

JANUARY 2019 — ADI NEWS ALERT

We at ADI hope your 2019 is off to a great start. May it be a truly happy year!

This alert¹ covers:

- [CALCRIM No. 315](#), allowing jury to consider a witness's certainty in evaluating credibility of an identification: If due process violation is arguable under the facts of the case, consider raising issue pending Supreme Court's resolution of the matter in *People v. Lemcke*, S250108.
- [Going in Style](#) series — New article on typography, part 2, discussing page layout.
- [Parallel citations](#) to U.S. Supreme Court cases need appear only in the Table of Authorities, all three divisions agree.
- [MCLE programs](#) to calendar:

Get, Admit, Acquit — by University of San Diego Law School and Community Defenders, Inc., on January 26.

Dependency Case Law Update — by Laura Furness at ADI or via webinar, on March 7.

Annual CADC conference — California Appellate Defense Counsel presents its annual conference on March 22-23 at the LAX Hilton.

How to Give (and Get) Good Edits — by Professor Mary Beth Beazley, William S. Boyd School of Law, on April 26 via webinar.

An Appealing Life: Tools for Maintaining a Fulfilling Career as an Appointed Appellate Attorney — by ADI, several panel attorneys, and expert Christy Cassisa, on May 17.

- [Phablets](#) not allowed at oral argument.
- [Annual Defender Dinner](#) will be Friday, April 5. Speaker will be Cecillia Wang of the national ACLU.

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

CALCRIM No. 315 issue to consider: Does an instruction allowing a jury to consider a witness’s level of certainty, in evaluating the credibility of an identification, violate due process?

The California Supreme Court has granted review in an unpublished case out of Division Three, *People v. Lemcke*, [S250108](#),² review granted October 10, 2018. The defendant challenges CALCRIM No. 315, which lists, among other factors to consider in evaluating a witness’s identification testimony, “How certain was the witness when he or she made an identification?” The defendant argued studies have shown that a witness’s confidence in the identification does not make the identification any more likely to be accurate. He cited the concurring opinion of Justice Liu in *People v. Sánchez* (2016) 63 Cal.4th 411, 495, as support. The Court of Appeal acknowledged the strength of the argument but felt itself bound by the majority opinion in *Sánchez*. ([G054241](#), at pp. 13-14.)

We urge counsel with a case where this instruction was given to consider raising the issue if error and prejudice are arguable under the circumstances of the case. Relevant factors include whether *all* of the witnesses were certain of their identification or some were uncertain. Whether the issue was preserved in the trial court is important, too. Ask ADI for sample briefing.

New article in *Going in Style* series — Typography, part 2, on page layout

Art Martin has done it again — producing a third article in the online series *Going in Style*, which aims to help attorneys get and keep their readers’ attention and present their cases in the most effective way possible. The latest article is on [page layout](#), an aspect of the broader topic of typography. He talks about line spacing, paragraph format, justification, centering, and argument organization — considerations that apply in virtually all documents and need the author’s thoughtful attention to make optimal impact.

²Review was actually denied as to defendant Desirae Lemcke and granted as to co-defendant Charles Henry Rudd, whose case was the one involving CALCRIM No. 315. But the proceeding in the Supreme Court is still entitled *People v. Lemcke*.

Parallel citations to U.S. Supreme Court cases need appear only in the Table of Authorities, all three divisions agree

The use of bulky parallel citations to decisions of the U.S. Supreme Court (such as Supreme Court Reporter and Lawyers' Edition) tends to impair the readability of sentences in briefs, especially when several such cases are cited in a sentence. The presence of lots of numbers and abbreviations in the middle of a sentence or paragraph impedes the absorption and flow of the message. The information is surplusage to readers with access to electronic research, who do not *need* parallel citations to locate the authority with speed and ease.³

Rule 1.200 requires citation style be in the form of the California Style Manual or the Bluebook. ADI and the court prefer the former. The Style Manual in turn, in § 1:32[B], provides for a parallel citation to an unofficial U.S. Supreme Court reporter in brackets "with the first citation to the opinion." ADI approached all three divisions of our court with a proposal that parallel citations need appear only in the Table of Authorities. The courts agreed that the "first citation" would normally be in the Table of Authorities, and if the parallel citation appears there, the rule is satisfied. Common sense and readability rule.

MCLE programs coming up

- *Get, Admit, Acquit*, sponsored by the University of San Diego School of Law and Community Defenders, Inc., will be presented on January 26, 2019. Warren Hall, Room 3A, University of San Diego School of Law, 9:00-3:00 p.m. Speakers will address investigation and record-collection – methods and techniques, legal authority, and resources. Ensuring *Brady* compliance is covered. The presentation covers trial and post-trial phases. MCLE: 3.75 hours of general credit, and 1.5 hours of credit for ethics. More details [here](#).
- *Dependency Case Law Update* — by Laura Furness at ADI, 12:00 noon. This always-helpful and popular presentation will be given on March 7. It will also be available by webinar. Details for attending online will be distributed.

³ADI's [Appellate Practice Manual](#) uses official cites only, if they are available. To assist clients or others unlikely to have access to electronic research, we offer a [table](#) listing the U.S. Supreme Court cases cited in each chapter and providing parallel citations.

- *Annual CADC conference* — [California Appellate Defense Counsel](#) presents its annual conference on March 22-23 at the LAX Hilton. Details and a link to register are [here](#).
- *How to Give (and Get) Good Edits* — by Mary Beth Beazley, Professor of Law, William S. Boyd School of Law, University of Nevada at Las Vegas, on April 26. The program will be available via webinar. Other details are still being planned. The program is made possible by a generous grant from the San Diego County Bar Foundation, Indigent Criminal Defense Fund.
- *An Appealing Life: Tools for Maintaining a Fulfilling Career as an Appointed Appellate Attorney* — by ADI, several panel attorneys, and expert Christy Cassisa, on May 17. A half-day seminar with workshops and dinner. Free to ADI panel attorneys. Space will be limited. Made possible by a generous grant from the San Diego County Bar Foundation, Indigent Criminal Defense Fund. RSVP forms and further detail will be released later.

Phablets not allowed at oral argument

At Presiding Justice Judith McConnell's November 8 presentation on practice in Division One, she was asked whether the court would permit possession of a phablet in the courtroom while oral arguments were being presented. After the questioner explained what a phablet is (a combination cell phone and tablet), she said she thought it would not be permitted, but she would check. She later emailed to say she had been right: a phablet is not permitted because a ringing phone would potentially disrupt oral argument.

Annual Defender Dinner set for April 5, with Cecilia Wang of the national ACLU as speaker

SAVE THE DATE: The annual Defender Dinner will be Friday, April 5. The featured speaker will be Cecilia Wang of the national ACLU. Awards will be presented, as well. ADI traditionally helps subsidize the cost of panel attorneys' dinner. Details later.