

## OCTOBER 2017 – ADI NEWS ALERT

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#### Seminar with new Division One Justice William Dato

On October 3, 2017, Justice William Dato came to ADI for a brown bag seminar to introduce himself to our panel and staff, both in person and to a larger webinar audience. Staff attorney Neil Auwarter has written a short [summary](#), to which we have appended a link to an [excerpt from a memo](#) by Justice Dato on motion writing and an [announcement](#) by seminar co-sponsor California Appellate Defense Counsel, on membership.

#### TrueFiling scene; revised “Filing and Service Charts” on ADI website

##### TrueFiling scene

The California appellate courts are moving much closer to universal electronic filing, provided through TrueFiling, by ImageSoft:

- The [Supreme Court](#)<sup>2</sup> makes TrueFiling mandatory for petitions for review and related filings such as answers, replies, and motions. But electronic filing is not yet available in non-capital review-granted cases or non-capital original writ proceedings.
- The only Court of Appeal district not yet using TrueFiling, the [Second](#),<sup>3</sup> has announced TrueFiling will be mandatory in that court as of October 30, 2017.

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<sup>1</sup>As always, panel attorneys are responsible for familiarizing themselves with all ADI news alerts and other resources on the ADI website.

<sup>2</sup><https://newsroom.courts.ca.gov/news/supreme-court-launches-mandatory-efiling>

<sup>3</sup><http://www.courts.ca.gov/8872.htm>

Exemptions from mandatory TrueFiling include self-represented parties and those to whom the court grants an excuse for hardship or prejudice or lack of technical feasibility (Cal. Rules of Court, rule 8.71(d); [Supreme Court Rules Regarding Electronic Filing](#),<sup>4</sup> rule 6(b)).

The scene is somewhat chaotic right now. First, as mentioned, only some filings in the Supreme Court are subject to TrueFiling. Second, the Supreme Court and the Sixth District, but not other courts, require an unbound paper copy in addition to TrueFiling. Third, under rule 8.74(b) each district must prescribe a format. Each district has its own requirements, and the provisions are not consistent from one district to the next. Some are published in the form of local rules and some as website postings. They may not be easy to find. Some are labeled “guidelines” when they are in fact requirements, meaning submissions will be rejected if they don’t comply. The district postings may be amended soon after publication, or supplemental rules may be published.

To check for a particular court, go to the [court website](#),<sup>5</sup> click the *Courts* button in the upper lefthand corner, and choose either *Supreme Court* or *Courts of Appeal* on the dropdown menu. If the latter, select the applicable district from the list at the left. On the web page for that court, click *Electronic Filing* (or *Electronic Filing/Submission*) from the menu of topics at the left. If the topic is not covered by the online material, contact the court clerk’s office or the district project.

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<sup>4</sup>[http://www.courts.ca.gov/documents/supreme\\_court\\_of\\_california\\_rules\\_regardin\\_g\\_electronic\\_filing.pdf](http://www.courts.ca.gov/documents/supreme_court_of_california_rules_regardin_g_electronic_filing.pdf)

<sup>5</sup><http://www.courts.ca.gov/home.htm>

### Fourth Appellate District

The court has published [Electronic Formatting Requirements of the Fourth District Pursuant to California Rules of Court, Rule 8.72\(a\) and 8.74\(b\)](#), spelling out such requirements as use of a text-searchable PDF format, bookmarking sections of documents filed, consecutive pagination starting with the cover, size of no more than 25 megabytes per file, and privacy protection.

It also has published [Guidelines for submitting documents to the Court of Appeal that a party seeks to become part of the record on appeal](#),<sup>6</sup> which specifies that if a party intends an attachment to a filing to become part of the record on appeal (for example, an augmented record, supplemental brief, etc.) or to be judicially noticed, the filing and the attachment must be submitted as *separate* PDF files.

In time, perhaps, this situation will be resolved by stable statewide rules. Meanwhile, contact the applicable court clerk's office or project whenever in doubt. ADI's Filing and Service Charts (next) are another resource.

### Revised Filing and Service Charts on ADI website

As readers may know, ADI's website has a [Filing and Service corner](#),<sup>7</sup> with charts for preparing, filing, and serving five kinds of documents: (1) briefs and petitions for rehearing in the Court of Appeal, (2) petitions for review, answers, and replies, (3) non-capital briefs on the merits and petitions for rehearing in the Supreme Court, (4) non-capital habeas corpus filings in appellate courts, and (5) applications, motions, and miscellaneous documents in appellate courts. Each chart covers such topics as due dates, format, cover, contents, attachments, and filing and service requirements applicable to that type of document. The charts apply statewide.

