JUNE 2018 – ADI NEWS ALERT

This alert[1] discusses a published order, *People v. Garcia,* D073825,[2] striking a *Wende* brief because of an unorthodox way of listing *Anders* issues. The decision unfortunately chooses to focus, not on the particular brief, but instead more broadly on the general issue of listing *Anders* issues in *Wende* briefs. To some extent this has reignited a debate we had hoped was settled. It has created confusion and some understandable consternation among panel attorneys. Some are saying they do not want to include *Anders* issues any more—a dangerous move, in light of the demand for such issues on the part of one or more justices in Division One (see discussion below). The alert describes the cross-currents at work and suggests an approach to navigating through them.

Garcia order

The order in *Garcia* strikes a *Wende* brief in which each unbriefed (*Anders*) issue was described as a "claim." The "claim" was a heading followed by lengthy string citations, in no discernible order. The court professes confusion as to what is meant by the term "claim." Most commonly on appeal it means a challenge to a decision because of an alleged error of some type. But a challenge would contradict the *Wende* label. Purportedly to clear up the ambiguity, the court gives counsel the option of filing a traditional *Wende* brief (no issues listed) or a traditional merits brief.

It is understandable why panel attorneys are confused by this order. The options offered counsel in *Garcia* entirely omit the conventional *Anders* brief. On the surface, this omission could be read to imply disapproval of *Anders* briefs. A closer reading of the *Garcia* decision, however, shows the court does not say it disapproves of *Anders* issues. To the contrary, the decision actually says:

> [The remaining] question is whether an *Anders* listing is beneficial to a reviewing court and more so, to the interests of appellants seeking review. We conclude the answer is, it can be (see *People v. Kent* (2014) 229 Cal.App.4th 293, 296), but not always.

(*People v. Garcia*, *supra*, D073825, printed decision at p. 12.) In the particular case, the court found *Anders* issues as framed by counsel were ambiguous and confusing.

---

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

[2]*People v. Garcia* (June 5, 2018, D073825) ___ Cal.App.5th ___ [2018 WL 2753053].

The decision complains that *Anders* issues can distract the court from other, more meritorious issues. It looks at other criticisms of *Anders* in U.S. Supreme Court opinions. The overall tone is fairly negative to *Anders* issues but not outright disapproving.

Splits among courts

Garcia finds there are no significant disagreements among courts on whether *Anders* issues are constitutionally required. (*People v. Garcia*, *supra*, D073825, printed decision at p. 10.) Since *Smith v. Robbins* (2000) 528 U.S. 259 definitively answered that question "no," it is unsurprising there is no debate on the point these days. But practical usefulness—not constitutional constraint—is the real issue in *Garcia*.

Further, *Garcia* assumes the concern is about Supreme Court decisions. (*People v. Garcia*, *supra*, D073825, printed decision at p. 9.) That is incorrect. Supreme Court decisions merely set out the overarching principles. In the *Wende* world, the real picture lies in the day-to-day application of the principles. And here the picture is jumbled.

Statewide picture

In California, half of the appellate districts will not accept briefs with *Anders* issues—they often are turned away at the clerk's office. The other half does accept them, with attitudes toward them varying drastically, depending on individual judges and panels.

Nowhere is the label "jumbled" more closely applicable than in the Fourth District. Most *Wende* briefs in this district do include *Anders* issues, with ADI's encouragement, but conflicting court attitudes about them keep popping up unpredictably. We are told the First District likewise has had conflicting unpublished opinions on this topic.

Division Three split in 2014

Readers may well remember the 2014 flare-up in Division Three of the Fourth District, when a panel of three justices criticized *Anders* issues as belonging to the discredited "arguable but unmeritorious" genre. (*People v. Hernandez*, formerly published at 228 Cal.App.4th 539, depublished on grant of rehearing.) ADI submitted an amicus curiae memo[3] disputing that characterization, explaining the historical and practical bases for encouraging listed issues, and suggesting the decision is up to counsel, not the court. Shortly after *Hernandez*, another panel of the same division filed *People v. Kent* (2014) 229 Cal.App.4th 293, disagreeing with *Hernandez* and welcoming *Anders*

[3]http://www.adi-sandiego.com/pdf_forms/Hernandez_Wende_amicus.pdf

issues. Rehearing was granted in *Hernandez*, and the court later filed a conventional *Wende* opinion. *Kent* remains valid, and *Garcia* cites it with apparent approval.

