuance of the remittitur. (*People v. Perez* (1979) 23 Cal.3d 545, 554; *Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1, 8-10.) Allowing the trial court to correct its own errors instead of invoking the whole appellate process (with its need for transcripts, briefing, oral argument, written decision, etc.) promotes judicial economy. It is often more expeditious – an important consideration in time-sensitive cases (see § 1.30, *post*).

The principle that the trial court loses jurisdiction pending appeal does not apply to juvenile cases, because the juvenile court retains ongoing jurisdiction during the appeal. (*In re Nicholas H.* (2003) 112 Cal.App.4th 251, 259-261; *In re Omar R.* (2003) 105 Cal.App.4th 1434, 1439; *In re Natasha A.* (1996) 42 Cal.App.4th 28; *In re Katherine R.* (1970) 6 Cal.App.3d 354, 356-357; see Code Civ. Proc., § 917.7.) For this reason, appellate counsel should be in contact with trial counsel throughout the progress of the appeal to determine whether proceedings in the trial court have changed the posture of the appeal significantly. Theoretically, under California Rules of Court, rule 8.410(b)(2), the juvenile court clerk should notify the Court of Appeal and parties when this occurs, but in practice they seldom remember. (See also rule 8.340(a).)

As to criminal cases, an example of statutorily required initial resort to the trial court is Penal Code section 1237.1, which requires a motion in the trial court to correct clerical errors in custody or conduct credits before raising that issue as the only one on appeal, and section 1237.2, applying the same requirement to fines, fees, and similar monetary assessments. (See § 2.13 of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started.")

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[21]In a dependency case, for example, a parent may appeal from the termination hearing and separately from the denial of a Welfare and Institutions Code section 388 motion ordered on a different day from the termination hearing.

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Other examples of trial court remedies available during appeal include release pending appeal (Cal. Rules of Court, rule 8.312; chapter 3, "Pre-Briefing Responsibilities: Record Completion, Extensions of Time, Release on Appeal"), correction of clerical error (*People v. Alanis* (2008) 158 Cal.App.4th 1467, 1473), correction of an unauthorized sentence (*People v. Karaman* (1992) 4 Cal.4th 335, 349, fn. 15; *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1424), recall of a sentence within 120 days of judgment (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 455; *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1836), modification of probation conditions (*In re Osslo* (1958) 51 Cal.2d 371, 380-381), and vacation of a void, not merely voidable, judgment (*People v. Malveaux* (1996) 50 Cal.App.4th 1425, 1434).

The preferred approach is generally to ask trial counsel to make the motion in the trial court. If that approach is not appropriate or feasible, however, appellate counsel should consult the project about handling the matter himself or herself.

E. Selection of Issues [§ 1.12]

Issue selection begins with a comprehensive, non-selective list of potential issues and proceeds through a gradual winnowing process to the final selection. Often the choice of issues will depend on further record review, research, consultation with other attorneys, and consideration of such matters as the relative strength and scope of the issues, strategic factors, the client's expressed concerns, and potential adverse consequences. (See chapter 4, "On the Hunt: Issue Spotting and Selection" for an extensive discussion of the issue selection process; see also ADI's article on *To Brief or Not To Brief: Marginal Issues*.[22])

Appellate counsel has no constitutional duty to raise every non-frivolous issue requested by the client. (*Jones v. Barnes* (1983) 463 U.S. 745.) If the client insists on raising issues that, in counsel's professional judgment, would have no reasonable chance of success or would detract from stronger issues, counsel should consult with the assigned staff attorney. In the end, counsel's responsibility is to handle the case according to counsel's best professional judgment, and issue selection is one of the most critical decisions appellate counsel makes.

Procedures for situations in which counsel can find no arguable issues are discussed in § 1.24 et seq., *post*, and more extensively in § 4.73 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection."

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

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F. Preparation of the Opening Brief [§ 1.13]

This topic is covered extensively in chapter 5, "Effective Written Advocacy: Briefing." Very summarily, brief preparation requires a number of steps: drafting the statement of case and statement of facts,[23] researching, drafting the arguments, submitting the draft brief to the project staff attorney in an assisted case, revising the draft, and filing the final version as required by the California Rules of Court.

A copy of the brief must be sent to the client, unless the client has specifically requested otherwise.[24] It is important at that time to explain the omission of any issues in which the client has expressed an interest or which were intensively litigated at trial. This kind of communication is vital to foster good relations and helps forestall ineffective assistance of appellate counsel or malpractice claims. Depending on circumstances, appointed counsel may or may not provide explanations for rejecting other issues.

Special care must be exercised in juvenile and other confidential cases to follow rules for the title of the case, names used in the brief, names and addresses on the proof of service, etc. The ADI web page on confidential records [25] has guidance for the multiple protections counsel must observe in handling these cases.

If there are multiple appellants in a case, coordination among counsel with clients taking compatible positions is encouraged, for the sake of economy and quality. Joinders may be filed in such instances. (Cal. Rules of Court, rule 8.200(a)(5).) However, joinder must be done thoughtfully. Many issues require individualized argument applying the law to the particular case. Counsel must identify which specific points or arguments are joined. *Do not use generic, boilerplate language*, such as "counsel joins other parties'

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[23]Some attorneys prefer to draft the statements of case and facts as a first step, to put the case in a concrete contextual focus, while others find it beneficial to wait until the arguments are drafted, to ensure the statements do not contain material irrelevant to helping the court understand the issues.

[24]Some types of cases, such as child molest, may endanger the client's personal security, especially within an institutional setting. Counsel should be sensitive to such possibilities and discuss them with the client before sending documents revealing facts about the case or client into an environment where they might not be secure.

[25]http://www.adi-sandiego.com/practice/conf_records.asp

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points to the extent they may benefit my client." (*People v. Bryant* (2014) 60 Cal.4th 335; October 2014 ADI News Alert.[26])

The method of filing depends on the court. Courts of Appeal are gradually shifting to electronic filing, but the process is slow and uneven. Counsel should consult the court clerk's office or website[27] for current information or ask the appellate project.

Service on other counsel is another fast-changing area. It may be electronic or hard copy, depending on the area. Counsel should check with the applicable project about the current situation in that district. In Fourth Appellate District criminal cases, service on and from the Attorney General is by email. In dependency cases, service on opposing counsel may be by hard copy or email, depending on the arrangements ADI has made with County Counsel in the county where the case originated. Service on ADI and between panel attorneys is by email. As for others to be served, such as the trial court, the district attorney (criminal and delinquency cases), and trial counsel, some have entered into an e-service arrangement with ADI, but others have not. The most recent information on ADI's e-service program may be obtained on the e-service page[28] of ADI's website or from the assigned project attorney. ADI website home page has a link to its quick-reference guide, or "Cheat Sheet."[29]

G. Later Filings [§ 1.14]

After the opening brief is filed, the next major responsibilities are to review the respondent's brief when it is filed and decide how to reply – normally in the form of a reply brief. Counsel representing a non-appealing minor submits a filing on behalf of the child after the reply brief.

1. Respondent's brief [§ 1.15]

Appointed counsel receives a copy of the respondent's brief; the project also receives a copy. In areas such as the Fourth Appellate District, the copies will be electronic in criminal cases where the Attorney General is opposing counsel. In dependency cases, it will be either electronic or paper, depending on the county from

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[26] http://www.adi-sandiego.com/news_alerts/pdfs/News_Alert_October_2014.pdf

[27] http://www.courts.ca.gov/courtsofappeal.htm

[28] http://www.adi-sandiego.com/practice/eservice_adi.asp

[29] http://www.adi-sandiego.com/pdf_forms/E-serve_Quick_Reference.pdf

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which the case arose. The client's copy will normally be paper but may be electronic if the client has access to a computer. The respondent's brief may be sent immediately with an explanatory cover letter, but it normally is more advisable to send it along with the reply brief, so that the client sees counsel's response right away. In either case, counsel should reassure the client that the respondent's brief is simply an argument, not a decision, and that counsel is answering it. It is often advisable to send the client the respondent's brief and reply brief at the same time.

2. Reply brief [§ 1.16]

ADI for the most part takes the position that *in most cases counsel should file a reply brief*. It will usually be the last document filed by the parties and, unlike oral argument, will be considered before the opinion is drafted. It is a chance to answer the opposing party's contentions and authorities, deal with procedural obstacles such as waiver, cite new legal developments, bolster the arguments, communicate confidence, and avoid the appearance of conceding. (See § 5.58 et seq. of chapter 5, "Effective Written Advocacy: Briefing.") In assisted cases, appointed counsel should discuss the reply brief with the project attorney. In those rare cases in which a reply brief is not filed, appointed counsel should explain the reasons to the client and to the assigned staff attorney.

3. Non-appealing minor's filing [§ 1.16A]

If appellate counsel has been appointed for a non-appealing dependency minor, the child's brief or letter brief is due 10 days after the respondent's brief is filed. (Cal. Rules of Court, rule 8.412(b)(4).) The filing states the minor's position.

As the appellate project with the most extensive experience with minor's counsel, ADI has developed guidelines[30] for determining a position, preparing a filing, and handling other responsibilities. (See chapter 5, "Effective Written Advocacy: Briefing," § 5.63 et seq.)

H. Oral Argument [§ 1.17]

Oral argument is covered extensively in chapter 6, "Effective Use of the Spoken Word on Appeal: Oral Argument." If appointed counsel has never argued before the Court of Appeal, or has argued before but has questions about how to approach a

[30] http://www.adi-sandiego.com/delinq_depend/dependency/juvenile_guide.asp

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particular case, it is advisable to consult with the project staff attorney. He or she might offer pointers, reassurance, and war stories that may help put things in perspective. In occasional cases, especially for those in the Supreme Court, a moot court practice session might be available.

The "unofficial rules" of oral argument are a matter of common sense. Dress and conduct oneself professionally, be prepared, be on time, be polite and respectful but assertive, keep it *short*, don't repeat the facts or just rehash the briefs, answer questions immediately when asked (*don't* say "Wait, I'll be getting to that later"!), don't read the argument, admit when you don't know the answer (never bluff), if appropriate ask permission to file a supplemental letter brief, and don't "save" the best arguments or case citations for oral argument (they belong in the briefs).

I. The Court's Decision; Advice to the Client [§ 1.18]

The court's decision is covered extensively in § 7.4 et seq. and § 7.29 et seq. of chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision." Counsel should review the opinion carefully in light of the briefs and consult with the project attorney if necessary.

Prompt communication with the client is essential. If the client has lost, it is important to explain whether counsel plans further action. If the decision is not to pursue the case further, the client must be told of the right to petition for review in pro per and be given the applicable rules and deadlines. Petition for review information forms for clients are on the ADI website.[31] If the client has won, counsel should explain what it means and what to expect next. The client's first questions will usually be "When am I going back to court, what will happen, and will you still be my attorney?" When there are ongoing trial court proceedings – as with juvenile cases – counsel should explain how the appeal affects those proceedings.

If the outcome is mixed – a victory in part and a loss in part – counsel should evaluate whether a petition for review on the losing issue(s) is called for and advise the client accordingly, but should leave it up to the client to decide whether to proceed, since doing so could risk losing the partial victory already in hand.[32]

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[31]http://www.adi-sandiego.com/practice/forms_samples.asp. Basic information is on the court website at http://www.courts.ca.gov/2962.htm. Caution: Some of the information (e.g., on filing fees) does not apply to criminal or juvenile cases.

[32]Even if opposing counsel does not file a petition for review, rule 8.504(c) of the California Rules of Court allows him or her to file an answer to the client's petition,

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It is helpful to send a copy of the opinion to trial counsel, especially if the case is to be remanded or if the case is reversed because of ineffective assistance of counsel. (See Bus. & Prof. Code, §§ 6068, subd. (o)(7) [duty of attorney to self-report to State Bar a reversal of judgment based on the attorney's "grossly incompetent" representation], 6086.7 [duty of court to report reversal or modification based on misconduct or incompetence of counsel].)

J. Post-Decision Responsibilities [§ 1.19]

Petitions for rehearing, review, and certiorari are covered in § 7.33 et seq., § 7.46 et seq., and § 7.100 et seq. of chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision."

1. Rehearing [§ 1.20]

If the decision is adverse to the client, appointed counsel has only 15 days after the opinion is filed to petition for rehearing, asking the Court of Appeal to reconsider.[33] (Cal. Rules of Court, rule 8.268(b)(1).) A rehearing petition should be used to call the court's attention to material problems, errors, or omissions in its decision and not merely to reargue positions with which the court disagrees. A rehearing petition is required by Supreme Court policy if the party intends to seek Supreme Court review on the ground of a material factual or legal error or omission in the Court of Appeal opinion. (Rule 8.500(c)(2).) If the attorney does not intend to file a petition for review but the client wants to continue in pro per, the attorney should preserve it for the client by seeking to cure the error or omission; such a correction is a legitimate ground for rehearing, and as a practical matter, few clients would be able to prepare a petition for rehearing within jurisdictional time limits.[34]

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raising additional issues to be considered in the event review is granted. If review is denied, however, the additional issues will not be considered; a petition for review is necessary if counsel wishes the court to review the client's own issues *regardless* of whether the opponent's petition is granted.

[33]The presiding justice may grant relief from failure to file a timely petition for rehearing until the 30th day after the filing of the opinion. (Cal. Rules of Court, rule 8.268(b)(4).) The court also may grant rehearing on its own motion during this period. (Rule 8.268(a).) A late petition with a persuasive explanation *might* be considered, but counsel should not count on that possibility.

[34]Some courts take the position that clients represented by counsel have no standing to file in pro per and refuse to accept a petition for rehearing submitted by the

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A petition for rehearing may be used to correct factual errors in the opinion. It is important the opinion accurately reflect the facts and issues. (See, e.g., *People v. Woodell* (1998) 17 Cal.4th 448 [appellate opinion in prior case considered as evidence of underlying fact stated in opinion].) This occurs frequently in dependency cases, because they tend to be heavily fact-intensive.

Petitions for rehearing are covered more comprehensively in § 7.33 et seq. of chapter 7, "The End Game: Decisions by Reviewing Court and Processes After Decision."

2. Review [§ 1.21]

A petition for review asking the California Supreme Court to take jurisdiction of the case should be considered when the case involves an area of broad importance or an area where lower courts are in conflict. (See discussion of petitions for review in § 7.46 et seq. of chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision.") It is not appropriate simply because counsel disagrees with the Court of Appeal decision, although in a rare case the interests of justice may require correcting a glaring error. A petition or review is necessary if future federal review is a serious possibility. (See Cal. Rules of Court, rule 8.508, on petitions filed solely to exhaust state remedies.) In an assisted case, the possibility of petitioning for review should be discussed with the assisting project staff attorney.

If counsel decides not to petition for review, the client should be informed of this decision and told how to do so in pro per.[35] (See discussion in § 1.76, *post*.)

3. Certiorari [§ 1.22]

Petitioning for certiorari to the Supreme Court of the United States is relatively uncommon. It requires a substantial issue of federal law, properly preserved and presented to the state courts, including the California Supreme Court. Considerations are, first, the chances of getting certiorari granted and, second, the chances of prevailing on

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client. A procedural way around that problem, if the client wants to file in pro per, would be for counsel to ask to be relieved right after the decision not to proceed further is made.

[35]Petition for review information forms for clients are on the ADI website: http://www.adi-sandiego.com/practice/forms_samples.asp

the merits if it is granted. (In the end, the objective is to better the client's position, not just *get into* the United States Supreme Court. If the end result of a decision on the merits is very likely to be negative, the certiorari petition will not serve the client's interests and may end up making "bad law" for the whole country in the process.)

In any case, assisted or independent, counsel considering a possible certiorari petition should discuss it with the assigned project staff attorney. At ADI, the attorney must get the executive director's preapproval before doing any work on a certiorari petition for which compensation is expected.

K. Investigation of Collateral Matters and Petitions for Writ of Habeas Corpus [§ 1.23]

The appeal itself is bound by the four corners of the record, and appellate counsel has no duty to search actively for every off-record claim that might conceivably be developed. (*In re Clark* (1993) 5 Cal.4th 750, 783-784, fn. 20.) However, appointed counsel should be alert to the possibility of issues not reflected in the record.

When counsel has reason to believe that significant facts in support of such issues exist outside the record, counsel should discuss them with the assigned project attorney before proceeding further to any appreciable extent. In some districts counsel must get court preapproval for an expansion of the appointment to cover writ investigation and preparation. (For a comprehensive discussion of writs, see chapter 8, "Putting on the Writs: California Extraordinary Remedies.") Preapproval for unusual expenses such as investigators or experts must be given by the project, the project director, or the court, depending on the district, the project, and the amount. Funding for these costs is provided in the form of reimbursement to appointed counsel.

