APPELLATE DEFENDERS ISSUES
The Quarterly Newsletter of Appellate Defenders, Inc.

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NOTES FROM THE DIRECTOR
by Elaine A. Alexander

Romero Aftermath

The Supreme Court's decision in People v. Superior Court (Romero) (June 20, 1996) __ Cal.4th __ [96 Daily Journal D.A.R. 7229], places on all criminal defense attorneys a great responsibility to make sure all clients entitled to the benefits of that case in fact receive them. Appellate counsel must handle this responsibility for clients whose cases are at any stage of a direct appeal. We will detail the steps to be taken in a special mailing.

ADI will attempt to reach as many trial counsel as possible, to discuss procedures in cases where the appeal is final or where an appeal was never filed. Panel attorneys who have final Three Strikes cases should back us up on that: contact trial counsel and/or your former client to make sure appropriate measures are followed.

Covering your cases when you can't

An issue or two ago I discussed the importance of recognizing when you will be unable to handle a case or cases in timely and competent fashion because of substantial professional or personal obstacles (for example, an incompatible new job, a debilitating illness, the breakup of a law partnership, or severe family problems). In such serious situations the responsible approach is to request to be relieved.

In this column I want to address the less drastic and much more common circumstance of temporary inability to handle one aspect of a case. Such a problem may occur because of a vacation, short-term illness, schedule conflict, the pressure of several deadlines unexpectedly occurring in a short time, etc. Usually it is not necessary or even appropriate to ask to be relieved in this kind of situation, but you do need to have a backup plan for making sure that every client is fully and capably represented at each stage of the case even if you face temporary obstacles.

The simplest and best approach often will be to ask for a continuance. Extensions of time are available for most briefing and often even oral argument. You are the attorney most familiar with the case and thus are in the best position to handle each stage efficiently and knowledgeably.

Of course, extensions are sometimes inappropriate or unavailable, as when delay could hurt the client or a jurisdictional deadline is pending. In that case it may be necessary to have another attorney to cover for you. I recommend that *every attorney have standing arrangements with one or more attorneys of similar or greater relevant experience to cover in the event of emergency.*

One misconception is that the ADI staff attorney assigned to the case will routinely cover. We have had a panel attorney ask the staff attorney to do oral argument on a complex case the next day, because the panel attorney would be teaching a class. We have had a request, submitted on the last possible day for filing a petition for review, that the staff attorney write the petition because the panel attorney was sick. Such requests put the staff attorney in a difficult or impossible situation.

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You cannot expect staff attorneys to prepare complex pleadings or oral argument on short notice, or necessarily to cover for you at all. Our role is to consult, not to represent other attorneys' clients. If an emergency situation arises, you should discuss possible alternatives with the staff attorney, and one of those alternatives may be that the staff attorney will cover for you (we have done so many times). But it should be a matter of inquiring about the best way to handle it, not assuming the staff attorney will do it for you. You should always have the previously discussed arrangements with other panel attorneys as an option -- and should take care to give the backup attorney adequate notice to allow a competent job.

Getting both criminal and dependency appointments

For the most part, we select attorneys from physically separate criminal and dependency rotations. Only occasionally do we go to the criminal rotation for a dependency appointment, and then it is almost always to select a very experienced attorney. For practical purposes we never go to the dependency rotation in criminal cases. An attorney can be in only one rotation or another because we need to have only one file per attorney in order to keep track of the attorney's overall caseload, which is an extremely important factor in the matching process. Attorneys who signed up originally for both kinds of cases are in the criminal rotation.

We will soon have a computerized matching system that allows attorneys to be in several rotations simultaneously. Until then, however, we suggest that attorneys wishing to get both kinds of cases select either criminal or dependency cases for their regular rotation and then use the form for requesting an appointment outside the normal rotation to request an occasional appointment of the other type.

