PROCEDURES IN CASES WITH NO ARGUABLE ISSUES: NEW DEVELOPMENTS

By Elaine A. Alexander, Executive Director
April 27, 2007

We have often offered guidance on handling cases in which counsel is unable to identify any arguable issues.[1] The recent decisions of the California Supreme Court in *People v. Kelly* (2006) 40 Cal.4th 106 and *In re Ben C.* (2007) 40 Cal.4th 529 have again brought no-issue cases into the spotlight.

In *Kelly*, after counsel filed a *Wende-Anders*[2] (no-issues) brief, the defendant filed a pro per brief. The Court of Appeal opinion merely stated it had "read and considered" the defendant's argument. The Supreme Court held this was inadequate to meet the state constitutional requirement that a decision determining a "cause" be in writing with reasons stated (Cal. Const., art. VI, § 14). (*People v. Kelly*, *supra*, 40 Cal.4th 106, 119-120.) The opinion must set out the facts, procedural history, convictions, and sentence, and must describe the contentions, stating briefly why they are rejected. (*Id.* at p. 124.)

Ben C. held that the Court of Appeal has no obligation to review the record for issues in an LPS conservatorship appeal in which the attorney has filed a no-issue brief; as it held in *In re Sade C.* (1996) 13 Cal.4th 952 for dependency appeals, the court found the strict requirements of *Wende* apply only in criminal cases. *Ben C.* nevertheless prescribed procedures to be followed (40 Cal.4th at p. 544):

> If appointed counsel in a conservatorship appeal finds no arguable issues, counsel need not and should not file a motion to withdraw. Instead, counsel should (1) inform the court he or she has found no arguable issues to be pursued on appeal; and (2) file a brief setting out the applicable facts and the law.n6 [n6 The conservatee is to be provided a copy of the brief and informed of the right to file a supplemental brief.]

In response to *Ben C.*, Division One has informed us how they intend to handle no-issue cases in conservatorship appeals. (See attached letter from Presiding Justice McConnell.) Divisions Two and Three have not announced a formal policy but presumably will follow similar procedures. This memo summarizes the Division One policy, reminds counsel of standard practices in no-issue cases, and discusses matters left open by recent developments. These include the right of the client to file a pro per brief when counsel files a no-issue brief and the right to a written opinion on the merits.

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[1]See, for example, the Appellate Defenders, Inc., California Criminal Appellate Practice Manual, chapter 1, § 1.24 et seq.; chapter 4, § 4.73 et seq. http://www.adi-sandiego.com/Articles/Manual2007/ADIManualApril2007.pdf.

[2]*People v. Wende* (1979) 25 Cal.3d 436; *Anders v. California* (1967) 386 U.S. 738.

A. No-Issue Briefs

The letter from Justice McConnell requires, for the most part, that counsel follow traditional *Wende-Anders* procedures in an LPS conservatorship appeal raising no issues. The main difference will be that the LPS brief should not state that the court *must* review the record, although it may invite the court to do so in its discretion.

The typical no-issues brief must meet these requirements:

- ADI's preapproval is required. We will usually want to review the record first.[3]

- The words "BRIEF FILED UNDER [APPLICABLE CASE][4]" should appear prominently on the cover.

- The brief must include a statement of the case and facts and ordinarily should list of issues identified but not briefed, with relevant authorities. It should neither urge the issues listed as a ground for relief nor argue against the client by, for example, affirmatively characterizing the issues as frivolous.

- The brief should include a declaration stating that counsel has reviewed the record. The declaration must also say counsel has sent the client a copy of the brief and has informed the client of (a) the nature of the brief filed, (b) the right to file a pro per brief, and (c) the right to obtain the record from counsel on request.

- In a criminal case the brief should state the court has a duty to review the record for issues, citing *Wende*. In a dependency or conservatorship, while acknowledging that under *Sade C.* or *Ben C.* the court has no such duty, the brief may nevertheless urge the court exercise its discretion to do so and explain why.

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[3]On occasion, if counsel has filed a brief on the merits but it appears the issues are borderline frivolous or trivial, the ADI staff attorney may ask to do a "quasi-*Wende*" review of the record to see if there might be additional issues. See chapter 4 of the ADI manual, § 4.87 et seq., on deciding whether to brief an unproductive issue on the merits or to file a no-issues brief instead.

[4]In a criminal case the caption on the cover would say "BRIEF FILED UNDER *PEOPLE V. WENDE* (1979) 25 Cal.3d 436 AND *ANDERS V. CALIFORNIA* (1967) 386 U.S. 738." In a dependency case, it would say "BRIEF FILED UNDER *IN RE SADE C.* (1996) 13 Cal.4th 952." A conservatorship would say "BRIEF FILED UNDER *IN RE BEN C.* (2007) 40 Cal.4th 529."

- Include the client's address on the proof of service or, if confidentiality is an issue, in a cover letter requesting it be kept confidential. If the client will be given an opportunity to file a pro per brief,[5] the court needs to notify the client directly.

