JANUARY 2013 – ADI NEWS ALERT

BY

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All of us at ADI wish our readers a happy, healthy, and prosperous New Year! May your appellate reversals be many and your claims paid on time.

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This alert[1] covers:

CLAIMS MATTERS

Tax ID changes must be sent to projects and include a completed W-9 form

Panel attorneys must submit a tax ID change notice to the *projects*, as well as the AOC. A W-9 is essential, in addition. The AOC's accounting department office is severely under-staffed, and claims are likely to be delayed if that office does not have current information and the necessary forms.

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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.

AOC imposes new requirements for reporting habeas time and expenses

The Administrative Office of the Courts has been given the responsibility of collecting more complete data on the costs of habeas corpus litigation in appointed cases. To facilitate this task, it has changed the policies for reporting habeas time and expenses:

> **Time** – *Habeas time previously reported on line 24 should go on line 11:* All habeas-related time that previously has gone on line 24 ("other services") must now be reported on line 11 ("habeas").
>
> **Expenses** – *Habeas-related expenses continue to be entered on applicable expense lines, but must be explained and itemized in the comments field to line 11:* If the entries on lines (H)(1), (H)(3), and (H)(5) include habeas-related expenses of $20 in photocopying, $15 in postage, and $240 in travel, for example, the comments to line 11 might read: "Habeas-related expenses: photocopying $20; postage $15; travel $240 for pre-approved client visit."
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> > Note: If there were **no** such expenses, the comments field for line 11 must state this. Only the panel attorney is in a position to determine which if any expenses were habeas related, and failure to provide a statement about it will delay the claim while the staff attorney inquires.

E-SUBMISSIONS

Apparently a court clerk was told that ADI is telling counsel to submit PDF copies of briefs to the court via the e-**file** tab and not the e-**submission** one. That is incorrect, both as to procedure and as to ADI's advice. Using the wrong tab causes delay and extra work on the court's end. As our web page on this matter states:

> **E-submission:** The e-submission tab is used to provide the court with an electronic copy of *briefs* and similar documents, *in addition to* the regular paper copies. E-submission is required in our cases and must be shown *on the proof of service*. Failure to show it can delay our processing of the case and thus any related claim.
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> > *Caveat:* We have conflicting information as to whether the Court of Appeal's service copy of a petition for review or other Supreme Court filings requires a paper copy. We will post a definitive answer on our website when we resolve this matter. *Until then, e-submission with an additional paper copy is always a correct and safe alternative.*
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> **E-filing:** The e-filing procedure is *in lieu* of paper filings and is optional. It applies only to a few specified short documents, not briefs. The list of documents that

can be e-filed and the buttons for e-filing in each division are on e-filing tab of the court website.

As electronic methods of communication increasingly supplant traditional ones, it is imperative that attorneys familiarize themselves with the applicable terminology and procedures. When in doubt, check ADI's or the court's website or call the clerk's office.

PROPOSITION 36

Resentencing possibilities

By now all panel attorneys are aware of Proposition 36, the Three Strikes Reform Act of 2012, passed in the November 6 election. It essentially replaces a third-strike indeterminate sentence with a second-strike, doubled one for many (but not all) defendants convicted of a non-violent, non-serious felony after two prior strikes. It also provides **a** remedy – new Penal Code section 1170.126 – for defendants already sentenced before the initiative passed. That section allows a petition for resentencing to the trial court within two years of the effective date of the initiative (November 7, 2012). Resentencing is mandated unless the trial court finds the defendant's release would be dangerous to society.

- **Resources**

ADI and the other projects have cooperated to produce materials on the new law, outline possible issues, and make sample documents available. Soon after the election ADI posted initial guidance on the initiative on its website. We also have posted links to FDAP's analysis by Brad O'Connell and an article by the judiciary's Three Strikes experts, Couzens and Bigelow. We are preparing other materials. Attorneys with appealing clients who have a third-strike life sentence for a non-violent, non-serious felony should look for these materials on ADI's and other projects' websites, determine whether their clients qualify for reduction to a second-strike sentence, and if so seek relief.

- ***Estrada* versus section 1170.126**

The immediate controversy, for cases on appeal when the initiative was passed, is over the procedure for obtaining a new sentence. This matter is discussed in the accompanying article, *The Battle Is Joined: Estrada v. 1170.126*.

In it, ADI takes the position that qualifying defendants can seek resentencing as an issue on appeal and are entitled to a reduced sentence under *In re Estrada* (1965) 63 Cal.2d 740. *Estrada* held that, in the absence of an expressed contrary intent, the presumption is that, in reducing the punishment for a given offense, the enacting body

found the lower penalty is adequate to protect society and thus intended it to apply to *all non-final cases*.

The initial reaction of some attorneys and courts, on the other hand, has been that the *only* remedy for defendants already sentenced is new Penal Code section 1170.126. The Attorney General apparently has taken that position, we understand, to the extent they have been heard on this matter so far. One published opinion agreed with it, as well, but the court has since granted rehearing on its own motion.[2] One of our courts initially also denied leave to file supplemental briefing, saying section 1170.126 is the remedy, but changed its mind (next section).

ADI agrees a section 1170.126 remedy is available to defendants on appeal, but disagrees with the position no *other* remedy is available. The 1170.126 remedy is not as beneficial to clients as *Estrada*, because it has an exception for dangerousness, whereas *Estrada* mandates the lower sentence and has no such exception. ADI therefore urges attorneys to push for *Estrada* relief. We try to provide some ammunition for that in the accompanying article.

Insist on right to file supplemental opening brief if AOB filed before Proposition 36 enacted

For pre-opinion appellants whose opening briefs were filed before November 6, 2012, when the electorate approved Proposition 36, the appropriate remedy is a supplemental opening brief, with a request for the permission of the presiding justice to file it. (Rule 8.200(a)(4).)

The courts have understandably been concerned about workload considerations created by the proposition and have been looking for streamlined methods of dealing with it. In the Fourth District several applications for supplemental briefing were denied on the ground the defendants could apply for relief in the superior court under section 1170.126. On motions for reconsideration, supported by an amicus letter from ADI, the court later vacated those denials and granted leave to file the briefs.

If any panel attorney has encountered such a denial, it is important to contact ADI for copies of the motions for reconsideration and our amicus curiae letter and then to follow through by asking the court to reconsider and if necessary going to the Supreme Court. Even though supplemental briefing is technically discretionary under the rules, we think defendants have a due process *right* to be heard on the *Estrada* issue.

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[2]Initially, a published Third District decision in *People v. Conley* held section 1170.126 to be exclusive, but the court has since granted rehearing. (C070272.)

TAYLOR GRANT OF REVIEW

The California Supreme Court has granted review in *People v. Taylor*, S206143 formerly published at 209 Cal.App.4th 210. The issue to be briefed and argued on review is: Does the residency restriction of Penal Code section 3003.5, subdivision (b), when enforced as a mandatory parole condition against registered sex offenders paroled to San Diego County, constitute an unreasonable statutory parole condition that infringes on their constitutional rights? (See *In re E.J.* (2010) 47 Cal.4th 1258, 1282, fn. 10.) The Court of Appeal had concluded the restrictions could not constitutionally be applied across the board, without consideration of each individual parolee's situation and ability to find suitable housing.