The most common off-record claim is ineffective assistance of trial counsel, and as noted in § 1.7, *ante*, it is important for appointed counsel to discuss such a claim with the project attorney. (ADI *requires* advance consultation with the project attorney.) If the claim has no arguable merit, appellate counsel will not want to tarnish the trial attorney's reputation – and counsel's own – by raising it. If the claim does have merit, appellate counsel will have to exercise caution at every step to preserve and document the claim for the benefit of the client.

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L. Representation When There Are No Arguable Issues (*Wende-Anders-Sade C.* Filings) [§ 1.24]

An "arguable issue" is one that, in counsel's professional opinion, has a reasonable potential for success and that, if resolved favorably to the client, will result in a reversal or modification of the judgment. (*People v. Johnson* (1981) 123 Cal.App.3d 106.) This matter is explored in an ADI memo on arguability, *To Brief or Not To Brief: Marginal Issues*.[36] Appointed counsel who has found no arguable issues after a diligent search must follow a specific procedure – called *Wende-Anders*[37] in criminal and delinquency[38] cases or *Sade C.* in dependency cases – whether the appointment is designated as assisted or independent. Depending on whether the case is criminal or civil, the court may have certain responsibilities, as well. These procedures are described in more detail in § 4.73 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection." A brief summary follows here.

1. Preliminary steps [§ 1.25]

The *Wende-Sade C.* procedure requires counsel to ensure the record is complete and to review the complete record thoroughly. Before any no-issues brief or letter brief is filed, and before any case is abandoned or dismissed for lack of issues, all counsel (assisted or independent) must discuss the case with the assigned project attorney, usually provide the record, and get the project attorney's "second opinion" and approval to proceed on a no-issues track. The panel attorney should provide to the staff attorney, along with the record, a draft *Wende-Sade C.* brief or letter brief, a memo on issues considered and rejected and why, plus any contacts with the client, trial counsel, or others that might shed light on potential issues.

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

[37] Criminal and delinquency: *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738. Dependency: *In re Sade C.* (1996) 13 Cal.4th 952; see also *In re Phoenix H.* (2009) 47 Cal.4th 835, 843, on contents of *Sade C.* briefs. Similar but not identical procedures apply to LPS conservatorship cases. (*In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544.)

[38] *In re Kevin S.* (2003) 113 Cal.App.4th 97 held *Wende-Anders* applies to delinquency appeals. Most appellate courts have assumed that without discussion.

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If the project attorney agrees that the case is appropriate for no-issues treatment, appointed counsel must write to the client about the assessment and procedures, including advice about applicable timelines and any right to file a pro per brief or letter or to request that counsel be relieved.

If an extension of time is needed for the project to perform its record review, counsel should not mention the *Wende-Anders-Sade C.* review in the extension request, because such a comment tends to disparage any merits issues later raised.

If counsel believes an arguable issue exists but pursuing it would not be in the client's best interests, counsel cannot properly file a *Wende-Sade C.* brief or letter brief. (*In re Josiah Z.* (2005) 36 Cal.4th 664, 677.) An authorized motion to dismiss, client waiver of the issue, or other remedy is required.

In fast-track cases, the time frames require counsel to notify the client very quickly – usually, before the project review – of a potential *Sade C.* situation, so that the client can prepare a pro per filing, if desired, for submission at the time of the brief or letter brief. Counsel should be aware the court is highly likely to reject the filing.

2. No-issues brief or letter brief [§ 1.26]

Unless the client chooses to abandon the case, counsel will need to file a *Wende-Anders* brief in a criminal or delinquency case or a *Sade C.* brief or letter brief in a dependency case.[39] This filing has several purposes:

• It summarizes the proceedings and facts fully, with citations to the transcripts.

• In districts that prefer or at least permit inclusion of unbriefed issues, the filing may describe issues raised at trial and others suggested by the record, as well as related authorities the court should consider.[40] Counsel are advised to consult the

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[39]The letter brief format is required for dependency cases in all three divisions of the Fourth Appellate District. It must be filed electronically. Other districts may have different expectations, and so counsel should consult the project for guidance. Regardless of format, the contents of the dependency no-issues filing must conform to the requirements of *In re Phoenix H.* (2009) 47 Cal.4th 835, 843.

[40]ADI encourages inclusion of issues. (See Sep. 2014 alert at http://www.adi-sandiego.com/pdf_forms/Sep_2014_news_alert.pdf; decision of Division

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district project for guidance. An unbriefed issue should not specifically urge that issue as a ground for reversal but also should not argue against the issue; a neutral description is the objective. (See § 4.77 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection," for detailed guidance.)

• In criminal and delinquency cases, the filing reminds the court of its constitutional duty to read the record; in dependency, conservatorship, and similar cases, it must acknowledge this review is not legally required but then should suggest the court review the record in the exercise of its discretion.

No-issue brief and letter brief templates are available on the ADI website, forms and samples page[41] and dependency forms and samples page.[42] Other projects also offer samples tailored to their court.

Because the client has no *right* to file a pro per brief in a dependency case (*In re Phoenix H.* (2009) 47 Cal.4th 835) and the court almost always denies any extension for such a filing, practicality suggests such a brief be submitted along with the *Sade C.* filing. The court need not accept it (and usually does not), but at least it gives the client a shot at showing "good cause . . . that an arguable issue does, in fact, exist." (*Id*. at p. 844.)

3. Sending record to client [§ 1.27]

Counsel normally should send the record to the client before or upon filing the brief or letter brief, so that the client can file a pro per brief or letter, if one is permitted and desired. Alternatively, if counsel believes there is a reasonable possibility the court will order supplemental briefing by counsel and the client has expressed no interest in filing a pro per brief, counsel may retain the record and tell the client it is available on

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Three in *People v. Kent* (2015) 229 Cal.App.4th 293.) That strong preference is not a requirement, however.

Legal issues and authorities need not be included if counsel concludes the client's interests would best be served by omitting them. (See *Smith v. Robbins* (2000) 528 U.S. 259.)

[41] http://www.adi-sandiego.com/practice/forms_samples.asp

[42] http://www.adi-sandiego.com/delinq_depend/dependency/forms_samples.asp

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request. Counsel may make a copy of some or all of the record for future reference.[43] (See also *In re Phoenix H.* (2009) 47 Cal.4th 835.)

4. Court's responsibilities [§ 1.28]

a. First criminal or delinquency appeal as of right [§ 1.28A]

When a *Wende-Anders* brief is filed in a first criminal or delinquency appeal as of right, the Court of Appeal must conduct its own review of the entire record to determine whether there are any arguable issues. (*People v. Wende* (1979) 25 Cal.3d 436, 441-442.) It also must offer the appellant an opportunity to file a pro per brief. (See *People v. Feggans* (1967) 67 Cal.2d 444, 447-448.)

If the court discovers an arguable issue, it must order counsel to brief the issue. (*Penson v. Ohio* (1988) 488 U.S. 75, 81, 83-84.) It may appoint new counsel for that purpose, but almost never does since original counsel does not routinely seek to withdraw on making a no-issues filing. If the court finds no arguable issues, it will affirm the judgment or dismiss the appeal.

The court must issue a written, reasoned opinion if the defendant files a pro per brief. (*People v. Kelly* (2006) 40 Cal.4th 106.)

b. Other appointed appeals [§ 1.28B]

In civil appointed cases, the court's duties are more limited. The court is not required to review the record, for example, in LPS conservatorship (*In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529), dependency (*In re Sade C.* (1996) 13 Cal.4th 952), mentally disordered offender (*People v. Taylor* (2008) 160 Cal.App.4th 304), and sexually violent predator (*People v. Kisling* (2015) 239 Cal.App.4th 288) cases and appeals from such post-judgment orders as denial of a motion to set aside a plea because of invalid immigration advice (*People v. Serrano* (2012) 211 Cal.App.4th 496).

In dependency cases, the court does not have to provide an opportunity to file a pro per brief in a dependency appeal, because those cases are so time-sensitive. (*In re*

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[43]A modest amount of copying for counsel's use in the event the court orders supplemental briefing is compensable. Any substantial copying, however, requires specific justification and should be cleared with the project.

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Phoenix H. (2009) 47 Cal.4th 835.) It must do so, however, in civil commitment cases (e.g., *In re Conservatorship of Ben C.* (2007) 40 Cal.4th 529 [LPS]; see also *People v. Taylor* (2008) 160 Cal.App.4th 304 [mentally disordered offender appeal]) and arguably other non-criminal, non-dependency appointed appeals.

If the defendant files a pro per brief in a non-criminal case, the court arguably has a duty to file a written decision under *People v. Kelly* (2006) 40 Cal.4th 106. That duty is based on article VI, section 14, of the California Constitution, providing a decision determining a "cause" must be in writing with reasons stated – a requirement that applies to civil as well as criminal cases. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232.)

M. Representation When the Client Might Suffer Adverse Consequences from Appealing [§ 1.29]

On occasion a client may face the prospect of receiving an increased sentence or other adverse result from pursuing an appeal. For example, the lower court may have imposed an unauthorized sentence in the defendant's favor, or the remedy for an error might be withdrawal of an advantageous plea bargain. Counsel must be alert to the possibility of such adverse consequences in every case. This topic is discussed in § 4.91 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection."

Dependency clients may also have been involved in criminal proceedings, and the two cases may interact in negative ways. Or certain actions in the dependency case may trigger retaliatory conduct by agencies, foster parents, etc. Close contact with trial counsel and the client will aid counsel in identifying and dealing with such situations appropriately.

Decisions about abandoning or pursuing an appeal belong ultimately to the client. It is important for appointed counsel to consult with a project attorney before advising the client about filing an abandonment or motion to dismiss because of possible adverse consequences. Counsel should have the client sign and return a written acknowledgment that the client has been advised of the potential benefits and risks of the various options and that the decision whether to pursue the appeal is the client's own.

N. Protecting the Client in Time-Sensitive Cases [§ 1.30]

One important responsibility of appointed counsel is to safeguard the possibility of meaningful relief for the client in time-sensitive cases and avoid the possibility the client might end up serving "dead" time – custody in excess of the lawful sentence – in the

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event of a favorable result on appeal. Counsel must always keep in mind that, if the client fails to benefit from any remedy ultimately awarded on appeal, the whole effort might prove meaningless.[44] As a preliminary step during the initial review of the case following appointment, especially when the sentence is relatively short, appellate counsel should determine the client's expected release date and calculate how that might be affected by a favorable ruling on appeal.

All dependency cases by nature are time sensitive. The case will be continuing at the trial level. Extensions of time are disfavored and should be requested only when genuinely necessary. (Cal. Rules of Court, rule 8.412(e).) A heavy workload is generally not a sufficient reason.

1. Release pending appeal [§ 1.31]

Appellate counsel can seek release pending appeal, on bail or other terms, or assist the client or trial counsel in doing so. (Cal. Const., art. I, § 12; Pen. Code, §§ 1272 & 1272.1; Cal. Rules of Court, rule 8.312.) This topic is treated in depth in § 3.37 et seq. of chapter 3, "Pre-Briefing Responsibilities: Record Completion, Extensions of Time, Release on Appeal." The possibility of release pending decision is also available on habeas corpus. (Pen. Code, § 1476.)

2. Motion to expedite appeal [§ 1.32]

A motion to expedite the appeal and a motion for calendar preference can be filed if the circumstances warrant it. (See Cal. Rules of Court, rules 8.54, 8.240.) In such cases it is important to avoid asking for extensions of time and to oppose extensions of time by other parties.

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[44]If the defendant ends up serving "dead" time, the period of parole should be reduced by the excess time of imprisonment. (E.g., *People v. London* (1988) 206 Cal.App.3d 896, 911, fn. 8; *In re Ballard* (1981) 115 Cal.App.3d 647, 650; cf. *In re Lira* (2013) 58 Cal.4th 573 [no credit against parole for custody between Governor's erroneous reversal of earlier grant of parole and eventual release on parole]; *People v. Espinoza* (2014) 226 Cal.App.4th 635 [no credit toward post-release community supervision after grant of Prop. 36 resentencing under Pen. Code, § 1170.126].) Counsel should ask the Court of Appeal to note this fact in its disposition. (E.g., *In re Phelon* (2005) 132 Cal.App.4th 1214, 1221-1222, overruled on other grounds in *People v. Duff* (2010) 50 Cal.4th 787, 801, fn. 2; *In re Pope* (2010) 50 Cal.4th 777, 785, fn. 3.)

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3. Motion for summary reversal or stipulated reversal [§ 1.33]

If the need to reverse is indisputable, the court may reverse without going through the usual briefing processes. One procedure is a motion for summary reversal. (*People v. Geitner* (1982) 139 Cal.App.3d 252 [court erroneously assured defendant he could appeal issue of voluntariness of statement under Fifth Amendment after guilty plea]; *People v. Browning* (1978) 79 Cal.App.3d 320, 322-324 [*Allen*[45] instruction given jury had been found reversible per se by the California Supreme Court].) The opportunity for oral argument must be provided. (*Browning*, at p. 322; see also Pen. Code, § 1253; *People v. Brigham* (1979) 25 Cal.3d 283, 289.)

Similarly, if opposing counsel concedes that reversible error occurred, it may be possible for the parties to stipulate to a reversal. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273, as limited by Code Civ. Proc., § 128, subd. (a)(8).[46]) *People v. Barraza* (1994) 30 Cal.App.4th 114 expressed doubt that section applies to criminal cases.[47] On the other hand, *In re Rashad H.* (2000) 78 Cal.App.4th 376 applied it

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[45]*Allen v. United States* (1896) 164 U.S. 492 (instruction to deadlocked jury, urging minority jurors to give weight to majority's views, found prejudicial per se error and ordered not to be given in California in *People v. Gainer* (1977) 19 Cal.3d 835, 852).

[46]Code of Civil Procedure section 128, subdivision (a)(8) provides:

> An appellate court shall not reverse or vacate a duly entered judgment upon an agreement or stipulation of the parties unless the court finds both of the following:
>
> (A) There is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal.
>
> (B) The reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement.

[47]At the risk of advancing an ad hominem point: The author of *Barraza*, Justice Anthony Kline, vociferously opposed *Neary* and once (in dissent) refused to follow it, arguing his ethical principles required departure from the duty to honor the rulings of a higher court: "I cannot as a matter of conscience apply the rule announced in *Neary*." (*Morrow v. Hood Communications, Inc.* (1997) 59 Cal.App.4th 924, 927, dis. opn. of Kline, J.) He was brought before the Commission on Judicial Performance, but charges

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to a dependency case.[48] If a given client in either a criminal or juvenile proceeding could benefit from the procedure, ADI would support submitting a stipulation to the court, making the showings specified in Code of Civil Procedure section 128, after appropriate consultation with the project.

Counsel should be cautious about these remedies. Summary or stipulated reversal on a particular issue might waive, for purposes of retrial and a subsequent appeal, issues that might have been resolved on the first appeal. If retrial and another appeal are likely or the defendant has substantial issues other than the one requiring reversal, counsel should consider alternatives to summary or stipulated reversal.

4. Writ petition on the merits [§ 1.34]

If appropriate, a writ petition can be filed in addition to or in lieu of a brief. The petition would state a prompt disposition is required in the interests of justice and an adequate remedy cannot be provided by way of the appeal. (*In re Quackenbush* (1996) 41 Cal.App.4th 1301, 1305; *In re Duran* (1974) 38 Cal.App.3d. 632, 635; Cal. Rules of Court, rules 8.380, 8.384, 8.485 et seq.)

5. Immediate finality of writ opinion or issuance of the remittitur [§ 1.35]

In a writ case, after receiving a favorable opinion in the Court of Appeal, counsel might ask the court to order early finality as to the Court of Appeal to prevent mootness, frustration of relief, etc. (Cal. Rules of Court, rules 8.387(b)(3)(A), 8.490(b)(3); e.g., *M.V. v. Superior Court* (2008) 167 Cal.App.4th 166, 184; *In re Phelon* (2005) 132 Cal.App.4th

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were dismissed on the ground the commission could not conclude that "the argument for a narrow exception to the stare decisis principle . . . was so far-fetched as to be untenable." (Decision and Order of Dismissal, p. 4, http://www.cjp.ca.gov/res/docs/Dismissals/Kline_8-19-99.pdf.)