In choosing a regular rotation, you may wish to know that the dependency rotation tends to move faster than the criminal one because it is smaller. However, almost all Fourth Appellate District dependency cases are "fast track," requiring an AOB in 30 days and having strict, sometimes relentless deadlines; that can put considerable pressure on attorneys and interfere with the rest of their practice. Dependency cases also require some very specialized knowledge that is hard to acquire in the confines of "fast track" deadlines, and so inexperienced dependency attorneys will not necessarily get more cases than they would if they were in the criminal rotation.■

ROMERO WINS!

On June 20th, the California Supreme Court decided People v. Superior Court (Romero) (June 20, 1996) ___ Cal.4th ___ [96 Daily Journal D.A.R. 7229], which recognizes a trial court has the discretion, under Penal Code section 1385, to strike a prior conviction for purposes of the Three Strikes law. This decision has a potential benefit for many Three Strikes defendants. ADI has sent a mailing to panel attorneys, and this newsletter article summarizes some of its main points.

Attorneys should review **all pending and final** Three Strikes appeals for a possible issue in light of Romero. No client should lose this potential benefit because of attorney oversight. At every stage until the remittitur issues, the appellate attorney can raise this issue with a reviewing court, and the mailing provides details for each stage.

The panel mailing emphasized several important points: (1) early and frequent communication with trial counsel and the client, to coordinate efforts and take account of all factors, (2) thorough analysis of the case to determine whether an arguable Romero issue exists, (3) a careful check for adverse consequences such as unauthorized sentences subject to increase and loss of plea bargain benefits, (4) identification of and early action on urgent cases where the client may be entitled to imminent release, and (5) consultation with ADI, which has a number of sample pleadings and a Romero "hotline," about any problems that might arise.

If a Romero issue **was** raised in the opening brief, counsel may wish to send a letter to the court to cite Romero for the record; in some cases, further analysis in light of Romero may be required. Even if the Romero issue was not raised in the opening brief, it can still be raised in the reviewing court by appellate counsel. Outlined in the mailing to panel attorneys are the procedures to be followed depending on the stage of the appeal. ADI can provide some sample motions.

Once the remittitur has been issued, a Romero issue may be raised in the trial court by way of a petition for writ of habeas corpus. Trial counsel will in most cases be in the best position to file the petition because it should be filed in the trial court and because appellate counsel is no longer under appointment.

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ADI is mailing letters to all trial counsel it can identify who have handled three-strike cases that were appealed and are now final. It alerts them to the need to review their cases for a possible Romero issue and to file a habeas petition if appropriate. The letter also informs trial counsel that ADI has prepared a sample Romero habeas petition for their use. Appellate counsel is encouraged to follow up with trial counsel and/or with the client, to ensure the client gets the benefit of Romero, and to contact ADI if problems arise.

ADI is also sending letters to Public Defenders and certain other criminal defense offices in the Fourth Appellate District. The letters note that **appellate counsel** will be responsible for raising the Romero issue in cases currently on direct appeal. In addition, they discuss the need for trial counsel to take the lead on cases at other stages.

As is evident, the factors to consider in raising a Romero issue can be complicated, and both attorneys and clients are well advised to review their cases thoroughly before filing any pleadings. We offer our help to attorneys who wish to consult us.■

New Statute Of Limitations For Filing Federal Habeas Corpus Petitions

In all appeals, counsel prepares a "close out" letter to the client after the opinion issues or the California Supreme Court has denied review. In this correspondence, the appellant is normally advised about the availability of federal habeas relief and what is required to file in federal court.

When advising appellants regarding the availability of federal habeas relief, counsel should be aware of a new federal bill which substantially restricts the filing of a federal petition for writ of habeas corpus.

On April 24, 1996, President Clinton signed into law the "Antiterrorism and Effective Death Penalty Act of 1996." (P.L. _____.) The law, which took effect the same day it was signed, is set forth in Title 28 of the United States Code. The Act contains provisions on habeas corpus reform, and special measures applicable to the review of death penalty judgments arising in states which have implemented qualifying mechanisms for state court review.

