JULY 2015 – ADI NEWS ALERT

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CONTENTS

This alert[1] covers:

• **Policies on unbriefed issues:** AIDOAC has adopted a formal policy on unbriefed issues. It clarifies but does not change the policy and suggests how panel attorneys may describe them so as to get maximum compensation with minimum delay.

• **Motions, as well as writs, to be efiled in Division One:** Division One allows motions to be efiled. Under the general rule that compensation is available only for the least expensive reasonable alternative, costs of paper filing of motions after this alert will not be compensable, without special reasons.

Policies on unbriefed issues

At its June 16-17 meeting, the Appellate Indigent Defense Oversight Advisory Committee adopted policies on unbriefed issues. (Appendix A.) It "codifies" and clarifies the applicable policy, but does not change it.[2]

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

[2]One sentence has caused some concern: "If a settled rule is dispositive, compensation will not be awarded if a reasonably experienced appellate lawyer should have known of the rule without conducting research." Some panel attorneys apparently read it at first as curtailing research into challenges to a law.

The sentence does improvidently conflate two concepts: (a) dealing with adverse law and (b) the expectation that the hypothetical "reasonably experienced attorney" will be familiar with general principles of law in our areas of practice without needing to do basic research. As to the former, adverse law, see relevant excerpts from ADI's 2008 article *To Brief or Not To Brief* in Appendix C. As to the latter, the "reasonably experienced attorney" concept has long been the universal measure for what is reasonable – i.e., compensable – time for a given service. Neither AIDOAC nor ADI intends changes in policy or practice as to either area.

We have tweaked the ADI Compensation Claim Manual entry on "Unbriefed Issues" to reflect and help explain the policies. Panel attorneys may find that amplification helpful in construing them. (Appendix B.)

The AIDOAC policy and ADI's manual entry also offer suggestions on how panel attorneys may describe unbriefed issues so as to get maximum compensation with minimum delay. These are *recommendations*, designed to assist attorneys, not requirements.

Motions, as well as writs, to be efiled in Division One

Division One now allows motions to be efiled. As the court says on the main page of the Fourth District sections[3] of the court website:

> Division One will accept motions through e-Filing.[4] A filing in electronic format will be accepted in lieu of any paper copies and will constitute the official record of the Court.

Although efiling is "voluntary" from the court's viewpoint, under the general rule that compensation is available only for the least expensive reasonable alternative, costs of paper motions filed after the distribution of this news alert will not be compensable in the absence of specific need for it.

Writs in Division One are also filed electronically only, as explained in the June 11, 2015, news alert.[5] These policies apply only to Division One; Divisions Two and Three are not yet accepting electronically filed writs or motions.

Postscript: ADI is updating its web pages on E-filing with the court and E-service in ADI cases. We realize the picture is confusing because of frequent changes and the multiplicity of agencies we deal with (four big counties with a variety of agencies in each). On our website home page is a link to our "CHEAT SHEET," our quick reference guide to the current state of these programs.

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[3] http://www.courts.ca.gov/4dca.htm

[4] http://www.courts.ca.gov/9408.htm

[5] http://www.adi-sandiego.com/news_alerts/index.asp

. **APPENDIX A**

AIDOAC Policies on Unbriefed Issues

GUIDANCE FOR BILLING UNBRIEFED ISSUES

I. Counsel may bill for an unbriefed issue if a reasonably experienced appellate lawyer would need to perform work in order to determine if a viable issue existed. If a settled rule is dispositive, compensation will not be awarded if a reasonably experienced appellate lawyer should have known of the rule without conducting research.

2. Unbriefed issues are not just possible questions that you thought about and rejected. In order to be compensable, an unbriefed issue must involve legal research or the application of legal principles to the record if you are already familiar with the controlling legal principles.

3. An unbriefed issue is a question that raises sufficient concern to merit either: (1) some research (checking of case law, statutes, or other authorities); or (2) the application of already known legal principles by examining the record to see if an issue exists. An example of category 2 would be the application of already known cases regarding the *Miranda* rule to review of the Evidence Code section 402 hearing and ruling on the *Miranda* motion.