Counsel may take from this background the understanding that *Barraza* should not be an obstacle if a stipulated reversal is to the client's advantage.

[48]*In re Joshua G.* (2005) 129 Cal.App.4th 189 declined to apply section 128, subdivision (a)(8) under the facts of the case, but stated: "There is nothing in the statutory scheme or the California Rules of Court preventing the appellate courts from using the stipulated reversal procedure and nothing in this opinion should be read to foreclose the appellate court from accepting stipulated reversals." (*Id.* at p. 198, fn. 8.)

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1214, 1222, overruled on other grounds in *People v. Duff* (2010) 50 Cal.4th 787, 801, fn. 2; *In re Pope* (2010) 50 Cal.4th 777, 785, fn. 3.)[49]

The Supreme Court may order early finality of one of its decisions. (Rule 8.532(b)(1)(A).)

Counsel may also seek immediate issuance of the remittitur via stipulation of the parties under California Rules of Court, rule 8.272(c)(1). The Supreme Court may order immediate issuance on stipulation or for good cause. (Rule 8.540(c)(1).)

6. Follow-through with custodial officials [§ 1.36]

Counsel should always make certain, especially in time-sensitive cases, that custodial officials know about any relief granted (such as a favorable decision on appeal, the grant of a writ, or the issuance of a order for release) and that they take action on it. Occasionally a case falls through the cracks – as when paperwork gets lost, a court omits to inform the prison, or the prison itself delays taking action.

O. Requests To Be Relieved [§ 1.37]

Sometimes an attorney is unable to handle a case to which the attorney has been appointed. A new job with incompatible responsibilities, a conflict of interest not discovered when the appointment began, personal or family illness, breakup of a law partnership or marriage, and many other factors may interfere with representation. In such a situation, it is important that counsel take appropriate action as soon as possible. A request to be relieved is usually the best resolution for both the client and the attorney. ADI does not count such a request as a negative factor in the attorney's record, but on the contrary sees it as a responsible and professional way of dealing with a difficult situation. Attorneys should call the project for guidance on how to do this.

Occasionally, appointed attorneys have been told that the client or the client's family has retained an attorney and that a substitution of counsel needs to be filed. When this happens, it is important that the appointed attorney *contact the ADI staff attorney or executive director at once, before* signing any substitution agreement, sending the records

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[49]Finality as to the Court of Appeal does not end an appeal: the Supreme Court still has rule time to grant review. (See *Ng v. Superior Court* (1992) 4 Cal.4th 29; rule 8.512(b), (c).)

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to the other attorney, or assuming that the new attorney will take care of such needed steps as an augmentation or extension request. This topic is discussed further in the July 2003[50] and November 2011[51] ADI alerts, and is listed on the FAQ page[52] under question 5, "When is it mandatory (or strongly advisable) for a panel attorney to consult ADI?"

P. Handling Situations in Which Appeal Is Subject to Potential Termination Because of Jurisdictional Defects, Non-Appealability, Mootness, Death or Escape of Client, Etc. [§ 1.38]

An appeal is subject to dismissal – i.e., termination before a decision on the merits – if basic requirements are lacking, such as jurisdiction, standing, or appealability, or if it can no longer materially affect the client's interests, as when, for example, it has become moot because of developments in the lower court or changes in the underlying situation, or the client has died or escaped. To ensure the attorney responds appropriately and does not end up doing non-compensable work, it is vital to notify the project immediately upon learning of the situation and to cease doing anything but urgent work on the case (such as an extension request to avoid default).

The project will help assess what if any action would be appropriate. The steps to be taken will depend greatly on the situation. They might include notifying the court

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[50] http://www.adi-sandiego.com/news_alerts/pdfs/bef2005/2003_july.pdf

[51] http://www.adi-sandiego.com/news_alerts/pdfs/2011/Nov_2011_alert.pdf

[52] http://www.adi-sandiego.com/panel/faq.asp

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and/or proceeding until the court orders otherwise, abandoning, moving for abatement[53] or dismissal, or seeking permission to continue the litigation despite the situation.[54]

These topics are covered in more detail in § 2.5 et seq. of chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started," and § 4.34 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection."

IV. CLIENT RELATIONS [§ 1.39]

An essential component of appellate advocacy is client relations. It starts with counsel's first communication with the client. The approach taken by counsel at the outset and throughout the appeal may make a world of difference in the success of the appeal or, at the very minimum, the rapport counsel enjoys with the client. This section serves as a guide for establishing and maintaining good client relations and for handling the various circumstances that may arise during the appeal.

A. Communications [§ 1.40]

Throughout the appeal, the attorney must keep the client reasonably informed of significant developments and promptly respond to inquiries and requests from the client. Samples of initial and follow-up letters are in § 1.144 et seq., appendix B, *post*. (Adapted from letters provided courtesy of panel attorney David Y. Stanley.)

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[53]The death of the client during the pendency of the appeal permanently abates the proceedings. The appellate court normally should remand to the lower court with instructions to enter an order to that effect. (*In re Sheena K.* (2007) 40 Cal.4th 875, 893 [juvenile delinquency appeal]; *People v. Anzalone* (1999) 19 Cal.4th 1074 [MDO appeal]; *In re Jackson* (1985) 39 Cal.3d 464, 480 [parole review]; *People v. Dail* (1943) 22 Cal.2d 642, 659; *People v. De St. Maurice* (1913) 166 Cal. 201, 202; *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1587; *People v. Alexander* (1929) 101 Cal.App. 394, 396.)

On occasion, however, a motion for dismissal may be preferred. (E.g., *In re A.Z.* (2010) 190 Cal.App.4th 1177 [dismissal provides final resolution for the child to proceed to adoption].)

[54]The court might elect to proceed with a moot or quasi-moot case, if the issues are important and an opinion would provide guidance in similar cases: public interest can be considered. (*In re William M.* (1970) 3 Cal.3d 16, 23-25.)

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1. Governing principles [§ 1.41]

The ethical principles governing client communications are set out in Business and Professions Code section 6068 and rule 3-500 of the California Rules of Professional Conduct. Section 6068 provides, in relevant part:

> It is the duty of an attorney . . . :
>
> (m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.
>
> (n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct . . . .

Rule 3-500 states:

> A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

2. Initial communication [§ 1.42]

Client communications should begin promptly when the attorney is first appointed to the case. As part of the goal to maintain good client relations over the course of the appeal, the initial contact letter should anticipate and deflect problems. Early in the appointment process ADI sends clients a paper entitled *Understanding Your Appeal*. (See § 1.143, *post*, appendix A.) It explains what an appeal is, who will represent the defendant, what happens during an appeal, and how the defendant can find out more about the appeal. The attorney's initial letter should reinforce this information. Making early contact is especially important in dependency cases, which often are fast-track.

In addition to informing the client of the appointment, the letter should explain counsel's role, the appellate process, the likelihood of substantial delay between filings, and the differences between a trial and an appeal. It should inform the client of what is and is not permitted in appeals: for example, the client needs to understand that the brief cannot cite matters outside the record and that the facts must be stated in the light most favorable to the judgment. Counsel most likely will not be traveling for a prison visit because the nature of appeals makes in-person contact unnecessary and because such travel is not compensable except under unusual circumstances. Counsel will need to keep possession of the transcripts during the course of the appeal. The letter should also

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explain the importance of keeping attorney-client communications confidential and of refraining from discussion of the case with fellow inmates, prison staff, or others.

The project will provide counsel with copies of correspondence generated in the case before the appointment. Counsel should communicate awareness of the prior letters so that the client does not feel shuttled from attorney to attorney.

For some courts, minor's counsel may be expected to visit the minor at least once. Counsel should seek preapproval for long-distance travel.

3. Later communications [§ 1.43]

a. Significant developments [§ 1.44]

The client is entitled to be informed of all significant developments. (Bus. & Prof. Code, § 6068, subd. (m); Cal. Rules Prof. Conduct, rule 3-500; Proposed Rules of Professional Conduct,[55] rule 1.4 – Communication.)

What is a "significant" development is situation-specific and generally depends on the surrounding facts and circumstances, as well as the client's expectations. (Proposed Rules, rule 1.4, Comment [see preceding footnote].) Certainly the requirement includes providing copies of all briefs and petitions, significant motions, the opinion, and other court rulings on significant matters.[56] The client of course *must* know of potential adverse consequences from the appeal and any other matters requiring the client's participation or decision. The attorney must respond to reasonable requests for information.

The duty to communicate about other occurrences during an appeal depends on the nature of the case, the issues raised, the client's level of involvement, the time-

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[55]http://ethics.calbar.ca.gov/Portals/9/documents/CRRPC/RRC%20Final%20Docs/Proposed%20Rules%20of%20Professional%20Conduct%20v.24%20(7-21-14).PDF. The Proposed Rules have been submitted to the Supreme Court but not yet enacted. They are cited here, not as authority as such, but as suggestions of what are commonly understood standards among members of the bar.

[56]An exception would be when the client expressly asks not to get such documents because, for example, his or her security might be jeopardized if fellow inmates learned the facts of the offense. Counsel should at least advise the client of the fact of filing and the general content, to the extent possible within the constraints of the client's situation.

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sensitiveness of the proceedings, what the client has asked for, what counsel has told the client he or she would do, and numerous other factors.

If the client is very demanding or hostile, it is advisable to err on the side of self-protective communication. This includes advising the client of decisions *not* to do something, such as file a reply brief, request oral argument, or seek rehearing. A good precaution is to give notice an adequate time *before* taking the action, so that the client has an opportunity for input. (That does not mean the client has power to dictate the decision; only that he or she has a chance to express an opinion.[57])

Note: For *any* client, a decision not to petition for review should generally be communicated, because the client may want to file in pro per. (See ADI instructions for pro per petitions for review.[58])

b. Frequency [§ 1.45]

The frequency of communication is a function of the significant developments of the case and the need to respond to client inquiries. In addition to communications necessitated by significant developments, updates at reasonable intervals may be advisable during long periods of delay. If the client communicates excessively, the attorney is expected to exercise control over the client and limit the number and mode of communications. The attorney can explain to the client the need for counsel to focus primary attention on handling the case itself and other clients' cases, rather than responding to repeated queries and complaints.

4. Method of communication [§ 1.46]

Appointed counsel need to consider both efficiency and effectiveness in choosing a method of communication. Most of the time this means written communication, but telephone calls and in-person visits are also possible.

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[57]"Counsel 'is in charge of the case' and the defendant 'surrenders all but a handful of "fundamental" personal rights to counsel's complete control of defense strategies and tactics.'" (*In re Barnett* (2003) 31 Cal.4th 466, 472, citing *People v. Hamilton* (1989) 48 Cal.3d 1142, 1162.) See § 1.56 et seq., *post*, on decision-making authority as between the client and the attorney.

[58]http://www.adi-sandiego.com/practice/forms_samples.asp, under Petition for Review Information Forms.

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a. Written correspondence [§ 1.47]

Because most criminal clients are incarcerated and other kinds of communication are difficult, written correspondence is by far the most common. This method has the advantages of efficiency and creation of a permanent record of communication. Counsel should inform the client of the likelihood that communication will be by letter and advise him or her, that to ensure confidentiality, letters and envelopes should be labeled "Attorney-Client Confidential Communication." (It is also good practice for the client to include the title "Attorney at Law" in addressing the envelope.)

It is a good idea to check the client's current address before sending any correspondence, especially if it concerns time-sensitive or other important matters. Addresses tend to change with some frequency for a number of clients. The ADI website includes links to common locating resources.[59]

The client should be reminded that California Department of Corrections and Rehabilitation regulations require the following for the processing of *outgoing* confidential correspondence: (1) the letter and the envelope must be addressed to the attorney by name; (2) the inmate's name and the address of the facility must be included in the return address appearing on the outside of the envelope; and (3) the word "confidential" must appear on the face of the envelope. (Cal. Code Regs., tit. 15, §§ 3141, subd. (c), 3142; see also Pen. Code, § 2601, subd. (b) [prisoner's civil rights include confidential correspondence with attorney].)

Counsel should additionally be aware of the requirements for *incoming* confidential mail: counsel's letter must bear *counsel's* name or title, return address, and office name. (Cal. Code Regs., tit. 15, § 3143.) Incoming correspondence bearing only a department, agency, or law firm return address, without any reference to the name or title of the individual attorney, will be processed as non-confidential correspondence. (*Ibid.*) Although a notice or request for confidentiality is not required on the envelope (*ibid.*), the better practice is to identify the envelope as "Attorney-Client Confidential Communication."

Both the attorney and the client must ensure confidential legal mail is not used for transmission of information and materials unrelated to the case. Failure to observe this

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[59] http://www.adi-sandiego.com/practice/locating_prisoncontacts.asp

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restriction is considered an abuse of the right and could result in discipline**.** (Cal. Code Regs., tit. 15, § 3141, subd. (b).)

Communication with out of custody clients may be more difficult, because many clients are homeless, living in shelters, living temporarily with friends and relatives, or are in drug treatment; many frequently move. Diligence in attempting to reach the client can entail using contact information from such sources as the appellate record, relatives, the trial attorney, and social media. Email or texting increasingly may be useful.[60]

b. Telephone calls [§ 1.48]

Counsel should inform the client that collect calls are allowed; however, telephone calls should be limited to what is reasonably necessary. Confidential matters should not be discussed in recorded, non-confidential telephone calls. (See Cal. Code Regs., tit. 15, § 3282, subds. (e) & (i).)

The regulations do permit counsel to make special arrangements for a confidential call:

> If staff designated by the institution head determine that an incoming call concerns an emergency or confidential matter, the caller's name and telephone number shall be obtained and the inmate promptly notified of the situation. The inmate shall be permitted to place an emergency or confidential call either collect or by providing for the toll to be deducted from the inmate's trust account. A confidential call shall not be made on an inmate telephone and shall not be monitored or recorded.

(Cal. Code Regs., tit. 15, § 3282 (g).) The designee of the institution may be the litigation coordinator of the particular prison facility where the client is located. Sometimes the client's counselor is cooperative in arranging and facilitating such calls.

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[60]It is important to take reasonable precautions to protect confidentiality when communicating with clients through electronic means. (Cf. Cal. Evid. Code, § 917, subd. (b).) Before sending e-mails with confidential information, counsel should confirm the client is the only person with access to the account. Emails should include a disclaimer. The client should also be cautioned about using public wi-fi and computers.

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In prearranging for a confidential call, counsel may use California Department of Corrections and Rehabilitation form CDCR 106-A.[61] Counsel should make clear it is to be "confidential, unmonitored, and not recorded." The request must be in writing on letterhead**.** (Cal. Code Regs., tit. 15, § 3282, subd. (g)(1).) Generally, "[t]he date, time, duration, and place where the inmate will make or receive the call, and manner of the call are within the discretion of the institution head . . . ." (*Ibid.*) The request should explain why the matter cannot be dealt with by mail or personal visit. (Cf. Cal. Code Regs., tit. 15, § 3282, subd. (g)(2).)

> As long as the attorney-client communication privilege is not violated, a confidential call may be denied where the institution head, or his/her designee, determines that normal legal mail or attorney visits were appropriate means of communication and were not reasonably utilized by the inmate or attorney.

(*Ibid.*) Some institutions may impose a fee to defray the cost of having a staff member visually monitor the client during the call.

Out of custody clients may frequently change phone numbers and may not have regular access to a telephone. Counsel may want to obtain a stable emergency contact number from the client.

c. Visits [§ 1.49]

Non-local client visits are usually not necessary in the context of appeals and are not compensable. Exceptions may arise in special circumstances, as when a personal interview is a necessary part of a habeas corpus investigation or when telephonic and written contacts have not been successful in achieving the required level of communication. As a general rule, to be compensable, client visits (except local ones) must be preapproved by the project or the court.

Dependency minor's counsel may be expected to visit the minor at least once in some courts. Counsel should seek preapproval for long-distance travel, however.

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[61] http://www.adi-sandiego.com/practice/forms_samples/Confidential_Phone_Call_Request_CDCR_106-A.pdf

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5. Literacy and language [§ 1.50]

Many indigent clients have limited education. The attorney should write simply and clearly and avoid using legal terms unless they are necessary and their meaning is explained. If there is a language difference, a translator should be used to translate letters of reasonable length.[62] Briefs cannot be translated verbatim; instead, a summary of the principal points raised in the briefs can be translated.