ADI has adapted the charts to reflect TrueFiling insofar as that is feasible, given the evolving and varied landscape. But because, even in areas with mandatory TrueFiling for attorneys, some users may file in paper form, for four of the five types of documents covered there are now *two* charts – one for TrueFiling and one for paper filings. The

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<sup>6</sup><http://www.courts.ca.gov/documents/4DCA-eFiling-additional-eFiling-guidelines.pdf>

<sup>7</sup>[http://www.adi-sandiego.com/practice/filing\\_service\\_chart.asp](http://www.adi-sandiego.com/practice/filing_service_chart.asp) . This page is accessible through the ADI home page – in the column of blue buttons at the right hand side of the screen, it is the third one from the top.

exception is non-capital briefs on the merits and petitions for rehearing in the Supreme Court, which are not yet subject to TrueFiling and so by necessity are paper only.

For some kinds of documents, users must exercise special care in choosing which chart to consult. With writ petitions and related pleadings, such as informal replies or traverses, for example, the choice depends on whether one is in the Court of Appeal (TrueFiling chart) or the Supreme Court (paper chart). For applications, motions, and miscellaneous documents in the Supreme Court, the filings are covered by the paper chart if related to review-granted cases or writs, but by the TrueFiling chart if related to petitions for review. (Each set of charts repeats these rules, often in several different places, to help users navigate through the maze!)

As pointed out above, in addition to the general statewide requirements listed on the charts, individual courts often have their own requirements for TrueFiling. Guidance on finding these was provided in the previous subsection.

#### **Updated Appellate Practice Manual now online**

ADI tries to update its [Appellate Practice Manual](http://www.adi-sandiego.com/panel/manual.asp)<sup>8</sup> at least once or twice a year or more, to reflect significant new authorities and changes in the law. The September 2017 revision is now online.

Besides the new authorities and changes in the law since the prior revision in December 2016, this revision reflects the changes in electronic filing discussed in the preceding section. Chapters Three (augmentations, extensions, bail on appeal), Five (briefs), Seven (petitions for review and rehearing), and Eight (writs) are affected most.

*Hint: Sometimes a new posting will not appear on your screen the first time you look for it. If the version you see is still December 2016, try clicking your “refresh” button.*

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<sup>8</sup><http://www.adi-sandiego.com/panel/manual.asp>

## **APPENDIX**

### **INTRODUCTION TO JUSTICE DATO: A SUMMARY**

**BY NEIL AUWARTER, ADI STAFF ATTORNEY**

Justice William S. Dato spoke over lunch to attorneys at an October 3 gathering jointly hosted by ADI and CADC (California Appellate Defense Counsel). Justice Dato is a native San Diegan and obtained his undergraduate degree from San Diego State University. While he attended UCLA Law School, an internship at the California Supreme Court sparked his interest in appellate law. Upon graduation he clerked for Chief Justice Bird and Justice Matthew Tobriner. From the Supreme Court he returned to San Diego to take a one-year clerkship with Justice Howard Wiener of the Fourth Appellate District Court of Appeal.

Justice Dato spent two years in private practice before returning to Justice Wiener's staff in a career clerkship position, which he held for ten years. Then in 1993 he joined the civil firm of Milberg Weiss, where he practiced appellate law. In 2003, Governor Gray Davis appointed him to the San Diego Superior Court, where for thirteen years he handled assignments in civil and criminal court, drug court, family court, and the Appellate Division, where he presided. Justice Dato also taught appellate advocacy as an adjunct professor at both USD and California Western law schools. In December 2016 he was appointed by Governor Jerry Brown to the Fourth District Court of Appeal.

On the topic of appellate brief writing, Justice Dato expressed the view that the quality of briefing has declined over time. He advised that the single most important thing a young appellate lawyer can do is develop a clear and concise writing style. He recommends omitting unnecessary and distracting material and attempting to “tell a story” interestingly, as with a good novel.

On the topic of oral argument, Justice Dato said he has been surprised by the waiver of oral argument in some civil and criminal cases. He believes oral argument is an important part of the appellate process—and the only part allowing a dialogue between counsel and the court. He advises attorneys to use their best professional judgment in deciding whether to waive argument.

Finally, on the topic of judicial decision-making, Justice Dato described his style as more “deliberative” than “intuitive.” But he acknowledged every judge is the product of human experience, and that adjudicating is inherently a combination of intuitive and rational-deliberative processes. He closed by reflecting on the limits of judicial power. He noted that while a court may be the last word in a particular dispute, the court must justify its result under the law—and in this sense a judicial opinion is itself a piece of persuasive writing.

## ADDENDA

An excerpt from *Briefing Common Civil Motions: Common Pitfalls and a Few Common-Sense Suggestions*, by Justice Dato, is on the ADI MCLE web page, [http://www.adi-sandiego.com/practice/mcle\\_materials.asp](http://www.adi-sandiego.com/practice/mcle_materials.asp). He made it available as a supplement to this presentation.

California Appellate Defense Counsel ([www.cadc.net](http://www.cadc.net)) co-sponsored the event. That organization has a special announcement:

Anyone who has never been a CADC member can join now for 50% off at \$95 for their first year (regardless of years in practice). CADC membership also entitles you to 25% off the upcoming CACJ Appellate Seminar in San Diego November 4, 2017. Join at <https://cadc.net/>.