4. The more you help the reviewer by articulating information regarding the work you had to do to reject the issue, the more likely you will be paid for that work. Thus, it would be wise to include a reference to the specific authority or authorities you consulted prior to deciding to reject the issue. This is an important part of the process of distinguishing real unbriefed issues from rejected thoughts.

5. Explain the possible relationship between the issue and the case clearly enough to provide the reviewer with an understanding of the reasonableness of your consideration of the issue. Reading your brief may not be sufficient to give the reviewer an understanding of the appropriateness of investigating the issue, especially if the issue is not related to the main thrust of the brief.

Return to top

APPENDIX B

Entry in ADI Compensation Claim Manual on Unbriefed Issues
(revised June 2015)

Time spent on an issue considered but not briefed may be compensated at the interim or final stage. A compensable unbriefed issue is not a mere question the attorney thought about briefly and rejected. It must be sufficiently substantial that an experienced attorney would reasonably research or investigate it. Researching or investigating an apparently waived issue or obviously trivial error to any substantial extent would be unreasonable unless there was some plausible way to get around the waiver or prejudice problem.

Because there is no briefed issue to evaluate, the burden is on the panel attorney to explain the issue and describe the work in enough detail for the reviewer to evaluate the time claimed and assess the complexity of each issue. Although an elaborate analysis is neither expected nor very helpful, the other extreme – such as a sentence fragment without citations – will rarely, if ever, persuade a reviewer the unbriefed issue was potentially significant and relevant. To optimize the chances for compensation, it can be useful for the description to make it clear how the issue would have related to the case. Indicating the type and extent of research can be beneficial; for example, a list of authorities consulted helps to show the issue was a substantial one warranting research. A claim for time spent re-reading parts of the record should explain why the initial review with transcript notes was inadequate.

[Long-time statewide guidelines omitted here.]

The Judicial Council Services screens all claims over $7500 before approving them and sending them to the Controller. They look very closely at unbriefed issues in these cases, and so panel attorneys should explain these very carefully, especially when any given unbriefed issues is more than 2.5 hours or the aggregate of such issues is more than 10.0 hours. The staff attorney needs this information to support the recommendation and avoid any delays caused by the Judicial Council Services's having to get in touch with the project about the claim. It is helpful if the explanation describes the issue, the nature and scope of research conducted (e.g., a list of cases reviewed), and similar factors affecting the time required . . . .

Counsel should use care not to argue against the client or disclose a potential adverse consequence in describing unbriefed issues on the claim form; if it is necessary to discuss information possibly harmful to the client, do so in a confidential memorandum to ADI.

Return to top

APPENDIX C

Excerpts from *To Brief or Not To Brief* (2008)[6]
On Dealing with Adverse Law

Page 7: [A] kind of frivolous issue was denounced in *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286 – one that "consistently has been rejected by every appellate district . . . . [¶] The time has come for appellate attorneys to take this frivolous contention off their menus." (As discussed below, however, counsel need not give up prematurely merely because there is some adverse law. If there is a reasonable possibility that another court, including the Supreme Court or a federal court, will rule differently, it may be appropriate to raise an issue that has previously been rejected, provided the adverse law is acknowledged and plausible reasons are given for a contrary rule.)

Pages 9-10: If there is no extant law to support the position, the brief must say so and offer credible reasons why the law should be as counsel urges. If the law is adverse, the argument must acknowledge that fact and may urge the law should be changed, provided there are plausible grounds to support the contention, based on cognizable legal principles, logic, and policy. (E.g., *People v. Feggans* (1967) 67 Cal.2d 444, 447 ["counsel serves both the court and his client by advocating changes in the law if argument can be made supporting change"].) If there is adverse Court of Appeal authority but the Supreme Court has not yet reached the issue, if the Supreme Court has given signals it is reconsidering a legal rule, or if there is a reasonable possibility of federal relief, it may well be appropriate to raise the issue, as long as counsel acknowledges the contrary law.

Return to top

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