6. Family communications [§ 1.51]

If the client's family communicates with counsel, counsel should respond promptly. The content of communication with family and others must be limited to matters of public knowledge (such as due dates, procedures, etc.), not strategy or potentially confidential information, unless the client gives specific written permission. Before obtaining such permission, counsel should advise the client about potential waiver of confidentiality.

In juvenile and other cases with confidential records, counsel should ascertain the family member is entitled to see the records. The client may not be the holder of the privilege of confidentiality and so may not be in a position to waive it.

Only a de minimis amount of family contact (e.g., about an hour) is compensable if it is merely for purposes of reassurance, or "hand-holding." More time is compensable if it is reasonably necessary for the handling of the case, such as to investigate a habeas corpus petition, to facilitate communication with the client, or to translate. Counsel should inform the family about these limitations and also about the confidentiality of attorney-client communications.

B. Difficult Clients [§ 1.52]

Most attorneys at one point or another have to deal with a challenging client. Usually the underlying cause is the client's lack of understanding and mistrust of the legal system. One of the most important tools for managing this type of client is

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[62]Check with the project about low-level routine expenses. Moderate translator expenses (i.e., $200 or less) do not require ADI preapproval.

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communication. The attorney needs to keep the client informed, to show respect, to explain the issues and decisions, and to respond to the client on a timely basis.

It helps in initial contacts with the client to explain the appellate process and counsel's role. Early in the appointment process ADI sends clients a memo entitled *Understanding Your Appeal*. (See § 1.143, appendix A, *post*.) It explains what an appeal is, who will represent the defendant, what happens during an appeal, and how the defendant can find out more about the appeal. This document can be referenced, sent a second time, or paraphrased in counsel's attempts to help the client's understanding.

Counsel needs to tailor the approach to the specific type of difficult client. There are, for example, clients who have language or literacy barriers. (This topic is treated in § 1.50, *ante*.) Some are mentally ill or developmentally disabled. (§ 1.53, *post*.) There are prolific writers and "legal scholars" who provide counsel with long lists of issues and authorities and want to control the proceedings. (§ 1.54, *post*.) There are occasional threatening clients. (§ 1.55, *post*.)

1. Mentally ill or developmentally disabled clients [§ 1.53]

For clients who are mentally ill or developmentally disabled, clear, simple, and patient communication may suffice to ensure the client adequately understands and participates in the proceedings. If the case requires the client to make significant decisions, such as whether to abandon or proceed with the appeal, counsel should evaluate the client's capacity for such decisions, perhaps by contacting family members, trial counsel, doctors, or others who have known the client or by making a personal visit. If counsel is unsure the client is able to make a knowing and intelligent choice, the project should be contacted about such possibilities as a formal evaluation or guardian ad litem.

2. Demanding clients [§ 1.54]

A demanding client, such as a prolific or obsessive communicator, requires patience and invariable respect for the client's concerns – but also firmness. More letters or phone calls than normal are to be expected, and to some extent counsel must make allowances for the client's need for reassurance and a sense of control. However, counsel cannot let the client take over the case, much less counsel's entire practice, and eventually may need to set limits, such as one letter and one phone call a month. The limit-setting should be balanced by faithful communication at the times promised.

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When the client demands various non-arguable issues be raised, making a special effort to show the attorney's interest in and respect for the client's concerns could prevent a irremediable rupture in the relationship. Counsel can provide a legal analysis with citations to support the rejection of the issues. If the client is exceedingly distrustful, photocopying rather than paraphrasing the relevant authority can reassure the client the attorney is accurately representing the law. If the client rejects the analysis and threatens to file a motion insisting the attorney be relieved, a complaint with the bar, a petition alleging ineffective assistance of appellate counsel, or a malpractice suit, *the project must be informed*.[63] It will evaluate the situation and may offer to intervene as a mediator.

3. Threats against physical safety [§ 1.55]

If a client makes a threat against the physical safety of appointed counsel and/or others, the attorney should contact the project. Together, the project and counsel can sort out the facts (e.g., the seriousness of the threat and the ability to carry it out) and review ethical considerations.

Business and Professions Code section 6068, subdivision (e) imposes a duty on the attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client," with the exception that it allows but does not require disclosure when the attorney reasonably believes it is necessary to prevent a criminal act that threatens serious physical harm to a person. (See also Evid. Code, § 956.5 [same exception for lawyer-client testimonial privilege]; *People v. Dang* (2001) 93 Cal.App.4th 1293, 1299; *Elijah W. v. Superior Court* (2013) 216 Cal.App.4th 140, 151-160 [minor entitled to appointment of a defense-team psychologist who would respect defense counsel's duty of confidentiality, despite Child Abuse and Neglect Reporting Act and rule of *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 on duty to report patient's serious threat of violence to another]; see also *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 314 [duty of confidentiality under Bus. & Prof. Code, § 6068, subd. (e) is modified by various exceptions to attorney-client privilege in the Evid. Code (citing *In the Matter of Lilly* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 473, 478)]; see *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1189-1192.)

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[63]As noted in § 1.2E, *ante*, ADI provides professional liability coverage for panel attorneys' work on ADI cases. To safeguard coverage, it is essential that any suit, threat of suit, or facts that might lead to suit be reported to the carrier via ADI immediately.

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In addition to researching these applicable principles, counsel can consult the State Bar's and county bar associations' ethics opinions and hotlines. ADI's website pages on ethics[64] have links to a number of resources.

C. Decision-Making Authority [§ 1.56]

1. Attorney's authority [§ 1.57]

Appellate counsel is the decision-maker on issue selection and strategy. "When a defendant chooses to be represented by professional counsel, that counsel is 'captain of the ship' and can make all but a few fundamental decisions for the defendant." (*People v. Carpenter* (1997) 15 Cal.4th 312, 376; see also *Jones v. Barnes* (1983) 463 U.S. 745, 751-754 [no federal constitutional duty for appellate counsel to raise every available non-frivolous issue, even if client wants them to be raised]; *People v. Welch* (1999) 20 Cal.4th 701, 728-729 [defendant does not have right to present defense of own choosing but merely right to adequate and competent defense]; *In re Horton* (1991) 54 Cal.3d 82, 95 [defense counsel has complete control of defense strategies and tactics].)

Although appointed counsel has both the authority and the responsibility to make these decisions, maintaining good client relations requires counsel accord the client's opinions respect.

2. Client's authority [§ 1.58]

The client defines the basic goals of the appeal. The client decides such fundamental matters as whether to pursue or abandon the appeal (for example, because there are no arguable issues or appealing involves risks of adverse consequences). (See *Jones v. Barnes* (1983) 463 U.S. 745, 751 ["the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"]; *In re Josiah Z.* (2005) 36 Cal.4th 664, 680-681; see *People v. Harris* (1993) 19 Cal.App.4th 709, 715 [client, not counsel, responsible for deciding to abandon appeal]; *In re Martin* (1962) 58 Cal.2d 133 [counsel not permitted to abandon appeal without client's consent by letting it be dismissed under former rule 17, now rule 8.360(c)(5) of Cal. Rules of Court];[65] *In re*

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[64]http://www.adi-sandiego.com/research/ethics.asp

[65]Rule 8.360(c)(5)(A)(ii) now provides that if appellate counsel for an appealing defendant is court-appointed, substitution of counsel, rather than dismissal of the appeal,

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Alma B. (1994) 21 Cal.App.4th 1037 [counsel not permitted to appeal without client's consent]; ABA Model Rules of Prof. Conduct, Rule 1:2 [lawyer must follow client's direction as to objectives of appeal].)

The client also decides what issues should be waived because of their potential detriment to the client. For example, the client might want to forego issues that could highlight an error in his or her favor or that might require another appearance in court because leaving prison could result in the loss of a beneficial prison placement or job. If there is an issue regarding the legality of a guilty plea, the client determines whether to attack the plea and thereby potentially lose its benefits as well as its burdens. (See §§ 2.16 and 2.39 of chapter 2, "First Things First: What Can Be Appealed and What It Takes To Get an Appeal Started," and § 4.91 et seq. of chapter 4, "On the Hunt: Issue Spotting and Selection.")

3. Pro per briefs by represented clients [§ 1.59]

If the client wants to file a pro per brief, counsel should explain that a party in a criminal case does not have the right to act as co-counsel, to file a brief while represented by appellate counsel, or to represent himself or herself. (*Martinez v. Court of Appeal* (2000) 528 U.S. 152, 163-164 [no constitutional right to self-representation on direct appeal]; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163 [no right to act as co-counsel if represented by counsel].)[66]

If the client submits a pro per brief, a Court of Appeal usually will decline to accept it and will forward the brief to appointed counsel for a decision on whether to raise the client's issue. The attorney should not simply "adopt" the pro per brief. If counsel decides to submit the issue to the court, counsel should properly argue the issue and present it in a supplemental brief. If the issue does not have merit, counsel should return the brief to the client, explaining the reasons for the rejection by the court and for counsel's conclusion the issue does not have merit. Counsel may also write to the court and state, "I have reviewed the brief and will not be filing supplemental briefing. I have returned the brief to the client with an explanation of the court's policy."

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is the appropriate remedy.

[66]An exception is the right to file a pro per supplemental brief after appointed counsel files a no-issue brief under *People v. Wende* (1979) 25 Cal.3d 436, 440. This right does not apply to dependency appeals. (*In re Phoenix H.* (2009) 47 Cal.4th 835.)

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In such a situation the project may be able to help "mediate" by giving counsel a second opinion and explaining to the client why the issue is not arguable. If that is unsuccessful, counsel can advise the client about requesting a new attorney on appeal or on filing a pro per habeas corpus petition. At the same time counsel must admonish the client about such dangers as the successive petitions rule, possible waiver of attorney-client confidentiality (by alleging ineffective assistance of counsel), disclosure of damaging information in a motion or petition, undercutting counsel's efforts by attacking counsel or the arguments in the brief, and other pitfalls of self-representation.

D. Client Records [§ 1.60]

Counsel have ethical duties with respect to client records, both the appellate transcripts and materials in the case file. It is important to understand these duties and handle them carefully.

1. Transcripts [§ 1.61]

Although ADI has found no explicit authority stating that appellate court transcripts are the client's property and part of the attorney's file, ADI has always taken the "safe" position that they are and that the client is entitled to them on request at the end of the case, or else the attorney must retain them for the life of the client in criminal cases and for a substantial period after the subject child (or youngest child, if there are several) attains majority in a dependency case.[67] (See Cal. State Bar Formal Opn. 2001-157 [duty to retain file in criminal case for life of client unless provided to client or client consents to other disposition].)

a. Possession during appeal [§ 1.62]

During the course of the appeal, it is possible a client might request a copy of the transcripts. The attorney should explain that there is only one copy and the client is not entitled to them while represented by counsel because counsel needs them. If the client is insistent, however, and the record is small, making a copy may be reasonable. If the record is large, counsel can offer to send a summary of the transcripts or relevant

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[67]Superior court document retention policies may be a guide to counsel in determining how long is a reasonable period after the child attains majority. Written policies for at least some counties may be viewed on the court website. http://www.courts.ca.gov/find-my-court.htm

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excerpts. If that is not satisfactory, counsel can suggest that the client or the client's family or friends provide payment for the photocopying costs. But counsel should not relinquish possession of the record while the case is still being actively litigated, unless counsel has access to another copy (e.g., a scanned version).

An exception arises when counsel files a no-issue brief under *People v. Wende* (1979) 25 Cal.3d 436, 440, or *In re Sade C.* (1996) 13 Cal.4th 952. Counsel normally should send the record to the client upon filing such a brief, in case the client wishes to take advantage of the opportunity to file a pro per brief. Such an opportunity is required in non-dependency cases. (See § 1.27, *ante*.)

b. Disposition after appeal [§ 1.63]

Early in the case counsel should make written arrangements with the client for the disposition of the record when the appeal is over. The transcripts normally should either be (a) retained by the attorney, (b) sent to the client or his or her designee, or (c) otherwise disposed of in accordance with the client's instructions.

It is usually not feasible for attorneys to retain hard copies of transcripts, because a seasoned appellate attorney will have hundreds of cases over the years. Sending them to the client and asking for client instructions on some other disposition, such as destruction or transmission to a third party, are alternatives. If the attorney has obtained the reporter's transcript in computer-readable form,[68] storage is not a concern, and retaining the record, with notice to the client it is available at any time on request, is probably the most practical way of complying with ethical obligations. Attorneys who received records in computer-readable form will be reimbursed for sending the client a paper copy only when the client has expressly requested it in that form.

In cases with confidential records, counsel should use care to dispose of them in a way that does not compromise their confidentiality. See ADI's web page on confidential records.[69] (See also following § 1.64 on sensitive and confidential materials.)

The usual options may not be feasible when the client is an infant or young minor in a dependency appeal. In such a case, counsel cannot send the record to the client when

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[68]See California Rules of Court, rule 8.130(f)(4) (requesting reporter's transcript in computer-readable form).

[69]http://www.adi-sandiego.com/practice/conf_records.asp

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the child's caretaker is not entitled to access to it, because doing so violates confidentiality. It may be possible to send the record to the child's guardian ad litem, often trial counsel. Or, if counsel is able to verify that the documents and reporter's transcripts will be obtainable from court archives during the minority of the child, counsel may destroy them, while informing the client or the client's caretaker the attorney will pay for any costs of retrieval. Because such costs rarely occur and are not large, that approach is far less costly than storing increasing quantities of documents over the years.

When sending them to the client, counsel should always make it clear this is the client's only copy, and the client has the responsibility of safeguarding it. If it is lost, the client must pay the state for a replacement.[70]

c. Sensitive and confidential materials [§ 1.64]

There may be circumstances (e.g., many child molestation cases) when the client does not want the record coming into an institutional setting, where privacy is limited.[71] In such a situation, counsel should ask for written directions on whether to send it to a third party or destroy it. Counsel who fail to send the record to the client or make arrangements for its disposal may have an ethical obligation to keep it.

Sometimes material that is not supposed to be in the record is inadvertently included. For example, by law the transcripts must not include the names, addresses, or telephone numbers of sworn jurors; jurors must be referred to by an identifying number.[72]

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[70]The court can assist in obtaining copies of records. See "Records Retrieval" on each district's Practices and Procedures page.
http://www.courts.ca.gov/courtsofappeal.htm

[71]In such cases, counsel should be careful about *all* communications during the appeal, including contents of letters, briefs, etc. The client may ask that nothing revealing the nature of the crime be sent to prison. Other methods of communication may then have to be arranged.

[72]The information for unsworn jurors (such as those excused) must not be sealed unless the court finds compelling reason to do so (Code Civ. Proc., § 237, subd. (a)(1); Cal. Rules of Court, rule 8.332(c)), but by policy unsworn jurors should be identified only by first name and initial.

If access to juror identification information is required to handle the case, counsel may apply to the trial court under Code of Civil Procedure section 237, subdivisions (b)-

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(Code Civ. Proc., § 237, subd. (a)(2); Cal. Rules of Court, rule 8.332(b).) Other examples might be confidential juvenile records (see, generally, Welf. & Inst. Code, § 827; rule 8.401(b)) and confidential transcripts (rule 8.47). Examples in dependency appeals might be the contact information for confidential foster parents or a parent or the psychological evaluation of the other parent. Upon discovering material that counsel is not supposed to see, counsel should stop reading that part of the transcript immediately and notify the Court of Appeal and the project. The court may order return of the records, redaction, or other corrective action. *Under no circumstances should counsel send such material to clients or other persons without specific authorization from the court or project*.

If the material is appropriate for counsel to review, but not the client, counsel may personally redact the transcript, if practical, in order to send it to the client, completely covering the confidential information and ensuring it is not readable by any methods. If the changes are more extensive, counsel may ask the court to order the court clerk to prepare a proper copy. If the record is in electronic form, having the clerk do the corrections may be the only alternative.

2. Office file [§ 1.65]

If the client wants counsel's office file, he or she is entitled to it. Rules of Professional Conduct, rule 3-700(D) states:

> A member whose employment has terminated shall: (1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not . . . .[73]

a. Contents of file [§ 1.66]

The file to be turned over to the client on request includes all correspondence and filings. The attorney's work product materials – written notes, impressions, thoughts, etc. – may also belong to the client and if so must be delivered to the client or a successor

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(d). (See *People v. Johnson* (2013) 222 Cal.App.4th 486.)

[73]Counsel can make a copy of the file, at his or her expense, and retain those copies. (See Rules Prof. Conduct, rule 3-700, "Discussion.") This is highly advisable in most cases, for the attorney's own protection.