Of special interest to non-capital appellants, Title I of the Act, entitled "Habeas Corpus Reform," modifies existing habeas corpus procedures contained in Chapter 153 of the Judicial Code (Title 28). Perhaps of the greatest significance among these changes is the creation of a *one year statute of limitations* period for the filing of a federal petition for writ of habeas corpus by any person in custody pursuant to the judgment (non-capital) of a state court. (Section 2244, sub. (d)(1).)

The new law also enacts Chapter 154 to add sections 2261-2266 to the Judicial Code. This portion of the Act imposes a 180 day statute of limitations for federal habeas petitions in capital cases.

To successfully raise a federal constitutional issue under this new Act, the petitioner must show a clear violation of United States Supreme Court precedent by the lower court. In other words, the decision in the state court must be wrong regarding its interpretation of a United States Supreme Court opinion. In addition to this showing, the petitioner must clearly reflect that he/she has suffered some prejudice to the degree that it undermined a fair trial.

Almost immediately after President Clinton signed the Act, litigation regarding application of the new law commenced. For instance, on May 2, 1996, the United States District Court for the Northern District of California granted a temporary restraining order barring California prosecutors from applying the new habeas corpus reform laws in order to speed appeals in capital cases. This was a class action application for declaratory relief filed by death row inmates (Ashmus v. Calderon, CV-96-1533 TEH). The plaintiffs alleged the reform law should not be applied in California because the state lacks the necessary mechanism for appointing and paying competent attorneys to handle capital cases.

In another development, the United States Supreme Court granted expedited review to a Georgia death row inmate's challenge to the constitutionality of the new law. (Felker v. Turpin (1996) 134 L.Ed.2d 685; see also 96 Daily Journal D.A.R. 5151, 7759.) The high court quickly issued a decision on June 28, 1996, upholding key provisions in the new law. Chief Justice William H. Rehnquist stated the Suspension Clause is not violated by the requirement that inmates filing a second habeas petition first obtain permission from a federal appeals court panel, nor the provision that the decision of that panel cannot be appealed to the U.S. District Court. The Court did hold that in such a case, the act does not preclude the Supreme Court

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from entertaining an application for habeas corpus relief under its original jurisdiction.

The new "Antiterrorism" Act will be the subject of litigation for some time. Counsel should make sure and advise appellants regarding the new statute of limitations set forth in the Act when advising them about the availability of federal habeas relief.■

IN MEMORIAM:
ASSOCIATE JUSTICE HOWARD DABNEY

On April 16, 1996, Associate Justice Howard Dabney of Division Two of the Fourth Appellate District passed away. Justice Dabney was appointed by Governor Deukmejian to the position of Associate Justice in 1987, to replace Justice Marcus Kaufman when the latter was elevated to the California Supreme Court. Justice Dabney had previously served in the Riverside Superior Court between 1983 and 1987, and served in the Riverside Municipal Court from 1977 until his elevation to the Superior Court.

Any attorney who had the opportunity to argue a case before Justice Dabney at the Court of Appeal will recall his passion to do what he felt was right and his high expectations of all counsel. This commitment was reflected in all aspects of his juridical career, from rulings on motions presented to the appellate court, to his opinions, and even in his orders for compensation for appointed counsel: if one met the burden of persuasion, one could expect a result that was fair, if not favorable.

The hallmark of great justice is the ability to objectively view the record, consider legal arguments, and impartially render a fair opinion. Justice Dabney exhibited those characteristics, and by holding us to his high expectations, helped us improve our own abilities. He is definitely missed.■

NOTI CES:

DIVISION ONE:

Some panel attorneys may already be aware that Justice Richard Huffman of Division One has a son who is a deputy with the San Diego District Attorney's Office. Consequently, there may be some cases in which Justice Huffman's son represented the state in the lower court. In such cases, Division One would like to be made aware of this fact at the earliest possible time so that Justice Huffman can avoid assignment to a case where his son participated in the proceedings below.