B. Pro Per Briefs in No-Issue Cases

The right to file a pro per brief after counsel files a *Wende-Anders* brief in a criminal case is clear. (*Anders v. California*, *supra*, 386 U.S. 738, 744; *People v. Kelly*, *supra*, 40 Cal.4th 106, 120; *People v. Wende*, *supra*, 25 Cal.3d 436, 440.) Noting that *Anders* applies only to criminal cases, however, Division One has had a policy of not permitting pro per briefs in *Sade C.* dependency cases.[6] The court may reconsider that policy in light of footnote 6 in *In Ben C.*, *supra*, 40 Cal.4th 529, 544, noting a right to file such a brief in at least one kind of non-criminal case (conservatorship). Unless and until the court changes the policy, counsel in a *Sade C.* case should consider arguing for that opportunity if the client actually expresses interest in filing a brief.[7]

The argument can be supported, not only by footnote 6 of the *Ben C.* opinion, but also by the fundamental right of access to the appellate court embodied in due process and equal protection principles. (See *Yarbrough v. Superior Court* (1985) 39 Cal.3d 197 and *Payne v. Superior Court* (1976) 17 Cal.3d 908 [right to appointed counsel for incarcerated civil defendant unable to appear in pro per]; see also *Boddie v. Connecticut* (1971) 401 U.S. 371 [filing fees for indigent litigants in divorce case].) In an ordinary civil case, a litigant has a right to appear in pro per; otherwise, someone unable to afford counsel would literally be out of court. (*Baba v. Board of Supervisors* (2004) 124 Cal.App.4th 504, 522-523.) A right of access at least equal to that in an ordinary civil case necessarily exists in cases with far greater and more highly protected stakes, such as personal liberty or family ties. (E.g., *Griffin v. Illinois* (1956) 351 U.S. 12 [transcript in criminal case]; *Conservatorship of Roulet* (1975) 23 Cal.3d 219, 225, and *Waltz v.*

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[5]At present, the client is given such an opportunity in all no-issue cases except for dependency appeals in Division One. See section B of this memo, *post*, for thoughts on advocating for the right to a pro per brief in *Sade C.* dependency cases.

[6]Divisions Two and Three do offer the client that opportunity.

[7]The court's resistance to permitting pro per briefs is explained in part by the delay inherent in giving the client time to file. Counsel can help by not asking for time to file a pro per brief solely as a matter of routine. Instead, counsel should ascertain at an early stage (e.g., when it appears a *Sade C.* brief is likely) whether the client might want to file anything. If so, counsel should urge the client to act quickly and should notify the court of the client's affirmative intent.

Zumwalt (1985) 167 Cal.App.3d 835 [involuntary hospitalization]; *Salas v. Cortez* (1979) 24 Cal.3d 22, 27-29 [paternity].)

Ordinarily a litigant represented by counsel has access to the court through counsel and thus no right to submit pro per filings as well. (*In re Barnett* (2003) 31 Cal.4th 466, 471-473; *People v. Clark* (1992) 3 Cal.4th 41, 173.) However, when an appointed attorney fails to advocate for any relief – as happens in a *Wende-Sade C.-Ben C.* case – the litigant is effectively unrepresented. (See *Anders v. California*, *supra*, 386 U.S. at p. 744 ["[t]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae"].) The litigant would be denied the right to challenge the judgment on appeal altogether unless given an opportunity for self-representation. (See *Barnett*, at p. 474, fn. 3 [while ordinarily a represented defendant has no right to file pro per arguments, the *Wende-Anders* context is distinguishable and was the focus of the comment in *Martinez v. Court of Appeal* (2000) 528 U.S. 152, 164, that California laws "seem to protect the ability of indigent litigants to make pro se filings"].)

C. Disposition of Case When the Appellant Files a Pro Per Brief

Division One's *Ben C.* policy, as summarized in Justice McConnell's letter, indicates that if the client does not file a pro per brief, the case will be dismissed as abandoned. This is in accordance with *In re Ben C.*, *supra*, 40 Cal.4th 529, 544: "Nothing is served by requiring a written opinion when the court does not actually decide any contested issues."

Division One's policy also provides that if the client does file a pro per brief, the court will determine whether any issues the client has raised are arguable. If there are such issues, it will order briefing by counsel. This provision, too, is unobjectionable.

The remaining provision is open to dispute: If appellant files a pro per brief and the court determines the issues are not arguable, it will dismiss the appeal as abandoned, instead of filing a written opinion. We urge counsel to argue for the right to an opinion on the merits when the client actually does file a brief.

First, it is doubtful a case could be considered "abandoned" if the client has actually raised issues, even if frivolous, and has urged relief on that basis.[8] Both the majority and dissent in *Kelly* agreed that once the pro per brief was filed, the appeal was a

[8]Presumably all of the defendant's issues in *Kelly* were frivolous, i.e., not reasonably arguable. If they had been arguable, the court would have had a constitutional duty to order counsel to brief them. (*Penson v. Ohio* (1988) 488 U.S. 75, 83-85.)

"cause" requiring a written decision. (*People v. Kelly*, *supra*, 40 Cal.4th 106, 119-120 (maj. opn.), and 126 (conc. and dis. opn. of Corrigan, J.).)

Second, part of the rationale of *Kelly* was that the defendant in a *Wende* situation has a right to file a pro per brief, even though also represented by counsel; from this it follows that when a Court of Appeal disposes of the case it necessarily must have considered and rejected those contentions and thus must comply with the constitutional requirement of "reasons stated." (*Kelly*, 40 Cal.4th at p. 120.) *Ben C.* explicitly recognized the right to file a pro per brief in conservatorship cases (*In re Ben C.*, *supra*, 40 Cal.4th at p. 544, fn. 6), and in part B, *ante*, we offered reasons why that right exists in dependency cases, too. Thus it would appear arguable that *Kelly* applies to opinions in conservatorship and dependency, as well as criminal, cases.

Critically, *Kelly* was based on the state constitutional requirement for written decisions that determine causes. (Cal. Const., art. VI, § 14.) This applies to all cases, criminal and civil. (See *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1262-1264.) Since it was not derived from the federal constitutional right to counsel on a criminal appeal as interpreted in *Anders*, the holdings of *Ben C.* and *Sade C.* limiting *Anders* requirements to criminal appeals are not relevant to the question whether the Court of Appeal may dismiss a contested appeal instead of deciding it in a written opinion.