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attorney on request. (See *Eddy v. Fields* (2004) 121 Cal.App.4th 1543, 1548, and *Metro-Goldwyn-Mayer, Inc. v. Superior Court* (1994) 25 Cal.App.4th 242, 246-248 [describing conflicting lines of authority]; *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950; Code Civ. Proc., § 2018; Rules Prof. Conduct, rule 3-700(D).)

Copies of cases, statutes, etc., are not work product because they are in the public domain. Claims materials are not produced for the client's benefit; they are extrinsic to the attorney-client relationship and so need not be turned over.

As indicated in § 1.61 et seq., *ante*, ADI has always taken the "safe" position that appellate court transcripts are part of the attorney's file, that they belong to the client, and that the client is entitled to them on request.

b. Sending file to client [§ 1.67]

If the client requests the file during the appeal, counsel can send it right away, or if the original is needed to represent the client, can offer to send a copy immediately and provide the original at the end of the case.

At the conclusion of the case, if the file is sent to the client, counsel should warn the client that it is the original, that the client has the responsibility to preserve it, and that if they lose the material they may be responsible for the costs of additional copies. Counsel does not have to send the client copies of documents already sent. Nevertheless, it is often good for client relations to do so, provided the extra copying is modest in scope and is not repeatedly requested.

c. Storing file if not sent to client [§ 1.68]

If the original file is not sent to the client or the client has not given written instructions on its disposition, in criminal cases it is the attorney's responsibility to store it for the life of the client. (State Bar Standing Com. on Prof. Responsibility & Conduct, Formal Opn. No. 2001-157 ["client files in criminal matters should not be destroyed without the former client's express consent while the former client is alive"].[74]) It may prove useful in the event there is a post-appeal claims audit or post-appeal habeas corpus proceedings. The file may be stored in counsel's office or in an off-site storage facility.

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[74]http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=PFc4o8VEnCg%3d&tabid=838.

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In dependency cases, counsel should keep the files at least for a substantial period after the subject child (or youngest child, if there are several) has reached majority.[75] Counsel should ensure these confidential files are in a secure location, where unauthorized persons cannot get access.

E. Client Custody Issues [§ 1.69]

Counsel occasionally must face issues of whether the client should seek to be released, where the client is incarcerated, and other custody matters.

1. Release pending appeal/avoiding excess time in custody [§ 1.70]

Occasionally, the attorney may face the matter of seeking the client's release pending appeal. The client may request the attorney do so, or counsel may conclude release pending appeal is necessary to safeguard the possibility of meaningful relief for the client and avoid the possibility the client might end up serving "dead" time – custody in excess of the lawful sentence – in the event of a favorable result on appeal.[76] These matters are discussed in detail in § 3.37 et seq. of chapter 3, "Pre-Briefing Responsibilities: Record Completion, Extensions of Time, Release on Appeal." The possibility of release pending decision is also available on habeas corpus. (Pen. Code, § 1476.)

2. Compassionate release [§ 1.71]

If the client is terminally ill, counsel should consider pursuing a compassionate release. Seeking early release under this program is sensible only if there is a place for the client to go, such as family or an alternative care facility.

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[75]Superior court document retention policies may be a guide to counsel in determining how long is a reasonable period after the child attains majority. Written policies for at least some counties may be viewed on the court website. http://www.courts.ca.gov/find-my-court.htm

[76]If the defendant ends up serving "dead" time, the period of parole should be reduced by the excess time of imprisonment. (E.g., *People v. London* (1988) 206 Cal.App.3d 896, 911, fn. 8; *In re Ballard* (1981) 115 Cal.App.3d 647, 650.)

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The procedure for compassionate release is governed by Penal Code section 1170, subdivision (e)(1)-(6) and the title 15 of the California Code of Regulations, starting at section 3076. It does not apply to a defendant who is sentenced to death or a term of life without the possibility of parole. (Pen. Code, § 1170, subd. (e)(2)(B).)

Upon the recommendation of the Director of the Department of Corrections and Rehabilitation and/or the Board of Parole Hearings, a court may recall the prisoner's sentence if (1) the prisoner has an incurable condition likely to produce death within six months and (2) release or treatment would not pose a threat to public safety. (Pen. Code, § 1170, subd. (e)(1) & (2)(A) & (B).) The prisoner, his or her family, or a designee may make the request for consideration of recall and resentencing by contacting the chief medical officer at the prison or the Director of the Department of Corrections and Rehabilitation. (Pen. Code, § 1170, subd. (e)(4).)

The defendant may appeal the denial of compassionate resentencing as an order after judgment affecting his or her substantial rights. (*People v. Loper* (2015) 60 Cal.4th 1155 [rejecting previous line of decisions implying the fact the defendant has no right to make a motion deprives the defendant of standing to appeal its denial]; see chapter 2, "First Things First: What Can Be Appealed and How To Get an Appeal Started," § 2.62 et seq.)

3. Prison placement and other matters not directly related to the appeal [§ 1.72]

Sometimes the client asks for assistance dealing with matters other than the appeal, such as prison conditions, prison placement, or a particular medical problem. These communications promote the attorney-client relationship but, because they are unnecessary to the handling of the appeal, are compensable only to a de minimis extent. For example, the attorney may refer the client to prisoner resources.[77]

Counsel can also provide information on the general governing principles. For example, a client may want to be housed in a prison nearer home. Counsel can refer the client to Penal Code section 5068, which recognizes that maintaining family and community relationships reduces recidivism and provides that placement should be nearest the prisoner's home, unless other classification factors make such placement unreasonable. The client can inform the reception center, the counselor, and classification

[77] http://www.adi-sandiego.com/practice/pract_resources.asp#prisoner.

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committee of his or her desire and can provide them with information verifying family ties, such as the probation report and letters from family. Hardship, such as an elderly or ill parent who is unable to travel far, can be a basis upon which to seek placement. The client should be told that although custodial authorities may consider these factors, they will still give priority to custody and safety-based concerns.

F. Post-Decision Responsibilities [§ 1.73]

As discussed in § 1.19, *ante*, when the opinion is received counsel must analyze it, decide what if anything counsel will do next, and then explain the situation to the client.

1. Rehearing and review [§ 1.74]

If the opinion is unfavorable, counsel should inform the client about the petition for rehearing and review process. It is important to write promptly because of the tight time requirements: 15-day limit for petitions for rehearing (Cal. Rules of Court, rule 8.268(b)(1)) and the requirement that petitions for review be filed within 10 days after finality as to the Court of Appeal (rule 8.500(e)(1)).

a. Rehearing [§ 1.75]

Pro per petitions for rehearing are usually not feasible, given the short deadlines and typical slowness of prison mail.[78] In addition, the court may refuse to file a pro per petition filed by a client currently represented by counsel in that court. Thus counsel should give the benefit of the doubt to filing the petition if the client may want or need to do so. Petitions for rehearing are covered more comprehensively in § 7.33 et seq. of chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision." (See also § 1.20, *ante*.)

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[78]The presiding justice may grant relief from failure to file a timely petition for rehearing until the 30th day after the filing of the opinion. (Cal. Rules of Court, rule 8.268(b)(4).) The court also may grant rehearing on its own motion during this period. (Rule 8.268(a).) Although a belated petition accompanied by a good explanation of why it is late may possibly be considered, no one should rely on this if a timely petition is feasible.

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b. Review [§ 1.76]

Counsel should petition for review if in counsel's judgment there are grounds under California Rules of Court, rule 8.500(b), and the client is reasonably likely to benefit from it. Counsel should also petition if there is a reasonably viable and properly preserved federal issue the client wants to pursue. (See rule 8.508 [abbreviated petition for review solely to exhaust state remedies].) If counsel decides not to file a petition for review, counsel should provide the client with information on how to proceed in pro per. This may include a sample petition, the due dates, the addresses for the courts and parties to be served, and the number of copies required. Petition for review information forms for clients are on the ADI website.[79]

Petitions for review are covered more comprehensively in § 7.46 et seq. of chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision"; see also § 1.21, *ante.)*

2. Federal filings [§ 1.77]

An appointment in the California Court of Appeal may include a petition for certiorari in the United States Supreme Court in appropriate cases. Certiorari is compensable but is considered an exceptional step and at ADI requires the executive director's preapproval.

Federal habeas corpus is not compensable under the state appointment, although counsel may choose to "ghost-write" a pro per federal petition for writ of habeas corpus to be filed by the client or seek an appointment from the federal court.

The client should be informed about seeking relief in federal courts if the client has a substantial federal issue or has expressed interest in pursuing one. The client needs to know the grounds for certiorari and/or habeas corpus, the deadlines for filing, state exhaustion requirements, the restriction against successive petitions, etc. Counsel can provide forms, addresses, and other information.

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[79] http://www.adi-sandiego.com/practice/forms_samples.asp

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Certiorari is discussed more comprehensively in § 7.100 et seq. of chapter 7, "The End Game: Decisions by Reviewing Court and Processes After Decision." Federal habeas corpus is the topic of chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus."

3. Post-appeal contacts with clients [§ 1.78]

Sometimes after an appeal a client may ask for help relating to the appeal or other areas. Counsel should give the client the respect of a timely reply. The authority to act under the appellate appointment is usually over, but counsel can inform the client about such resources as legal books maintained by the prison law library, prisoner rights organizations, and innocence projects. The ADI website maintains a partial list of prisoner assistance resources.[80] Counsel can also provide habeas corpus forms and instructions on filing them.

V. RESPONSIBLE USE OF ASSOCIATE COUNSEL AND LAW CLERKS [§ 1.79]

At its December 2015 meeting, the Appellate Indigent Defense Advisory Oversight Committee (AIDOAC) promulgated a statewide policy regarding the use of associate counsel. It was largely based on the policies previously spelled out in this Manual and represented no substantive change for ADI panel attorneys. In the interests of maximum uniformity among districts, the Manual is revised to adopt the AIDOAC formulation. Any special ADI interpretations or Fourth District rules on the subject are marked clearly.

AIDOAC POLICY ON USE OF ASSOCIATE COUNSEL
(section numbers added to conform to ADI Appellate Practice Manual system)

The AIDOAC guidelines are based on principles articulated by the California Supreme Court and Courts of Appeal and reflect the appellate projects' standards for assessing the performance of appointed counsel. They are based, as well, on the broad ethical responsibilities of attorneys, recognizing that the failure adequately to supervise the work of subordinate attorney or non-attorney

[80] http://www.adi-sandiego.com/practice/pract_resources.asp#prisoner

employees or agents is a failure to act competently on behalf of a client. (See Rules Prof. Conduct, rule 3-110, "Discussion,"and cases cited therein.)

Special considerations:

• *Court- or project-specific requirements:* Individual courts or projects may have additional or more specific requirements. Counsel must consult with the applicable project for such requirements.

• *Limitation for assisted cases:* AIDOAC has determined that attorneys in assisted cases may not use associate counsel, except with prior approval of the project executive director upon a showing of extraordinary circumstances.

A. Basic Principle of Personal Responsibility [§ 1.80]

The attorney of record at all times has complete, final, and personal responsibility for the case. It is acceptable for the attorney in an independent case to employ others to *assist* in any of the attorney's functions. The attorney personally, however, is fully accountable for what has or has not been done on the case. The projects use a detailed, comprehensive method of evaluating attorneys' performance and selecting them for particular cases. The projects' quality controls would be undercut if attorneys were to allow others, not subject to this system, to take over important aspects of a case. The projects examine every category for which associate counsel or law clerk time is claimed, to determine whether appointed counsel has been sufficiently engaged to fulfill expectations.

The projects expect the quality of an attorney's work at all stages to reflect his or her own experience and other personal qualifications. This policy of personal accountability applies, not only to final filed documents, but also to preliminary drafts, if any, submitted to the projects and discussion of cases with a project staff attorney. Appointed counsel must be prepared to communicate personally with the project on all substantive, legal, strategic, ethical, and other important matters related to the case. Drafts and communications must conform to what is reasonably expected of attorneys at the experience level of appointed counsel.

Over-delegation may negatively affect the project's evaluation of appointed counsel's performance. Any substandard work produced by associates will damage the standing of the panel attorney personally.

B. Specific Responsibilities of Appointed Counsel [§ 1.81]

The appointed counsel is responsible for the following tasks, among any others the handling of a case may require: reviewing the entire record, completing it, and selecting issues; filing appropriate briefs, motions, applications, and other pleadings; reviewing all filings; making any personal appearances that adequate representation might require, including oral argument; and ensuring prompt, proper, and thorough communication with the client, the project, counsel for all

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parties, trial counsel as necessary, and the court. In performing these tasks, counsel must also ensure all applicable deadlines are met. To expand on some of these areas:

1. Reviewing the entire record, completing it, and selecting issues [§ 1.81A]

Review of the entire record for issue selection and mastery of essential facts is an especially critical aspect of representation. Counsel must ensure the record is adequate for performing this task and complete it if necessary. While associate counsel may assist in record completion and review by performing such functions as taking notes on the transcript or writing a summary of the case and facts, ultimate delegation of this supremely important responsibility to another is unacceptable. The time appointed counsel spends personally reviewing the record must be adequate to assure *all* potential issues in the record have been spotted and considered. Counsel must also be familiar with the details of the record to understand nuances of fact that might affect the assessment and drafting of arguments.

2. Filing appropriate briefs and other pleadings [§ 1.81B]

The opening brief is usually the pivotal document in an appeal, and counsel must put substantial personal effort into filing a product of appropriate quality. It is the attorney's own responsibility to confirm that the facts are stated appropriately, in accordance with appellate standards, and are supported by accurate citations to the record; to ensure all appropriate authorities have been considered and all citations are accurate and up to date; and to see that the document is proper and complete in both form and substance, complies with all requirements of the Rules of Court, accurately states all facts and law, and is argued intelligibly, coherently, grammatically, and persuasively. Similar responsibilities apply to reply briefs, petitions for rehearing or review, motions and applications, and any other filing.

3. Reviewing all filings by others [§ 1.81C]

Other aspects of representation also require close personal attention. Decisions about reply briefs, oral argument, rehearing and review, etc., cannot be made properly unless appointed counsel reviews such filings as the respondent's brief and the opinion, plus any co-appellant's briefing, court orders, and any other filing that may affect counsel's exercise of judgment.

4. Making personal appearances [§ 1.81D]

Personal appearances (such as oral arguments) require special care, because supervising another's work in a courtroom is essentially impossible. Unless advance arrangements have been made, the projects and the courts expect appointed counsel to make all appearances personally. The panel attorney must consult with the project before using associate counsel at oral argument. The court may have to pre-approve the appearance of associate counsel, as well. In

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certain circumstances, the court or project may also require the client's consent. Requirements may vary from one court and project to another.[81]

5. Engaging in proper communication with the client, court, project, and others [§ 1.81E]

Counsel is personally responsible for ensuring prompt, proper, and thorough communication with the client, the court, the project, counsel for all parties, trial counsel as necessary, and any other person or entity the needs of the case may require. Counsel must fully comply with the ethical requirements of adequate client communication, including providing copies of significant documents and keeping the client informed of significant developments in the case. (Bus. & Prof. Code, § 6068, subds. (m) & (n); rule 3-500, Cal. Rules Prof. Conduct.)

C. Compensation [§ 1.82]

Appointed counsel must report on all compensation claims any usage of associate counsel and indicate how much of that counsel's time is included in the hours claimed. These principles apply:

Meaning of "associate counsel": Associate counsel must have been an active member of the California State Bar at the time the services were performed for that individual's time to be billable as "counsel" time. If that was not the case, the time is billable only as law clerk or paralegal time – an expense not to exceed $25 per hour.

Compensable costs of associate counsel: A claim with associate counsel time will be judged under the same guidelines and standards of reasonableness as those applicable to single-attorney claims. The use of associate counsel does not increase the time payable for any service performed.

Claiming associate counsel's time: Associate counsel time is reported as a part of appointed counsel's time for any specific task. Associate counsel time included in the claim is then itemized in the associate counsel attachment, which must state the name and California State Bar number of the associate counsel. These special rules apply:

• *Counsel must first claim all of his or her own billable time and only then add any associate counsel time deemed billable on top of that:* It is essential for the project to know how much time appointed counsel personally spent on the case, in order to

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[81]ADI note: Our courts specifically expect counsel to discuss oral argument by associate counsel with ADI ahead of time and get the court's preapproval, as well.