When appellate counsel discovers this situation, he or she should send a letter to the Court of Appeal. The letter should merely note that Richard D. Huffman II was the deputy district attorney in the case. It should not state that Justice Huffman has a conflict, is disqualified, is required to recuse himself, or other such things implying the rules prohibit his participation. Under the law on the disqualification of appellate justices, recusal is left to Justice Huffman's discretion.■

DIVISION TWO:

All Rule 35(e) Requests In San Bernardino Cases Should Be Sent To The Downtown Courthouse Rather Than The Branch Courts

In appeals originating from San Bernardino County, some panel attorneys are sending rule 35(e) requests to the branch of the superior court where appellant was tried. Because the branch deputy clerks may not be well versed in appeals, they may OR MAY NOT do anything with the rule 35(e) letter, like forward it on to the Appeals section. In San Bernardino County, all rule 35(e) requests should therefore be addressed to the Appeals section:

San Bernardino Superior Court, Attention: Appeals, 401 N. Arrowhead Ave., San Bernardino, CA 92415.

REMINDER: Division Two has commented that some of the briefs filed do not include the trial judge's name on the cover. This information is required by rule 15(b)(4) of the Rules of Court, so please remember to include it on all briefs.■

DEPENDENCY MATTERS:

Augment Or Rule 35(e) Letter In Dependency Cases?

When the record is deficient in dependency and parental termination cases in Divisions One and Three, augment requests are required. (Cal. Rules of Court, rules 39.2 and 39.2A.) An augment request is required even when the request is for additional records which are a part of the normal record which would usually be obtained by a California Rules of Court, rule 35(e) letter.

Both divisions prefer the record requested be attached to the augment request, when possible. If you can get the records you need from the juvenile court file, have certified copies made and attach them to your augment request.

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In Division Two, rule 35(e) letters, even in fast track parental right termination cases, are the norm. (Cal. Rules of Court, rule 39.1A.) The Court of Appeal usually discovers a rule 35(e) letter was filed when the requesting party seeks an extension. The Court then checks with the appeals department of the superior court to determine if it is honoring the request. If the rule 35(e) request is being honored, the Court obtains a deadline for preparation of the record before ruling on the extension.

In summary, the provision defining the normal record in a juvenile dependency case is stated in rules 39(c)(1) and (2). California Rules of Court, rule 39.1A allows for the augmentation and correction of the record under rule 12 (augmentation through the appellate court) or rule 35(e), as the situation requires. Rules 39.2 and 39.2A, applicable to Orange, Imperial, and San Diego counties, allow for augmentation and correction of the record under rule 12 only.

Other Dependency Matters--Minor's Counsel

Recently, one of the justices from Division One commented it would be helpful to know what the minor's attorney did in reaching the position taken on appeal. Another justice has complained that occasionally minor's counsel takes a position which is different from that of trial counsel for the minor, but doesn't state why.

Many letter briefs filed on behalf of the minor do not state whether appellate counsel read the record, visited the minor, talked to the caretaker, social worker, or any of the trial attorneys, or reviewed the briefs or the law. While it may be assumed these tasks were performed, stating what was done in determining the minor's position lends credibility to the position taken.

Under the Guidelines For Minor's Counsel On Appeal produced by Appellate Defenders as requested and approved by the justices in Division One, the presumption is that appellate counsel should defer to trial counsel and argue for the position taken in juvenile court. The minor's appellate attorney may take a different position from that of the trial counsel when appellate counsel believes trial counsel was clearly wrong on the law and the assessment of the best interests of the child, or because circumstances have changed significantly.

As the Guidelines state, [in all cases] "the letter or brief should state what the minor's position is and why." Obviously, it is inappropriate to take a new position for the minor on appeal without giving the reasons for the change, and does not help the Court in making its decision.■

New Rule 15 On Brief Format, Effective July 1, 1996

The Judicial Council has changed rule 15, dealing with the format and typography of briefs, in some pretty significant ways. If you use the "Courier" font which looks like that produced by a traditional pica typewriter, there is only one applicable change in the new rule: margins on briefs printed in Courier must be 1.0 inch (instead of the current .5 inch) on the right (or side away from the binding for 2 sided copying). Left (or side next to the binding) margins remain at 1.25 inches, and the page limit for opening briefs in criminal cases remains at 75 pages. But for attorneys who use "proportionally spaced" fonts (like the Times Roman used in this newsletter), the rule is significantly changed.

