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JANUARY 2016 – ADI NEWS ALERT

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This alert[1] covers:

- Go to the trial court first to correct fines and fees: New Penal Code section 1237.2 requires appellate counsel go to the trial court before raising issues regarding fine and fee calculations. An informal request is adequate under this or section 1237.1.

- Frivolous vs. marginal issues: Assess arguability of issues carefully and recognize a frivolous issue when you see one.

- When silence is golden: Ethical and practical guidance in dealing with unpublished favorable decisions – other attorneys' cases and your own. Special word of advice: a victorious attorney should *keep quiet* about an unpublished win until it is final.

- Tracking email-served documents: Protect your reputation by asking for a "delivered" or "opened" receipt when serving documents by email, to ensure your service was received. When you are the recipient of anticipated service, sign up for automatic notification of court filings in *every* case you are responsible for.

- Multi-document attachments to augment and judicial notice requests: Arrange attached documents chronologically if possible, paginate consecutively, include chronological and alphabetical indexes.

- CADC Conference: The annual conference of CADC will be March 11-12, 2016, in San Jose. Registration open now.

FINE AND FEE ISSUES MUST BE RAISED IN TRIAL COURT FIRST

New Penal Code section 1237.2, effective January 1, 2016, requires appellate counsel to seek a remedy in the trial court before raising an issue concerning fines or fees or similar monetary assessments as the sole issue on appeal. It codifies case law saying such a provision gives the trial court jurisdiction to make such changes while the case is on appeal.

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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.

The enacting bill, A.B. 249, also modified the similar provision on credits calculations, Penal Code section 1237.1, to eliminate the previous requirement that the request to correct be done by formal motion. (Superseding *People v. Clavel* (2002) 103 Cal.App.4th 516, 518-519.)

ADI has a brief treatment of the new law on its RECENT CHANGES IN THE LAW – STATUTES page. It includes a link to the more detailed analysis on the FDAP website by executive director Jonathan Soglin.

ASSESSING ISSUES CAREFULLY

The court has asked us to remind counsel to assess the arguability of issues honestly and critically. It has the impression an increasing number of briefs that should have been *Wende* or *Sade C.* are being filed as merits briefs. I myself happened to see a recent brief where my first reaction was, "Let's call a frivolous issue a frivolous issue. That should not have been filed."

We did a lengthy practice memo on that topic in 2008, and the court thought it helped. Perhaps the understandable tendency to avoid a no-merit brief begins to "creep" back in as a default after being put in its proper place for a while by a reminder. There is no point reinventing our advice. We ask attorneys to refresh their thinking by reviewing the introductory news alert of April 2008[2] and the practice article, *To Brief or Not to Brief: Marginal Issues*.[3] Issue selection is arguably the most critical of all of counsel's responsibilities on appeal, and it needs to be done right *every* time.

DEALING WITH AN UNPUBLISHED VICTORY: ETHICS AND STRATEGY

Not infrequently, ADI has had to deal with a situation where an attorney gets a favorable decision in an unpublished opinion, resolving an issue of law that has been pivotal in a number of cases. Winning counsel's usual impulse is to tell the staff attorney, "I think I'll ask the court to publish this!" Or, at the least, the panel attorney suggests notifying counsel around the state who have been grappling with the issue. It seems selfish to keep this favorable decision to themselves.

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[2] http://www.adi-sandiego.com/news_alerts/pdfs/2008/April-2008-News-Alert.pdf

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

We caution that publication greatly increases the chance opposing counsel will seek review or that the Supreme Court will grant review on its motion. When your client already has a victory in hand, the last thing he or she wants is to wipe it off the books and risk a less favorable decision from the Supreme Court. If the client's custody is at stake – as has happened in a number of Proposition 47 cases – the postponement of any decision for what is likely to be several years while the case is in the Supreme Court can mean denial of meaningful relief altogether. When these points are brought up, the attorney usually agrees it would be potentially harmful to the client – and therefore improper – for the attorney to seek publication.

But shouldn't we at least tell *other* attorneys about the decision? They would surely want to know. This is when we have to issue the most counter-intuitive advice one can get: *keep quiet.* Telling other attorneys is a virtual invitation for *them* to seek publication.[4] They do not have the same ethical duty of loyalty to your client that you do, and they have a strong motivation to ask for publication if one or more of their own clients could benefit. You do your client no favor by making the case a target for other attorneys trying to take advantage (quite properly) of your victory.

From another vantage point, what considerations does an outside attorney face when considering a request for publication? Does the attorney have an obligation to his or her own clients to file the request? What if any responsibility does the attorney have to avoid inflicting potential harm on the winning client, who is represented by someone else?

We have posted a short practice article, *Dealing with an Unpublished Victory: Ethics and Strategy*, exploring these questions. Given the relative frequency with which the issue has come up and the natural initial impulse to "share the good news," attorneys should read and consider it carefully.

FAILURE TO RECEIVE SERVICE SENT BY EMAIL

The Attorney General recently gave ADI a list of nine cases in the last few months where it did not receive a copy of the AOB until they discovered, checking online, it had already been filed and contacted the attorney. In one case the AG found out about it by seeing a notice under rule 8.360 of their default.

In a few of those cases, ADI had not been served, either. We hope these few do not reflect laxity on the part of the panel attorneys, who apparently served briefs well after the

[4]One does not have to be a party to the case to request publication under rule 8.1120(a) – "any person" may.

time stated in the proof of service – even several *weeks* afterwards. It goes without saying that delaying service well past filing time, thereby violating the Rules of Court and Code of Civil Procedure, hampering the ability of opposing counsel to file a timely response, and in the process making an untrue statement under penalty of perjury, could be viewed as a serious breach of professional responsibility.

In the vast majority of the cases, however, we would assume a failure somewhere in cyberspace must have occurred. To avoid the bad impression potentially created when opposing counsel has to ask the court for an extension on the ground they weren't served, we suggest counsel use the feature of most email systems that allows you to request notification when the email is received or opened. Failure to get such notification when expected would alert you to contact the recipient and ask whether they received the brief. That practice provides you with a written record to point to in showing you have exercised due diligence.

When you are on the receiving end, *always* give yourself a backup from electronic mishaps like these by signing up for automatic mail notification[5] of filings in the Court of Appeal as to each case you are responsible for. If you get ntoice a document has been filed but you haven't received a copy, you can contact counsel and request it. That also protects against failure to get court orders and opinions. The latter can mean blowing the deadline for a petition for review – and we have learned from experience that the Chief Justice by no means considers failure to get an opinion automatic grounds allowing for a late petition under rule 8.500(e)(2).

MULTI-DOCUMENT ATTACHMENTS TO AUGMENT OR JUDICIAL NOTICE REQUESTS

Division Two has issued its Misc. Orders for 2016.[6] A new one, 16-16, prescribes the form for documents sought to be augmented or judicially noticed, when attached to a request for such an order. It calls for (a) chronological order of the documents if possible, (b) consecutively numbered pages, and (c) two indexes. One index lists the documents in the order they appear in the attachment (normally chronologically). The other is alphabetical by title.

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[5] http://appellatecases.courtinfo.ca.gov/search.cfm?dist=0. Click "Change court" to find the court where your case is pending.

[6] http://www.adi-sandiego.com/pdf_forms/Div_2_Misc_Orders_2016.pdf

Although the order comes from Division Two, the requirements listed are good general practice, as well, and we recommend them.

CADC CONFERENCE MARCH 11-12, 2016

The panel attorney organization, California Appellate Defense Counsel, has opened registration for its annual conference, to be held March 11-12 in San Jose. See Conference registration and information.[7]

[7] http://cadc.net/registration/