(See ADI news alert of April 2012 for further information. http://www.adi-sandiego.com/news_alerts/pdfs/2012/APRIL_2012_ADI_NEWS_ALERT.pdf)

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assess counsel's compliance with these associate counsel policies. Counsel must not cut his or her own time in order to claim associate counsel time: doing so will understate appointed counsel's own involvement and cause the project, AIDOAC, or court to question whether counsel exercised appropriate control over the case.

• *In the attachment for itemizing associate counsel's time, the hours shown must be only those actually claimed (as opposed to those spent):* In determining how much time appointed counsel personally spent on each function, the projects take the total hours reported for each function and subtract the itemized hours for associate counsel. That calculation requires that the itemized hours be only those actually included in the hours claimed. If counsel wishes to state unclaimed associate counsel time to show the extent of work performed on the case or give the attorney due credit, the comments are the appropriate place, not the itemization chart.

— END OF AIDOAC POLICY STATEMENT —

VI. CLASSIFICATION AND MATCHING OF CASES AND ATTORNEYS [§ 1.83]

A. Case Screening and Classification [§ 1.84]

Under a statewide system approved by the judiciary, defendants' appeals in criminal and juvenile delinquency cases are classified as follows:

A: Sentence of less than 5 years for trials, less than 10 years for pleas.

B: Sentence of at least 5 but less than 10 years for trials, at least 10 but less than 20 years for pleas.

C: Sentence of at least 10 but less than 20 years for trials, at least 20 but less than 30 years for pleas.

D: Sentence of 20 years or more for trials, 30 years or more for pleas, or any with life maximum.

E: Life without possibility of parole.

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Special classifications for other types of appeals in criminal cases or quasi-criminal cases include People's appeals, habeas corpus, and Sexually Violent Predator. Juvenile dependency, family law, conservatorship, paternity, sterilization, and other civil cases requiring court-appointed counsel are classified by the type of proceeding.

B. Attorney Screening and Classification [§ 1.85]

The attorneys on the panel are separated into two speciality groups – criminal and juvenile dependency. They are then divided by the location of their office into geographic groups. Within each specialty/geographical area, the attorneys are divided into groups based on their qualifications, using the statewide level 1 through 5 classifications.

1. Attorney ranks [§ 1.86]

The general framework within which attorneys are classified and appointment decisions are made is shown in the following chart.

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CRITERIA FOR ATTORNEY CLASSIFICATIONS

Level 1. Attorneys who are fairly new to the panel and need substantial assistance.
Expected work product: Must demonstrate promising writing, research, and analytical skills and make steady progress toward skills required of higher classifications.
Typical ADI cases: Class A or B cases on an assisted basis.

Level 2. Attorneys with some relevant experience who need some but reduced assistance in cases and whose work indicates the ability to handle cases somewhat more difficult than the simplest.
Expected work product: Must produce work of at least standard quality, requiring little assistance to perform basic duties. As a general policy, attorneys at this level must demonstrate reasonable progress toward handling independent cases.
Typical ADI cases: Class A or B cases on a modified assisted basis.

Level 3. Attorneys with a moderate amount of relevant experience, whose work indicates ability to handle cases of intermediate complexity on an independent basis.
Expected work product: Must consistently produce work of at least good to very good quality, requiring assistance only to perform more complex duties
Typical ADI cases: Classes A through C on an independent basis.

Level 4. Attorneys of superior qualifications and considerable relevant experience, whose work indicates ability to handle complex cases on an independent basis.
Expected work product: Must consistently produce work of at least very good quality, requiring assistance only to perform very difficult and complex duties.
Typical ADI cases: Classes A through D on an independent basis.

Level 5. Attorneys with the highest qualifications and extensive relevant experience, whose work indicates ability to handle the most complex cases on an independent basis.
Expected work product: Must produce work of consistently very good to excellent quality, requiring assistance only at highly sophisticated levels.
Typical ADI cases: Cases of all classes on an independent basis.

These are general principles, not rigid rules, and are constantly evolving. They vary from project to project and over time.

2. Determination of rank [§ 1.87]

When an attorney's application to the panel is accepted, the initial classification depends not only on experience (which is of course an important factor), but also on more qualitative measures such as training and education, class rank and academic honors, writing ability, and commitment to indigent appeals.

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After admission, the project evaluates the attorney's work on each individual cases. The project uses an evaluation form assessing overall performance and itemizing specific factors that go into the overall assessment. The evaluations form a cumulative record of performance. The statewide evaluation process system is described in § 1.94 et seq., *post*.

Each attorney's ranking is reviewed on an ongoing basis as the record of evaluations and other factors change. The project may move the attorney's rank up or down, increase or decrease or suspend offers, remove the attorney from the panel, put him or her on probation, or take other steps as circumstances require.

C. Selection of an Attorney for a Particular Case [§ 1.88]

The matching process – selection of an attorney for a case – begins after the case is screened and classified as described in § 1.84, *ante* (A, B, C, D, or E, or one of the special classifications). The following discussion generally describes the matching process at ADI; other projects may use different procedures.

1. Assisted vs. independent decision [§ 1.89]

One fundamental decision is whether the case is to be "assisted" or "independent." Sometimes a hybrid category is used, such as "modified-assisted" (for an assisted case requiring less assistance than usual) or "modified independent" for an independent case requiring more assistance than usual). This decision is affected by such factors as caseload, staff attorney resources, training needs, costs, and the availability of qualified attorneys. Assisted cases are usually assigned to attorneys with less experience on the panel. Independent cases are generally assigned to the three highest rankings according to the level of complexity, giving the more complicated cases to the more highly qualified attorneys. (ADI tries not to use the highest ranked attorneys for the simplest cases, in order to assure they remain available for the most difficult cases.)

2. Choice of attorney rotation [§ 1.90]

Another step is to choose the appropriate rotation from which to select the attorney. The combination of the case classification and the type of representation (assisted or independent) indicate which attorney qualifications levels – level 1, 2, 3, 4, or 5 – are eligible under the standards described in § 1.86, *ante*. Geographic locale is often one consideration, although often it is not, as well.

Within each rotation, the attorneys are listed roughly in order of last offer, so that those whose last offer was longest ago tend to be near the front. Other factors, however,

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may affect the attorney's place in the rotation, including quality of recent work, time difficulties, request not to get an offer for a certain time for one reason or another, request for new appointment, and so on.

3. Choice of individual attorney within rotation [§ 1.91]

The appointment is offered to the first individual in the rotation who is considered to be highly suitable for the particular case. The judgment of suitability takes account of the attorney's preferences, number of unbriefed cases outstanding, timeliness, general quality of work, probable availability, special areas of strength or weakness, recent performance, client preferences, and numerous other factors.

4. Special request for appointment outside the normal rotation [§ 1.92]

ADI recognizes that attorneys may wish to let ADI know that they have come to a point where they can do no more work on their pending cases for some time (for example, while awaiting the preparation of a lengthy augmentation of the record). They may use the form requesting appointment outside the normal rotation on the ADI website.[82] Counsel must use only this form, not phone calls or letters, to inform ADI of a request. ADI cannot guarantee to honor such requests, since the suitability of the attorney for a particular case remains the most important factor, and ADI has to consider fairness to all attorneys in offering cases. Thus, special requests for appointment outside the normal rotation should be the exception. A request containing inaccurate information will be discarded.

5. Offer of case [§ 1.93]

The attorney selected for an appointment offer is contacted. If the attorney declines or cannot be reached reasonably promptly, ADI repeats the selection process. When an attorney has accepted, ADI sends a recommendation for the appointment to the court. Because of the many factors considered in making the selection, ADI can make no representations how many appointment offers an attorney may receive, or whether an attorney will continue to receive any appointments at all.

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[82] http://www.adi-sandiego.com/pdf_forms/Appointment_request_out_of_rotation_fillable_for_website.pdf

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D. Evaluations of Attorney Performance [§ 1.94]

The assigned project staff attorney evaluates every case handled by a panel attorney. The following categories, approved by the judiciary for statewide use, are considered:

1. Issues – selection and definition [§ 1.95]

a. Identifies standard issues [§ 1.96]

Identifies standard issues which would be apparent to an attorney having knowledge of the record and a reasonable awareness of existing procedural and substantive law.

b. Identifies subtle issues [§ 1.97]

Shows depth of insight and analytical skill in identifying and developing issues. Identifies issues that are not obvious and perceives their implications.

c. Identifies current issues [§ 1.98]

Identifies current issues which would be apparent to an attorney having knowledge of the record and familiarity with recent trends and the cases then pending in the appellate courts of California and the United States.

d. Evaluates issues properly [§ 1.99]

Exercises sound judgment in determining the merit of each issue and treating each issue according to its merits. Gives each issue its share of the brief, but no more. Arranges issues in the brief in an appropriate order. Eliminates issues that are only marginally arguable if they detract from the remaining issues or the tone of the brief as a whole.

e. Defines issues clearly [§ 1.100]

Demonstrates competency in framing each issue. Defines the scope of the issue. Clearly understands and phrases the exact

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question to be decided by the court. Uses effective argument headings.

2. Research [§ 1.101]

a. Performs thorough research [§ 1.102]

Thoroughly researches all relevant aspects of each potential issue, becoming familiar with the law on related issues or "sub-issues" when necessary. Finds the most recent cases. Shows resourcefulness and knowledge of available materials.

b. Selects appropriate authority [§ 1.103]

Cites adequate authority for the principles relied upon, neither string-citing unnecessarily nor making statements without support. Whenever possible uses cases which are factually on point as well as legally relevant. Takes account of adverse authority.

c. Cites authority accurately [§ 1.104]

Cites and quotes legal authorities accurately; does not intentionally or negligently misrepresent the facts or law contained in authorities.

d. Checks current validity of authority [§ 1.105]

Researches later history of cases. Cites no cases which have been overruled, depublished, or granted review in the California Supreme Court.

3. Argumentation [§ 1.106]

a. Organizes argument [§ 1.107]

Presents position in a coherent manner. States facts, sets forth legal principles and authorities, argues, and summarizes in a logical, orderly progression. Keeps objective of argument in mind; does not ramble or dwell on marginal matters.

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b. Covers all points essential to position [§ 1.108]

Is aware of and addresses all points logically or legally necessary to the argument. Applies law to facts. Argues prejudice. Anticipates and discusses failure-to-object and waiver or forfeiture issues.

c. Handles authority skillfully [§ 1.109]

Analyzes authorities accurately and perceives their implications. Argues from analogy and distinguishes or challenges adverse authority skillfully.

d. Demonstrates proficiency in advocacy skills [§ 1.110]

Shows confidence in position. Presents strong arguments forcefully, weak ones credibly. Takes controversial stand where necessary. Maintains appropriate tone and balance. Handles facts sympathetic to opposition capably, without adopting defensive or insensitive posture.

e. Is consistently professional in manner [§ 1.111]

Maintains decorum without being pompous or overly formal. Is respectful to the court and opposing counsel. Concentrates on merits and refrains from personal attacks.

4. Style and form [§ 1.112]

a. Writes fluently [§ 1.113]

Shows mastery of written language. Presents ideas clearly and concisely. Avoids legalisms.

b. Uses correct grammar, diction, spelling, capitalization, and punctuation [§ 1.114]

Demonstrates command of the structure and formal elements of the English language. Does not detract from professional image by displays of carelessness and illiteracy. Proofreads carefully.

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c. Presents statement of the case properly [§ 1.115]

Summarizes only those procedural facts relevant to the appeal itself or the specific issues to be decided. Cites to record.

d. Presents statement of facts properly [§ 1.116]

Summarizes in the statement of facts only those facts supported by the record. Adequately cites to the record. Is scrupulous in presenting the facts accurately and in the light most favorable to the respondent. Clearly separates and labels the defense evidence. Writes the pertinent facts in narrative form, not a witness-by-witness account.

e. Uses correct citation form [§ 1.117]

Uses correct citation form for both legal authorities and the appellate record.

f. Follows rules and good practice on form and technical aspects of pleadings [§ 1.118]

Follows prescribed format and formal requirements as to typing, binding, copying, and distributing of briefs and other pleadings. Gives briefs neat, orderly, professional appearance.

5. Responsibility [§ 1.119]

a. Makes sure record is adequate [§ 1.120]

Whenever necessary reviews the trial exhibits and the superior court file. Augments the record as needed.

b. Makes use of opportunities for reply briefs and/or oral argument [§ 1.121]

Orally argues or files a reply brief whenever necessary. Bases the decision to request or waive oral argument upon the appropriateness of argument, not upon convenience.

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c. Is reliable and cooperative in working with project [§ 1.122]

Promptly answers letters and returns phone calls. Keeps appointments. Meets informal interim deadlines within a reasonable time. Accepts reasonable recommendations and suggestions unless in conflict with the attorney's duty to the client or the attorney's professional judgment.

d. Observes deadlines [§ 1.123]

Files all motions, briefs, and petitions on or before the date due, requesting extensions of time if, but only if, necessary.

6. Relationship with client [§ 1.124]

a. Communicates reliably [§ 1.125]

Writes the client soon after appointment, answers correspondence, and provides the client with copies of all filings. When the court's opinion is issued, promptly advises the client; explains how to file his or her own petitions if the attorney sees no merit in proceeding further.

b. Faithfully pursues client's interests [§ 1.126]

Selects issues to maximize effectiveness of appeal for client. Acts zealously and conscientiously in fulfilling obligation to client, regardless of perceived reward or detriment to attorney.

E. Feedback to Attorneys [§ 1.127]

An accurate and realistic understanding of one's own strengths and weakness is critical to development of the necessary skills. Accordingly, attorneys always may obtain information on how they are doing at ADI. They do need, however, to be proactive in seeking this information. ADI cannot possibly advise attorneys *sua sponte* of the hundreds, indeed thousands, of individual decisions we make each year regarding the cases they receive.

Panel attorneys may, and when in doubt should, ask the assigned staff attorney for informal feedback on their performance in specific cases. A phone call or e-mail will do.

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Staff attorneys in turn are encouraged to provide such feedback, even when not asked, whenever they think it would benefit the panel attorney.

At ADI, formal written feedback in any given case is also available, in the form of a verbatim copy of the staff attorney's narrative evaluation and overall assessment. It will be provided on request in any case whenever the appropriate form[83] is submitted at the same time the copy of the opening brief is served on ADI.

In addition to case-specific feedback, attorneys may ask for an *overall* assessment and panel status report at any time. Although at ADI only the executive director is authorized to provide this information, attorneys may make their request in any way comfortable to them – directly to the executive director or through a staff attorney or the ADI panel liaison ("ombudsman"[84]).

We strongly encourage attorneys to take advantage of these opportunities to improve their performance, track their panel status, and head off any problems before they become big.

VII. COMPENSATION OF APPOINTED COUNSEL [§ 1.128]

A. Standards for Assessing Claims [§ 1.129]

1. Services [§ 1.130]

The judiciary has promulgated guidelines[85] to assure the reasonableness of compensation. The guidelines offer a prima facie measure of reasonableness for the time to be spent on various functions in the "ordinary" case (not significantly more or less complex than most). The ultimate standard is always reasonableness, which may or may not correspond to the guidelines in a given situation.

ADI has produced a compensation claim manual.[86] It "codifies" the ways the Appellate Indigent Defense Oversight Advisory Committee, the Judicial Council of

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[83] http://www.adi-sandiego.com/pdf_forms/evaluation.pdf

[84] http://www.adi-sandiego.com/panel/ombudsman.asp

[85] http://www.adi-sandiego.com/claims/claims_guidelines.asp

[86] http://www.adi-sandiego.com/pdf_forms/Claims_manual.pdf

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California services (formerly Administrative Office of the Courts), the projects, and ADI in particular have interpreted the guidelines over the years in particular situations.

Counsel are required to keep time records to the nearest one-tenth of an hour and may be required to produce them on request. Only *actual* time may be claimed. The claim must never be premised solely on the guidelines (for example, by simply dividing the record length by the guidelines' pages per hour) or an estimate ("I know I spent at least *X* hours on this").

While claims in excess of the guidelines are not necessarily unreasonable, appointed counsel has the burden of showing why the time was needed in the particular case. These claims should be supported by written justification, preferably submitted with the claim to avoid delays. Indeed, whenever the necessity for any time claimed is not evident from the face of the filings (for example, research that did not yield any cases), counsel would be well advised to include an explanation with the claim.

Payment may be different from the guidelines. A lower payment is often recommended, for example, when the case was relatively simple and straightforward as compared with the "typical" case that is the model for the guidelines, or when the quality of work was substandard. It may also be higher than guidelines if the case was exceptionally challenging or counsel produced work of unusually high quality that was of notable benefit to the client, the court, or the law. The ultimate test is "*reasonableness*" – what an experienced appellate attorney would find reasonably necessary for handling the case appropriately. This is an individualized judgment for each case.