Here are the main highlights of the new rule:

--proportionally spaced briefs must be in a minimum of **13 point** type. (This newsletter is printed in 12 point, which is too small.)

--if an attorney certifies their software does not have 13 point type (many older software and printer combinations do not offer it), briefs may be filed in 12 point type until December 31, 1997--but page limits are reduced 10%, to 67.5 pages for a criminal AOB--and the certification must be included in the brief.

--margins on proportionally spaced briefs must be 1.5 inches on each side.

--"typewritten" is redefined to include word-processed briefs printed in Courier font, 10 characters per inch, and the right side (or side opposite the binding for 2 sided copying) margin is increased to 1.0 inch.

The new rule gives attorneys a variety of choices, while trying to discourage the playing of "computer games" that cram a lot of text onto a page in violation of the spirit, if not the letter, of the rules. Whether you choose to use the traditional appearing Courier font so your briefs look like typewriting, or a more modern appearing font like the Times Roman in which this newsletter is printed, make sure your briefs comply with the new rule.■

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CLAIM NEWS AND REMINDERS: Postage and telephone expenses over $50, new issue codes, and more.

Postage and telephone expenses over $50: If a claim includes telephone or postage expenses over $50, please attach receipts or an explanation for the amount of the expense. This is not a "guideline" amount, it is just an amount Appellate Defenders uses as a trigger to inquire into the reasonableness of the amount claimed. Sometimes the explanation for a high postage claim is simply the number and length of briefs filed, and the length of the record which needed to be sent to the client; if that is the case, that is the only explanation needed. The main concern when there is a high postage expense is whether Federal Express or another express service was used, and if so, whether there was a case-related need for the use of express mail. **The use of Federal Express or another express mail service to meet regular deadlines is not considered a reasonable expense.** These are extraordinary postage expenses which are reimbursable only when the needs of the case--not convenience of counsel--require their use. For example, if the court ordered a supplemental brief and allowed only four days for filing, the use of Federal Express would be necessary for the needs of the case. By contrast, where counsel has delayed working on the brief until a few days before the due date and uses Federal Express to avoid default, the express service is for counsel's convenience and is not reimbursable. If a claim for telephone or postage expenses over $50 is not accompanied by an explanation, normally the paralegal processing the claim will call to ask about it. There is no presumption that greater claims will be cut to $50 in these categories--most are not cut. But we want to make sure there is an explanation.

Issue codes: The confirmation letter sent to attorneys by Appellate Defenders when the claim is forwarded to the Administrative Office of the Courts includes a box stating how the issues were classified by the reviewing attorney. This is represented by a letter code: "C" for complex, "A" for average, and "S" for simple. Recently you may have seen new codes for issue classification, such as "SA" or "AC." These are used when an issue falls somewhere between, or outside, the basic categories. An issue may be too lengthy to classify as "simple," but not complex enough to justify calling it "average." In such cases, the issue is classified as "simple average" and the reviewing attorney will assign a guidelines value falling somewhere between the 4 hours allotted for a simple issue and the 8 hour guideline for an average issue. The codes for these "hybrid" issue classifications are:

LS: less than simple
SA: simple average
AC: average complex
CP: complex plus

Don't attach normal receipts, or extra copies of claim or opinion: Previously, some courts required a duplicate copy of the claim, or a copy of the opinion, be submitted with the claim. Now that claims are processed by sending them to the Administrative Office of the Courts, such extra copies of the claim and opinion are not necessary, and Appellate Defenders will just put them in the recycling bin if they are attached. Similarly, there is no need to attach receipts for normal expenses such as photocopying, or for telephone or postage expenses under the $50 amount discussed above.