Demand for *Anders* issues among one or more justices in Division One

Garcia shows no awareness of a line of unpublished cases from its own division criticizing counsel who omit *Anders* issues. One attorney was rebuked for an "unacceptable" practice upon doing this repeatedly. Others were told, essentially, they had failed to assist the court in its hunt for issues.

Dealing with the situation

No one following this saga could suggest there is an easy answer to the dilemma. ADI's default suggestion for Fourth District no-merit briefs in all divisions is still to encourage inclusion of *Anders* issues. That is the last published word from Division Three (*Kent*); some panels in Division One have been insistent in calling for them; and even *Garcia* acknowledges they can be helpful. Importantly, ADI thinks that, properly done, they make for better advocacy than mechanical *Wende* briefs and on the whole help maximize the client's chances.

Obviously, in a district with three divisions consisting of 10, 7, and 8 justices, counsel cannot know who their panel will be at the time they file the opening brief. So we suggest a process that requires (a) deciding which approach serves the client best and (b) acknowledging the concerns of those justices who may have preferred a different approach.

At step (a), counsel needs to make a client-centered decision whether to list issues and which ones. It is not a mechanical process, but requires the exercise of good judgment. That is why our guidance uses language such as "encourage," rather than "require." Counsel should consider the benefits of calling attention to unbriefed issues – e.g., getting the court to advert to an issue that may escape its attention otherwise, demonstrating counsel's diligence and efforts to the audience (court, ADI, and client), stimulating thought on ways of looking at the case that might give rise to an arguable issue, making a systematic record of issues considered. Counsel should also consider the potential downside to listing unbriefed issues – e.g., highlighting an adverse consequence, describing an issue in a way that may predispose the court against it, suggesting the list covers the whole field and so stymying inquiry into other issues. They should decide which factors weigh most heavily in their own case, given the issues that might be listed.

At step (b), counsel needs to consider how to preempt criticism from justices who may not reflexively agree with their chosen approach. For instance, if counsel concludes *Anders* issues would be harmful in their case, the brief could say: Counsel acknowledges that some justices have expressed a strong desire for *Anders* issues, but counsel has carefully weighed the situation and concluded the approach needed to promote the client's interests in this particular case is to invite court review of the record unfettered by counsel's prior thought processes. To assist the court in its review of the record, however, counsel has written a statement of the case and facts more thorough than normal and [if applicable] has added a list of issues discussed in the lower court.[4] (Such a statement shows respect for the court's needs and preferences, by offering a substitute for an *Anders* list.) A sample no-merit brief using this approach is being prepared for ADI's website. http://www.adi-sandiego.com/practice/forms_samples.asp

On the other hand, if counsel decides to include *Anders* issues, counsel might add a statement like this: Counsel is aware appellate justices have expressed a concern that such issues can distract the court. Counsel is listing them as a way of assisting the court in its review of the record, making a record of counsel's efforts, (etc.). Counsel does not suggest appellant is asserting a right to relief because of them or is claiming the court must address them in its opinion. To the contrary, counsel acknowledges the court has plenary discretion to ignore the issues if it finds them unhelpful. A sample brief using this approach[5] is on ADI's website.

Statements like these can deflect court criticism and accommodate conflicting preferences while pursuing a strategy based on the client's needs.

Conclusion

The debate on what routine no-merit briefs should include obviously is far from settled, with half of the appellate districts resolving the matter by judicial fiat and half leaving the decision to counsel. While we think the leave-it-to-counsel approach is better protection for clients and truer to the reality that this is not a one-size-fits-all matter, the approach does tend to provoke unpredictable reactions such as the *Garcia* order.

ADI hopes the suggestions offered here will help shield counsel from criticism for a good-faith effort to comply with expectations, while allowing them maximum leeway to pursue vigorous advocacy.

---

[4] Be sure, of course, that any such list would not risk adverse consequences.

[5] http://www.adi-sandiego.com/pdf_forms/AOB_Wende.pdf