2. Expenses [§ 1.131]

Like services, all expenses are reviewed under guidelines and ultimately are subject to a general test of reasonableness. The guidelines are the "actual cost" for postage and telephone expenses, if the postage and telephone expenses are reasonable under the circumstances.[87] Ordinary use of computerized legal research (Lexis, Westlaw,

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[87]Extraordinary delivery expenses are reimbursable only when the unavoidable needs of the case – not counsel – require their use. For example, if the court ordered a supplemental brief and allowed only four days for filing, the use of express mail or even personal messenger delivery might be reasonable under the circumstances. By contrast, when counsel has delayed working on the brief until a few days before the due date and uses express mail to avoid default, the express service is for counsel's own needs and is not reimbursable. Consult the project for special situations, such as "fast-track" dependency cases.

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etc.) is considered overhead and is not compensable, but special circumstances, such as the need to search sources not within commonly available subscription plans, may warrant payment; consultation with the project before such use is advised. All extraordinary expenses will be considered on a case by case basis and should be explained. Some, such as experts,[88] require project director or court preapproval in order to assure compensability.

B. Submitting Claims [§ 1.132]

1. Timing [§ 1.133]

Counsel may file a compensation claim at two times for most cases: an interim claim after the opening brief is filed and a final claim after the opinion is filed or whenever services are concluded. Supplemental claims may be allowed in cases with records over 7,500 pages or, on the approval of the project executive director and Judicial Council services, in cases with unusually long delays causing hardship for the panel attorney.

Counsel are encouraged to submit claims as soon as they are permitted. Filing a final claim waives payment for reasonably foreseeable services performed after submission of the claim, such as reading the opinion or communicating with the client. If the court orders supplemental briefing, an additional claim may be filed.

Interim claims in *Wende/Anders* and *Sade C.* no-issue cases[89] are not permitted; final claims may be filed after the time the court sets for filing a pro per brief has expired.

A final claim needs to be filed within six months of the opinion. Appointed counsel should file a final claim even if it is for a relatively small amount of money. Judicial statistics are in large part based on final claims. Failure to file claims in cases with low hourly totals distorts those statistics and may hurt efforts to improve compensation for appointed attorneys. In addition, the Judicial Council requires the projects to submit "administrative" final claims for those considerably past due, in order to clear the books and pay the 5% holdback from the interim; these include no time past the interim and so may result in waiver of payment for such services.

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[88]Moderate translator expenses do not require preapproval.

[89]*People v. Wende* (1979) 25 Cal.3d 436 and *In re Sade C.* (1996) 13 Cal.4th 952. (See § 1.24 et seq., *ante*, for further discussion of this topic.)

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ADI sends counsel who have not already submitted a final claim a reminder approximately 60 days after the remittitur issues. About four weeks after that, the file will be closed and sent to storage. A claim filed after the case has been sent to storage cannot be processed until ADI receives payment for any costs of retrieving, transporting, and refiling the closed file. Counsel should call the project about the current applicable fee; claims submitted without this payment will not be processed.

2. Form and content of claim [§ 1.134]

ADI claims must be submitted through the panel portal.[90] Counsel's State Bar number and vendor site identification number must be included on the claim. Check with other projects about the proper procedures in their cases.

If counsel wants the income reported under a law firm's identification number, counsel must submit an attorney information change form,[91] an IRS form W-9,[92] and a certification,[93] on firm letterhead and signed under penalty of perjury by a partner or officer, to the Accounting Unit of the Judicial Council Services, 455 Golden Gate Ave., San Francisco, CA 94102.

Special explanations must be provided where applicable. Counsel should describe unbriefed issues, for example, with sufficient detail for the project reviewer to assess reasonableness. Counsel must also complete when applicable the step for stating the significant use of brief-banked or otherwise recycled material, both factual (as with reused statements of case and facts in petitions for review or in habeas corpus petitions) and legal (as in substantially reused arguments[94]).

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[90]https://cms.airsis.com/

[91]http://www.adi-sandiego.com/pdf_forms/AOC_and_Appellate_Project_Information_Sheet_Final.pdf

[92]http://www.irs.gov/pub/irs-pdf/fw9.pdf

[93]http://www.adi-sandiego.com/claims/pdf_files/TAX-ID-Change2.pdf

[94]Short boilerplate passages on general principles of law, such as standards of review or prejudice, tests for cruel and unusual punishment, standard *Wende-Sade C.* boilerplate, and elements of crimes, need not be declared as "recycled"; the project reviewer will assume it. More substantial and less obvious passages, however, must be declared.

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As discussed in §§ 1.79-1.82, *ante*, the use of others to assist in the appeal must not reflect over-delegation and, to the extent it is compensated is expected not to increase the costs of the case. On the form, associate counsel's time is to be combined with appointed counsel's on the appropriate line, and paralegal or law clerk time is to be reported as an expense.[95] The time must be itemized in the appropriate step, and associate counsel's State Bar number must be provided. In making recommendations for these services, the project evaluates their cost in combination with the appointed attorney's time to ensure the total is reasonable.

Counsel are well advised to add their own explanations whenever the need for and reasonableness of the services or expenses is not self-evident.

Counsel should review the ADI Compensation Claims Manual[96] on specific topics for more detailed information on these matters.

C. Procedures for Reviewing Claims [§ 1.135]

1. Project's recommendation [§ 1.136]

Attorneys should check with the applicable project about the procedures in that office. ADI policy and goal is to process claims expeditiously upon receipt – within 10 working days if there are no unusual problems or complexities. Claims are initially checked by a claims processor at ADI, then reviewed by a staff attorney.

The staff attorney will evaluate the number and complexity of the issues, both briefed and unbriefed. Using the guidelines and other measures of reasonableness applicable to the particular case, the staff attorney will calculate a recommendation for payment.

The recommendation takes into consideration the overall quality of the work. Even if the claim is within the usual guidelines and would otherwise be reasonable, a reduction

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[95]To be compensable as attorney time, work must be done by a person then an active member of the California State Bar. If the assistant does not qualify in this regard, the time may be claimed only as law clerk time, an expense. Thus work by persons who are, at the time of the work, members of another state's bar but not California's or persons who have passed the California bar exam but not yet been admitted may be claimed only as law clerk time.

[96]http://www.adi-sandiego.com/pdf_forms/Claims_manual.pdf

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may be recommended if the work is evaluated as substandard. Conversely, higher payment may be recommended if the extra time was required by the nature of the case or resulted in exceptionally high quality work.

The staff attorney may contact the panel attorney to inquire about any matter not understandable on the face of the claim when necessary to evaluate the claim. If the recommendation is to cut[97] more than five hours on a claim of 50 hours or less or 10% of a larger claim (10% of the AOB on an interim claim), ADI policy is for the staff attorney to contact counsel.

The staff attorney's recommendation is reviewed by at least one other staff attorney at the interim and another at the final stage. This review is done to ensure fairness and objectivity, compliance with policies, and uniformity and consistency in ADI recommendations.

2. Transmission to Judicial Council services [§ 1.137]

The project's recommendation is sent to the Judicial Council services for review and approval. The office reviews every claim over $7500 and a small sample of lower claims. (See ADI Compensation Claims Manual,[98] Appendix on *JCS and AIDOAC Reviews*.) Once authorized by the office, claims are sent to the state Controller for issuance of the check. This process is becoming increasingly expeditious as the steps are automated.

3. Holdback at interim stage [§ 1.138]

Interim claims are paid at 95% of the recommended hours and 100% of the recommended expenses. The final payment is for all approved hours and expenses not compensated at the interim stage.

4. Payment for cases not completed [§ 1.139]

Sometimes an attorney is relieved before completion of the case. Compensation in that situation depends in part on whether the reason was beyond counsel's control (such as serious illness or the client's retaining counsel) or within counsel's control (such as accepting conflicting employment). Also relevant is whether the relieved attorney filed

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[97]The 5% holdback is not a "cut," but a deferment.

[98]http://www.adi-sandiego.com/pdf_forms/Claims_manual.pdf

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any briefs or motions or produced a work product, such as a draft statement of facts or research notes on the issues, which were helpful to successor counsel. Recommendations may vary from no compensation at all (e.g., no draft of anything yet written or counsel relieved because of excessive delay) to full compensation (e.g., complete and usable work product or unavoidable need for new counsel).

5. AIDOAC audits [§ 1.140]

The compensation process is overseen by the Judicial Council's Appellate Indigent Counsel Oversight Advisory Committee. Every quarter, as part of its functions, the committee audits a number of final claims from the preceding quarter. *They are chosen at random*. If AIDOAC determines the project claim recommendation was too high or low, it will order an adjustment. Thus, counsel should always keep in mind that payment for a particular case is not necessarily final until the audit period for the following quarter is closed. (See ADI Compensation Claims Manual,[99] Appendix on *JCS and AIDOAC Reviews*.)

6. More information [§ 1.141]

As previously stated, on its website ADI has a Compensation Claims Manual,[100] which is indexed and easily searchable. Counsel should check with the assigned staff attorney for any recent modifications.

[99] http://www.adi-sandiego.com/pdf_forms/Claims_manual.pdf

[100] http://www.adi-sandiego.com/pdf_forms/Claims_manual.pdf

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Letter Appellate Defenders, Inc., sends to new clients in criminal cases.

A very similar letter is sent to clients in dependency cases[101]

UNDERSTANDING YOUR APPEAL:
Information for Defendants

This information letter will help explain what an appeal is all about. It answers some of the questions most often asked by our clients. Your individual attorney will help you understand your own case.

"WHAT IS AN APPEAL?"

An appeal is **not** a new trial. The purpose of an appeal is to check over the proceedings in the trial court to see if they followed the law.

An appeal can deal only with matters shown in the *transcripts*. The transcripts include: (1) the papers in the trial court files; and (2) a court reporter's word-for-word record of what happened in the courtroom. The Court of Appeal cannot consider facts outside of the transcripts. It hears no witnesses and takes no new evidence.

The Court of Appeal has **no power** to decide questions of *fact*, such as whether you are guilty or innocent, or whether a certain witness was lying, or what a particular piece of evidence proves. It has no power to say what sentence you should get, among those allowed by law. Decisions like those are only for the jury or trial judge, and the Court of Appeal cannot change them.

The Court of Appeal deals with *legal* questions. It decides whether the trial court proceedings followed the law. For example, it might decide whether certain evidence was correctly admitted, or whether the jury was properly instructed, or whether the trial

[101] http://www.adi-sandiego.com/practice/forms_samples/Understanding_your_appeal_civil.pdf

judge gave adequate reasons for choosing a particular sentence, and other questions of those types.

If the Court of Appeal finds that the proceedings were conducted correctly, the judgment is "affirmed," and your conviction and sentence will not change.

If the Court of Appeal finds some important mistake was made in the trial court, your case will probably be "reversed" (in part or in full) and sent back to the trial court for a new trial, a new sentencing, or some other proceeding to correct the mistake. Some mistakes can be corrected by the Court of Appeal itself, without sending the case back.

"WHO WILL REPRESENT ME ON APPEAL?"

Appellate Defenders, Inc., is a firm of criminal defense attorneys. All are very experienced in criminal appeals. The firm helps to manage criminal cases in the Fourth District Court of Appeal.

In every case requiring appointment of an attorney on appeal, Appellate Defenders either handles the case itself or finds a private attorney to handle the case.

Your case has been given to an attorney with appropriate qualifications after having been checked for length, difficulty, and seriousness of penalty.

If a private attorney has been selected, an Appellate Defenders staff attorney will be available to assist the private attorney at every stage of the appeal.

"WHAT CAN I EXPECT TO HAPPEN DURING THE APPEAL?"

The usual steps in an appeal include:

(1) Preparation of the Transcripts. The trial court clerk and reporter began preparing the transcripts in your case after the notice of appeal was filed. It is hard to guess how long it will take them. Sometimes the transcripts are done in less than a month, and sometimes they take six months or more, especially if the trial was long.

(2) The Appellant's Opening Brief. After the transcripts are filed, your attorney will study them and decide what issues should be presented to the Court of Appeal. These issues will be set out in the appellant's opening brief.

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The brief will normally have several parts. First, it will describe the trial court procedures in a section called "Statement of the Case." Then it will describe the prosecution's evidence in a section called "Statement of Facts." (The brief may, of course, describe the *defense* evidence, too. But by strict rule, the *prosecution's* evidence must be presented as the "facts.")

The next part of the brief will be the "argument." In this part your lawyer will show how the trial court proceedings did not follow the law, and will argue why you should be given a new trial, another sentence, or some other relief.

The opening brief is due 40 days after the transcripts are filed. In most cases, however, one or more 30-day extensions of time are needed.

(3) The Respondent's Brief. About two to three months after the appellant's opening brief is filed, the Attorney General will file the prosecution's answer, called the "respondent's brief." In it, the Attorney General will usually argue something like: no mistakes were made in the trial court; or any mistakes were unimportant and did not hurt you; or a particular issue cannot be raised on appeal; or something else in answer to your arguments. This is just the prosecution's argument and is *not* the Court of Appeal's decision.

(4) The Appellant's Reply Brief. In this brief, your lawyer will have a chance to answer the arguments made in the Attorney General's brief. It is due 20 days after the Attorney General's brief is filed. The appellant's reply brief is optional and will be filed only if your lawyer thinks it will help.

(5) Oral Argument. Usually within a month or two after all the briefs are filed, the Court of Appeal will give both sides a chance to ask for oral argument. In oral argument, the lawyers for both sides go to court and argue in person. It usually takes only a few minutes. You will not be there.

Oral argument is not held in every case. Your lawyer will ask for it only if he or she believes something needs to be said that was not already said in the briefs.

(6) The Opinion. The Court of Appeal will give its decision in a written "opinion." The opinion explains why the court decided each issue as it did.

The opinion will be filed sometime after oral argument is held or waived. It may be only a few days later, or as much as three months later.

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Three judges of the Court of Appeal will decide your case. They will read the briefs, look at the transcripts, and hear oral argument (if it has been requested). Then they will vote. It takes at least two judges voting the same way to reach a decision. One of the judges writes the opinion. One or both of the other judges may write separate opinions if they disagree with something the first judge said.

(7) Petition for Rehearing. If the decision is against you in some way, your lawyer may decide to file a petition for rehearing asking the Court of Appeal to reconsider. The Attorney General may also file a petition for rehearing if the decision is against the prosecution. The petitions are due 15 days after the opinion is filed. Very few are granted.

(8) Petition for Review in the California Supreme Court. Another possible step to take, if you lose in the Court of Appeal, is to file a petition for review. In it, your lawyer would ask the California Supreme Court to reach its own decision on one or more of the issues raised in the Court of Appeal. Your lawyer will file the petition if he or she believes there is a reasonable chance of having it granted. The Attorney General may also petition for review if the prosecution has lost in the Court of Appeal.

The petition must be filed no earlier than 30 days, and no later than 40 days, after the Court of Appeal's opinion is filed. If the petition is denied, the decision of the Court of Appeal is left standing and becomes "final." Very few petitions are actually granted.

(9) Other Matters

Many other motions and papers can be filed in an appeal. Your lawyer will file them in your case if they are necessary. You will get copies of all the briefs, the opinion, any petitions filed, and all other important papers.

In a few cases known as "People's appeals," the *prosecution* will be appealing, asking the Court of Appeal to change some ruling of the trial court. In People's appeals, the prosecution will be the "appellant" and file the appellant's opening and reply briefs. The defendant will be the "respondent" and will file the respondent's brief.

As you might be able to tell, most appeals take about a year from the time the notice of appeal is filed until the time the decision of the Court of Appeal becomes final. Of course, your case may be shorter or longer, depending on how long the transcripts are, how many issues are raised, and many other things.

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"HOW CAN I FIND OUT MORE ABOUT MY APPEAL?"

This letter is intended only to give you a general idea what to expect in your appeal. Your own case may be different from the "usual" case in some way or another. Your attorney will explain what is happening in your case and will try to answer any questions you may have.

While your attorney should regularly keep you informed of what is going, please keep in mind there are restrictions on the attorney's time. The attorney needs to spend most of his or her time preparing briefs and otherwise representing you. The Court of Appeal has adopted guidelines for the time to be allowed for client communication. Your attorney will get most of the information pertaining to your case from the transcripts. Please be patient and let your attorney put the time spent on your case to the best use on your behalf.

— APPELLATE DEFENDERS, INC.