Paralegal/reviewing attorney roles in claim processing: The paralegal doing the initial claim processing may call when there is a problem with the claim or an explanation is needed. The paralegal's role is to correct things like arithmetic mistakes and to get more information when certain items are unclear. A quick informational response to the paralegal's call can save your claim several days in processing time. But the paralegals do not make the claim recommendation; if you have a question or concern that goes beyond the preparation of the form itself, please ask to talk to the attorney who reviewed the brief.■

Supplement to the Quarterly Newsletter of Appellate Defenders, Inc.
NUMBER 15 JULY 1996

HOT TOPICS IN DEPENDENCY, FREEDOM FROM CUSTODY, AND CONSERVATORSHIP CASES

by Carmela F. Simoncini, Staff Attorney

DEPENDENCY CASES

A. Jurisdictional Issues

Addressing only appealability and standing to appeal in the published portion of the decision, the Fourth Appellate District, Division Two, recently affirmed a dismissal of a dependency petition in In re Lauren P. (1996) 44 Cal.App.4th 763. Since the dismissal occurred after the adjudicatory hearing on the jurisdictional facts, I will discuss the case in this section.

As to the issue of appealability, the court of appeal concluded that a dismissal based upon insufficient evidence is a dismissal on the merits. Citing In re Sheila B. (1993) 19 Cal.App.4th 187, the Court noted an order of dismissal constitutes a judgment for all purposes which is generally appealable. Additionally, the Court pointed out such a dismissal is with prejudice and a final judgment for res judicata purposes. However, the Court cautioned that including the language "without prejudice" in the order of dismissal did not necessarily affect appealability, because the juvenile court's "characterization of its own order...is not controlling." (Id., 44 Cal.App.4th at p. 768.)

On the issue of standing, the court of appeal held the mother had standing to appeal despite the fact it could be argued the respondent agency was the only party aggrieved by the dismissal. The court reasoned the public agency is not the only party whose interest is affected by the dismissal of a dependency petition. "Any parent who takes the position that dependency jurisdiction is warranted is aggrieved by the dismissal of the petition. Just as a parent must be permitted to present evidence and to argue in opposition to dismissal below, so such a parent must be allowed to appeal from a dismissal on the merits." (In re Lauren P., supra, 44 Cal.App.4th at p. 770.)

Furthermore, the Court opined that a party who would be bound by res judicata is sufficiently aggrieved to assert appellate rights: "Coralee must be allowed to appeal, lest she '"suffer the inequity of being bound by the decision without any right of review."' [Citations omitted.]" (Id., at p. 771.) The unpublished portion of the opinion, dealing with the merits of the argument there was insufficient evidence to support the dismissal, affirmed the dismissal.

In another case involving a termination of jurisdiction or dismissal of a petition, the California Supreme Court recently affirmed the court of appeal's holding that the juvenile court's termination order may include exit orders conditioning visitation on a parent's participation in a counseling program. In In re Chantal S. (1996) 13 Cal.4th 196, the California Supreme Court granted review to resolve the conflict created when Division Two of the Fourth Appellate District issued its opinion in this case which disagreed with the earlier opinion in In re Katherine M. (1994) 27 Cal.App.4th 91.

After discussing the distinctions between juvenile and family courts, the Supreme Court concluded that Section 362.4 of the Welfare and Institutions Code gave authority to the Juvenile Court to require counseling as a condition of custody or visitation. The Supreme Court agreed with the court of appeal's view, that section 362.4, by authorizing the court to make custody and visitation orders, implicitly authorizes the court to make collateral orders, such as counseling orders, that are reasonably related to the custody and visitation orders. It reasoned that the juvenile court's determination that continuation of dependency was unnecessary for Chantal's protection was in part premised on the existence of the court's custody and visitation
order; that the conditions appended to the exercise of visitation were the things that rendered jurisdiction unnecessary.

