JUNE 2017 – ADI NEWS ALERT

BY

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This alert[1] covers:

TrueFiling will begin on July 10 in the California Supreme Court.

The California Supreme Court will launch TrueFiling on **July 10**, according to a recent news release.[2] It will be voluntary until **September 1**, when it will become mandatory. It applies to:

- Petitions for review;
- Answers to petitions for review;
- Replies to answers to petitions for review;
- Motions, applications, and documents related to petitions for review; and
- Automatic appeals from a judgment of death and related habeas corpus matters

The news release does not mention briefs on the merits and other filings in review-granted matters. Check with the clerk's office if you have such a case.

ADI expects panel attorneys to use TrueFiling, since it saves money.

The court will adopt detailed eFiling Rules in June. Training in person will be available in Los Angeles and San Francisco on June 20 and 21, respectively, and a recording of the training will be posted online.

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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] http://newsroom.courts.ca.gov/news/releases-20170616

JCC will no longer accept inquiries directly from panel attorneys about the status of pending claims and will require all such communications to go through the projects.

The JCC (Judicial Council of California) and the projects recently agreed that direct panel attorney communications with the JCC about pending claims had become too time-consuming and susceptible to abuse. Fielding phone calls and emails was distracting staff and impeding the efficient processing of claims. Effective immediately, the JCC will no longer accept such inquiries. Instead, the panel attorney must contact a designated representative within the responsible project and ask that person to determine the status of the claim. The representative can collect information in a minimally intrusive way and filter out nuisance calls (unreasonably frequent or too early to expect action).

For ADI claims that have already been tagged (sent to the JCC for payment), the designated contact person will be staff attorney Dave Rankin, dkr@adi-sandiego.com. He supervises our claims processors and is very familiar with the workings of the statewide claims system. For inquiries before tagging, the panel portal home page[3] gives directions.

We hope this regimen will help the claims system operate at optimal efficiency while giving individual panel attorneys the information they need to manage their practice.

Second District court warns of potential sanctions for frivolous appeals.

In *People v. Sperling*[4] (June 8, 2017, B272275) ___ Cal.App.5th ___ [2017 WL 2472569], the Second District Court of Appeal noted in a footnote:

> The appeal is frivolous. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) We may impose sanctions for a frivolous criminal appeal. (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 738, fn. 16.) We elect not to do so here. But counsel is warned that in the future we may impose sanctions where a criminal appeal is maintained despite an insurmountable procedural bar or contrary to long-standing precedent precluding an appellate court from "second guessing" the lawful exercise of sentencing discretion.

(Page 1 of slip opinion, footnote 1.)

It is doubtful counsel could be sanctioned for *filing* a criminal *appeal.* Counsel in an appointed criminal or delinquency case have a duty to file an appeal on the client's

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

[4] http://www.courts.ca.gov/opinions/documents/B272275.PDF

request. (Pen. Code, § 1240.1, subd. (b); see also *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 479-480; *People v. Olson* (1989) 216 Cal.App.3d 601, 603-604 ["If this were a civil case we would unhesitatingly have utilized our power to curb the filing of frivolous appeals by imposing substantial monetary sanctions. Because this is an appeal of a criminal case, we are powerless to do anything about it"].) Nevertheless *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 739, footnote 16, a civil writ case, asserted, in dictum: "[A]n appellate court properly may impose sanctions in a criminal appeal, including sums necessary to reimburse the court for the cost of resources devoted to a frivolous appeal." But the only cases cited were a criminal writ proceeding and a civil appeal. This is rarely a concern for appellate counsel, anyway, because the appointed appeals they handle are almost always filed by someone else.

In contrast, counsel in a criminal case may be sanctioned for filing a frivolous *writ*, which is discretionary. (E.g., *In re Reno* (2012) 55 Cal.4th 428 ["an appellate court [may] impose financial sanctions on an attorney who files a frivolous or abusive habeas corpus petition"]; *In re White* (2004) 121 Cal.App.4th 1453, 1479 [habeas corpus: "This court may find a writ petition to be frivolous and order sanctions if we conclude the petition was prosecuted for an improper motive or the petition is indisputably without merit"]; *Jones v. Superior Court* (1994) 26 Cal.App.4th 92 [omission of material facts]; *Gottlieb v. Superior Court* (1991) 232 Cal.App.3d 804, 813-815 [disregarding controlling law in disingenuous way].)

Beyond the question of initiating a proceeding, counsel must decide what *issues* to raise on appeal or in a writ. Whether the case is appointed or retained, whether it is an appeal or a writ, counsel who raise an issue that the court deems to be obviously frivolous, repetitious of matters already decided, based on factual misrepresentation, abusive of the process, etc., will risk sanctions. (See *In re Reno* (2012) 55 Cal.4th 428; *Jones v. Superior Court* (1994) 26 Cal.App.4th 92; *People v. Craig* (1991) 234 Cal.App.3d 1066, 1071.) Counsel thus owe it to themselves, as well as to the legal system, to learn the distinctions between arguable and non-arguable issues.

We explored this matter in depth in a 2008 practice article, *To Brief or Not to Brief*,[5] after some justices complained that counsel were too frequently electing to file briefs in cases that should have come under *Wende* or *Sade C.*[6] We recommend counsel review the

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

[6] *People v. Wende* (1979) 25 Cal.3d 436 and *In re Sade C.* (1996) 13 Cal.4th 952. Appointed counsel have the option of filing a *Wende-Sade C.* brief if they find no arguable issues. *Sperling* was a retained case, where *Wende* does not apply; counsel could

practice article and the cases cited in it. The warning issued in *Sperling* is a good reminder to keep in mind the elements of arguability and avoid the temptation wishfully to brief issues that really are not there. (Counsel must not, however, go to the opposite extreme of declining to brief issues just because some response could be made to them. See ADI discussion of *Assertive Issue Selection*, June 2009 News Alert,[7] pages 3-4.)

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have withdrawn or persuaded the client to abandon the appeal. (*People v. Placencia* (1992) 9 Cal.App.5th 422, 428-429.)

[7] http://www.adi-sandiego.com/news_alerts/pdfs/2009/069-June-2009-alert-update.pdf