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– APPENDIX B [§ 1.144] —

SAMPLE CLIENT LETTERS

(Most adapted from letters provided courtesy of panel attorney David Y. Stanley)

INITIAL CONTACT LETTER [§ 1.145]

LETTER TO ACCOMPANY APPELLANT'S OPENING BRIEF [§ 1.146]

LETTER TO ACCOMPANY RESPONDENT'S BRIEF AND APPELLANT'S REPLY BRIEF [§ 1.147]

LETTER RE SETTING OF ORAL ARGUMENT [§ 1.148]

POST-ORAL ARGUMENT LETTER [§ 1.149]

LETTER TO ACCOMPANY OPINION [§ 1.150]
(if counsel has decided not to take further action)

LETTER TO ACCOMPANY OPINION [§ 1.151]
(if counsel intends to file petition for review)

LETTER TO ACCOMPANY PETITION FOR REVIEW [§ 1.152]

LETTER AFTER DENIAL OF PETITION FOR REVIEW [§ 1.153]

- **All letters should be prominently marked "Confidential Attorney-Client Communication" on both the envelope and the letter.**
- **Adaptations to the individual case will of course always be required.**

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INITIAL CONTACT LETTER [§ 1.145]

I am the attorney who will be handling your case under appointment by the Court of Appeal. Because the transcripts on appeal have not yet been prepared, I know very little about your case at this time. I will give you my assessment of the case as soon as I have read the transcripts.

You may have received from Appellate Defenders, Inc., some general information about how cases are handled in the Court of Appeal. Please let me know at any time if you have any questions about the process.

An appeal is very different from a trial court proceeding. It is not a new trial but a review of the trial court proceedings to ensure they were conducted according to law. For that reason, the appeals court does not decide guilt or innocence or other factual questions from scratch. The court's authority in an appeal is limited to matters in the "record," which includes a clerk's transcript of documents from the [superior/juvenile] court's file and a reporter's transcript of testimony and other oral proceedings in the [superior/ juvenile] court. We are not permitted to introduce new evidence or witnesses. However, if you believe something important may not be in the transcripts, please let me know about that; sometimes information outside the record can be the basis for relief other than by appeal.

[Additional proceedings may be held in juvenile court over the duration of the appeal. However, I am only appointed to represent you on appeal and I will not be able to advise you about your juvenile court case. Please keep me informed of any decisions the court makes as they may influence how I approach the arguments in your appeal.]

Appeals take a considerable amount of time to complete, and the major events in the case often are separated by periods of months. The most important step will be the filing of an opening brief, in which I will set forth all the issues to be raised on your behalf, as well as the procedural history and the facts of the case. The [Attorney General/County Counsel] will then file a respondent's brief, and I will file a reply brief if that will help your case. [*Mention other briefs if there are additional parties.*] After the briefing is complete, the court will begin to work on the case. I will have an opportunity to go to court for an oral argument if I think it is important, although often I find the best approach is to let the case be decided on the briefs alone, without oral argument. Your case will be decided by a panel of three Court of Appeal justices, and the decision will be in the form of a written opinion.

I will keep you advised of all major events in the case and send you copies of the briefs and the court's decision. Some of my clients prefer not to receive such materials because of privacy or other concerns. If that is the case with you, let me know; I will not send them and will discuss the case with you only in general terms. If you would like for me to send the briefs and the court's opinion to someone else, please send me the name and address of that person.

When the appeal is completed, I will send you the transcripts unless you have told me to send them to someone else or destroy them. Only one set of transcripts is made for the defense, and of course I will need to keep them during the appeal to handle your case properly. Once the appeal is over, the transcripts will become your property permanently.

You and I have an attorney-client relationship that makes our communications privileged, or confidential, under California law.[102] However, what you say to other people may well be used in later proceedings, and so I urge you not to discuss your case with anyone other than me, including those closest to you. You may call me collect if there is something too urgent to deal with in writing.[103] Under the standard practice in these cases, I will not be visiting you for an in-person interview, unless your case presents very unusual circumstances.

I invite you to write to me whenever you have questions or comments about your case, and I will respond promptly. Also, please keep me advised if your address or other contact information changes, so that we can be in touch on short notice if necessary. I look forward to working on your behalf and hope to be able to help you.

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[102]Note to attorney: *For incarcerated clients, add:* To ensure confidentiality, be sure to write "legal mail" on the outside of envelopes you send to me, along with using "lawyer" or "attorney" as part of my address.

[103]Note to attorney: *For incarcerated clients, add:* Unless special advance arrangements are made, however, calls from jails and prisons are monitored and we therefore cannot discuss confidential matters on the telephone.

LETTER TO ACCOMPANY APPELLANT'S OPENING BRIEF [§ 1.146]

Enclosed is your copy of our opening brief, which is now being filed with the Court of Appeal. When you read it, please keep in mind that the rules on appeal require that we present the statement of facts as the jury found the facts to be; we are not allowed to present the facts from your point of view.

[Explain issues raised.]

The next step will be a respondent's brief filed by the [Attorney General for the prosecution/ County Counsel for the social services agency]. Their brief will be due in 30 days, but they may receive one or two 30-day[104] extensions. I will keep you posted on the due date. After I have read the respondent's brief, I will decide whether to file a reply brief on your behalf. I will send you a copy of the respondent's brief and our reply brief if I file one.

That will conclude the briefing stage of the case. The court will then study the briefs and process the case in the normal manner, which generally takes several months before the case is either set for oral argument or submitted for decision on the briefs.

In the meantime, please let me know if you have any questions.

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[104]Note to attorney: In fast-track or other urgent cases, this number may be modified as applicable.

LETTER TO ACCOMPANY
RESPONDENT'S BRIEF/APPELLANT'S REPLY BRIEF [§ 1.147]

Enclosed you will find a copy of our reply brief, which is being mailed today for filing with the Court of Appeal, as well as a copy of the respondent's brief filed by the [Attorney General for the prosecution/ County Counsel for the social services agency].

[Describe any particularly important points in these briefs.]

This is the end of the briefing phase of your case. The court will now study the briefs and process the case in the normal manner, which can take several months before the case is either set for oral argument or submitted for decision on the briefs. I will keep you posted as the case progresses and will let you know about any oral argument that might take place.

The next major filing will be the court's decision, which will be in the form of a written opinion. I will send you a copy of it.

Please let me know if you have any questions.

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LETTER RE SETTING OF ORAL ARGUMENT [§ 1.148]

I have just been notified by the court that oral argument in your case is scheduled for the *[date]* calendar.

Oral argument is a court hearing in which the lawyers for the opposing sides present their positions to a panel of three judges. During argument the judges often ask questions of the lawyers to clarify the issues in the case.

[*For incarcerated clients:* You will not be brought to court for oral argument.] If [you or] your friends or family members might want to attend, please let me know so that I can provide a preview, because an appellate oral argument can seem very strange to persons who have never seen one or had the procedure explained to them. I can provide directions, as well.

The judges do not announce their decision at the argument. The decision may not come until several weeks, up to three months, after the argument. The decision will be in the form of a written opinion, and of course I will send you a copy as soon as I receive it from the court.

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POST-ORAL ARGUMENT LETTER[105] [§ 1.149]

The oral argument in your case occurred on schedule yesterday. *[Describe if significant developments occurred at argument.]*

When the court announces its decision, it will be in the form of a written opinion. Whether we will take any further action will depend on the decision and my judgment as to the likely benefits to you of such action. I will give you my assessment of the situation in a letter accompanying your copy of the opinion.

In the meantime, all we can do is wait a little longer. It likely will be at least several days, and possibly several weeks, before we get the opinion. Best wishes.

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[105]Optional. This letter should be sent if any significant developments occurred, or if the client has shown special interest in oral argument, or if counsel has promised a report..

LETTER TO ACCOMPANY ADVERSE OPINION

IF COUNSEL HAS DECIDED NOT TO TAKE FURTHER ACTION [§ 1.150]

I am sorry to have to tell you that the Court of Appeal has rejected our arguments and affirmed [your conviction/the juvenile court's findings] by an opinion filed *[date]*. A copy is enclosed.

[Summarize court's rulings on issues.]

After thoroughly studying the court's opinion and reviewing your case once again, I have decided not to pursue your case further, by way of a petition for rehearing in the Court of Appeal[1] and/or a petition for review in the California Supreme Court. While I regret the result, I believe the Court of Appeal has decided the case in such a manner that any further appellate efforts would not be useful. This decision was made after a careful evaluation of all possibilities.

Even though in my professional opinion your case does not present issues that the Court of Appeal will reconsider or the California Supreme Court will review, you have the option of pursuing your case further on your own by filing a petition for review in the

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[1]Note to attorney: Usually a pro per petition for rehearing is not a realistic option because of the short time frame and the typical delays in prison mail. If such a petition is needed under California Rules of Court, rule 8.500(c)(2) – because the Court of Appeal opinion misstated or omitted an issue or matter of law or fact, and the client likely wants to petition for review on the issue – *counsel* should file the petition for rehearing, even if counsel does not intend to petition for review. If the client is to file a pro per petition for rehearing, this letter should be modified accordingly and include a due date. The Court of Appeal may require counsel to withdraw before it allows a pro per petition for rehearing.

California Supreme Court. Instructions on what to file are enclosed.[2] The petition is due *[date]*.

[If a federal issue was raised in the Court of Appeal and the client might want to take it to federal court, add this:] We raised federal issue(s) in your appeal. *[Describe issue(s)]*. After the state appeal is over, you may want the United States Supreme Court [or a federal district court] to review these issue(s). BUT: You must *first* file a petition for review including the issue(s) in the California Supreme Court. If you do not ask the California Supreme Court to review the issue(s) first, the federal courts will refuse to hear your case. Once your petition for review to the California Supreme Court is denied, then you can go to federal court. You can petition for certiorari to the United States Supreme Court,[3] or file a habeas corpus petition in federal district court,[4] or both. Please let me know if you decide to take either action. I will give you sample forms and let you know about such important matters as calculating deadlines, putting all known issues into one single petition.

I am sending the transcripts to you separately. They are now yours to keep. Please remember that they are your only copy. If they are lost, you will not be able to get replacements, except at your own cost, from the state. *[Modify this language if alternative arrangements have been made.]*

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[2]Note to attorney: A petition for review information sheet is on the ADI website. http://www.adi-sandiego.com/practice/forms_samples.asp. It is also useful to enclose a short sample petition. Counsel may modify the information sheet to apply instead to an exhaustion petition for review under rule 8.508, California Rules of Court, if that is the only reason for the petition. Note that *counsel* should file an exhaustion petition if there is a substantial, well-preserved federal issue; this is an independent justification, aside from the likelihood of success on review. See chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision,"§ 7.46.) http://www.adi-sandiego.com/panel/manual/Chapter_7_Decisions_and_later.pdf

[3]Note to attorney: Certiorari is discussed in § 7.100 et seq. of chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision." The United States Supreme Court web page on Rules and Guidance, under Guides for Counsel, has a *Guide to Filing In Forma Pauperis Cases* (PDF). http://www.supremecourt.gov/rules_guidance.aspx .

[4]Note to attorney: Federal habeas corpus is covered in chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus." Some forms are on the ADI website: http://www.adi-sandiego.com/practice/forms_samples.asp .

I am pleased to have had the opportunity to represent you and am sorry my efforts to help you were unsuccessful. I offer you my very best wishes.

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LETTER TO ACCOMPANY ADVERSE OPINION

(IF COUNSEL INTENDS TO FILE PETITION FOR REVIEW) **[§ 1.151]**

I am sorry to have to tell you that the Court of Appeal has rejected our arguments and affirmed your conviction by an opinion dated *[date]*. A copy is enclosed.

[Summarize court's rulings on issues. If petition for rehearing was filed, state grounds and result.]

I believe it is worthwhile to file a petition for review in the California Supreme Court, asking the court to take over your case and consider *[name issue(s)]*. I will be filing a petition no later than *[date]*. I will send you a copy of the petition and let you know the Supreme Court's decision, which likely will be several weeks from the time the petition is filed.

Again, I am sorry that the Court of Appeal disagreed with our arguments. We must hope for the best in the Supreme Court. Best wishes.

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LETTER TO ACCOMPANY PETITION FOR REVIEW [§ 1.152]

Enclosed is your copy of our petition for review, which is being filed with the California Supreme Court.

[Describe issue(s) raised. If an exhaustion petition under California Rules of Court, rule 8.508 is being filed, describe its purpose.]

Because its resources are so limited, usually the Supreme Court will grant review only if an issue in the case significantly affects the public or applies to many other cases, or if the Courts of Appeal have divided on the issue. I think your case meets that standard, but it is important to understand that in the large majority of cases review is denied. *[This paragraph is unnecessary if an exhaustion petition under California Rules of Court, rule 8.508 is being filed.]*

I will let you know when the Supreme Court makes a decision. That will likely take one or two months or so. Best wishes.

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LETTER AFTER DENIAL OF PETITION FOR REVIEW [§ 1.153]

I am sorry to have to tell you that the California Supreme Court has denied our petition for review in your case. Enclosed is a copy of that order, which was filed *[date]*. This is very disappointing. I thought the issue(s) in your case were strong and might interest the Supreme Court. But as I explained earlier, in the large majority of cases, even those with important issues, review is denied because the court does not have enough resources to take all deserving cases. Unfortunately, the Supreme Court is the highest court in California, and that means your California appeal is done. *[Modify this paragraph if an exhaustion petition for review under California Rules of Court, rule 8.508 was filed.]*

[If a federal issue was raised in the Court of Appeal and the client might want to take it to federal court, add this:] We raised federal issue(s) in the Court of Appeal and the California Supreme Court. *[Describe issue(s)]*. Now that your state appeal is over, it is possible to ask the federal courts to review these issues. This can be done by petitioning for certiorari in the United States Supreme Court,[1]or by filing a habeas corpus petition in federal district court,[2] or both. Please let me know if you decide to take either action. I will give you sample forms and let you know about such important matters as calculating deadlines, including all known issues in one petition, and giving the California state courts a chance to decide the issues first.

I am pleased to have had the opportunity to represent you and am sorry my efforts to help you were unsuccessful. I offer you my very best wishes.

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[1]Note to attorney: Certiorari is discussed in § 7.100 et seq. of chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision." The United States Supreme Court has a guide for pro per petitioners: http://www.supremecourt.gov/casehand/guideforIFPcases2014.pdf. (See also Spanish version: http://www.adi-sandiego.com/pdf_forms/Spanish_Feb_2015.pdf .)

[2]Note to attorney: Federal habeas corpus is covered in chapter 9, "The Courthouse Across the Street: Federal Habeas Corpus." Some forms are on the ADI website: http://www.adi-sandiego.com/practice/forms_samples.asp .

FILING AND SERVICE REQUIREMENTS

FOR BRIEFS AND OTHER DOCUMENTS IN NON-CAPITAL CRIMINAL AND JUVENILE APPEALS

LINKS TO CHARTS ON ADI WEBSITE

CHARTS OF FILING AND SERVICE REQUIREMENTS[3] ON ADI WEBSITE

IMPORTANT: Electronic filing and service programs may supersede some of the requirements listed on the chart. This depends on the court in which the case is pending. The appellate project or court clerk's office should be consulted. Up-to-information on Fourth District practices is on ADI's web pages on electronic filing[4] and electronic service.[5]

COMBINED CHARTS

LINKS TO INDIVIDUAL TOPICS

PRELIMINARY NOTES [§ 1.155]
Applicability of charts
Rule references
Calculation of due dates
Filing
Sealed and confidential records
Electronic service and filing

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[3] http://www.adi-sandiego.com/practice/filing_service_chart.asp

[4] http://www.adi-sandiego.com/practice/eservice_court.asp

[5] http://www.adi-sandiego.com/practice/eservice_adi.asp

BRIEFS IN THE COURT OF APPEAL [§ 1.156]
OPENING, RESPONDENT, AND REPLY BRIEFS AND PETITIONS FOR REHEARING
Due dates
Format
Cover
Contents
Length
Service and filing

PETITIONS FOR REVIEW, ANSWERS, AND REPLIES [§ 1.157]
Due dates
Format
Cover
Contents of petition other than exhaustion petition
Contents of exhaustion petition
Contents of answer
Attachments to petition
Length
Incorporation by reference
Service and filing

NON-CAPITAL BRIEFS ON THE MERITS AND PETITIONS FOR REHEARING IN CALIFORNIA SUPREME COURT [§ 1.158]
Due dates
Format
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