The court also dismissed the claim that the open-ended condition violated the father's due process rights. It held that Family Code section 3190 does not govern juvenile court orders terminating dependency. It distinguished prior cases which disapproved of open-ended counseling orders issued by family courts in custody and visitation disputes, because in each of the family law cases, there was "no precedent" for an order requiring a parent to undergo counseling for as long as the therapist deemed necessary. In dependency cases,

"carefully crafted due process protections" insure that parental rights are protected along with the physical and mental health of children. The court also noted that Family Court procedures afforded adequate protection by ensuring the ability to modify prior orders upon an adequate showing of changed circumstances, insuring due process.

B. Dispositional Issues

In In re Luke L. (1996) 44 Cal.App.4th 670, the Third District Court of Appeal reversed disposition orders by which one minor was placed with cousins in Illinois and two siblings were placed with an aunt and uncle in Southern California. While acknowledging the preference for placement with relatives by virtue of Section 361.3 of the Welfare and Institutions Code, the court held the cousin was not a relative listed in the statute as one entitled to preference.

Respecting the placement of the two siblings with an aunt and uncle in Southern California, the court concluded the placement would thwart reunification efforts between the mother and her children. The court stated, in light of the primacy accorded reunification in the dependency system, it was incumbent upon the juvenile court to ensure a parent has a reasonable opportunity to pursue reunification, including giving full consideration to the proximity of appellant to her children so as to facilitate her visitation. It observed that the Department's plan to provide funds for bus, lodging and meals to appellant for bimonthly visits was inadequate and unrealistic.

The court also considered the question of the propriety of the order approving an extended visit of the minor Christina with the cousin in Illinois pending ICPC approval of the placement. It noted the ICPC does not permit contingent or conditional placement orders and thus held the juvenile court erred in not ordering Christina returned to Butte County at the conclusion of the visit.

The following is not so much an appellate resolution of a dispositional issue as an appellate resolution **not to review** for dispositional issues: Another court has jumped on the Sade C. bandwagon. In In re Benjamin E. (1996) 44 Cal.App.4th 71, the First Appellate District has declined to independently review the record for issues in a dependency appeal following a dispositional order. The court also pointed out the purpose of section 300 dependent child proceedings have as their goal reunification of the family and do not undertake to terminate parental status. Thus, the proceedings do not give rise to a right to counsel on due process grounds.

C. Review Hearing and Permanent Plan Issues

Regarding the type of evidence admissible and competent to satisfy the Department's burden of proof at a selection and implementation hearing, Division Three of the Fourth District Court of Appeal recently held that the social worker's report was properly admitted as competent evidence. In In re Keyonie R. (1996) 42 Cal.App.4th 1569, the court held Welfare and Institutions Code section 281 creates an implicit exception to the hearsay rule for social service reports, which were competent to support jurisdictional findings, and, in later proceedings, to support the termination of the parent's rights. The court interpreted the Supreme Court's decision in In re Malinda S. (1990) 51 Cal.3d 368, to extend the implicit exception to the hearsay rule to all later hearings. In so holding, it rejected the appellant's argument that Malinda S., which expressly limits itself to jurisdictional hearings, was so limited.

Note that Malinda S. interpreted the provisions of Welfare and Institutions Code section 355, in connection with Rule 1450, and did not specifically hold that section 281 creates an exception to the hearsay rule for all purposes. Section 281 does require the preparation of the report for filing with the court, and does require the court to consider the recommendations in the report. However, there is nothing in the statute that makes the social worker's post-jurisdictional report competent evidence to satisfy the burden of proof.

Oddly, parents are not permitted to introduce hearsay proof of compliance with court-ordered treatment programs to rebut a hearsay social worker's report. It appears this decision does little to insure the "level playing field" for which the various procedural requirements were supposedly designed, a la Cynthia D.

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In In re Hashem H. (1996) __ Cal.App.4th__ [96 Daily Journal D.A.R. 6429], Division Four of the Second District Court of Appeal reversed an order establishing guardianship as a permanent plan where the court summarily and erroneously denied a hearing on the mother's petition under Welfare and Institutions Code section 388. Hashem had been declared a dependent pursuant to an amended petition under section 300, subdivisions (b) and (c), based upon an allegation the minor had special and unique problems with which the parents had limited ability to deal. The original petition alleged the mother demonstrated emotional and mental problems, and that the minor's home was filthy and unsanitary.

The mother was unable to attend counseling on a regular basis during the first year of the reunification plan, and visitation was sporadic during parts of the plan. During this time, Hashem had been ordered to reside with his father, but his father subsequently placed the child with family friends, who were accorded de facto parent status in the later stages of proceedings, and expressed the desire to be appointed as guardians. However, following the twelve month review, reports revealed the mother had improved: she had regularly attended counseling and therapy, improved her housekeeping habits, and visited regularly such that a 60 day visit was recommended by the Department in May, 1994. In January, 1995, the mother filed the 388 petition alleging changed circumstances. By this time, in addition to the other changed circumstances, mother was working steadily and the Department opined she was ready to provide for the child on a full time basis. The court denied the petition without a hearing. She subsequently filed another 388 petition alleging in greater detail the changed circumstances, her progress, and her ability to assume custody of Hashem. This was also denied without a hearing.

The reviewing court held the mother had met her burden of proof in the initial 388 petition because "A fair reading of the petition indicates that appellant's mental and emotional problems which led to the removal of Hashem from her home had been successfully resolved through therapy. Appellant's petition made out a prima facie case of changed circumstances." (Id., [96 Daily Journal D.A.R. at p. 6431].) The court of Appeal discussed the trial court's erroneous reliance on In re Baby Boy L. (1994) 24 Cal.App.4th 596, in which the parent offered "a bare scintilla of proof that she was beginning to rehabilitate" at "the eleventh hour and the fifty-ninth minute." (Ibid.) It concluded the distinctions between this case and Baby Boy L. were "obvious." (Ibid.)

Further, the court determined that the fact the trial court agreed to consider the material presented in the 388 petition in connection with the 366.26 hearing was not an adequate substitute for a hearing on the section 388 petition.

In Blanca P. v. Superior Court (1996) __ Cal.App.4th ___ [96 Daily Journal D.A.R. 6356], Division Three of the Fourth District Court of Appeal has granted a writ of mandate challenging an order by which a dependency matter was referred for a hearing pursuant to Welfare and Institutions Code section 366.26. In that case, the original petition alleged excessive corporal punishment by the mother, based upon an incident in which she struck her son Juan in the face hard enough to leave fingermarks. While in foster care, several months after being removed from parental custody, the foster mother determined 3-year-old Daisy had a vaginal opening which was larger than normal. She asked Daisy several times if anyone had touched her private parts, and after several different responses, Daisy finally indicated that her father had touched her. A subsequent petition alleging molestation was filed.

The court concluded, based upon its finding by a preponderance of evidence, the allegations had been established and the children should not be returned.

The court ordered an Evidence Code section 730 examination of the father by a psychologist, who subsequently reported findings that did not support a diagnosis of pedophilia or incest and expressed disbelief that the father had molested any of his children.

Nevertheless, in the 18-month hearing report, the Department noted the parents had not totally accepted the molestation allegation as fact, had not fully internalized proper parenting skills, and, since the mother was not fully convinced about Daisy's molest she was unable to protect the minor. Regarding the father, the social worker referred to the father's continuous denial, and opined he continued to present a risk to any child since he failed to assume responsibility for the molest and did not demonstrate remorse for the inappropriate behavior. (Blanca P. v. Superior Court, supra, [96 Daily Journal D.A.R. at p. 6357-6358].)

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The court of appeal reviewed the adequacy of the evidence of detriment found at the 18-month review hearing, where the parents had complied with the service plan, but for some reason have not convinced the social worker it would be safe to return the child to the parent.

The court concluded that psychological evaluations can serve as credible evidence to sustain a detriment finding, providing they are reasonably specific and objective, and not subjective impressions. (Id., [96 Daily Journal D.A.R. 6359-6360].) In the present case, the court noted there was no clinical evaluation, no testing to indicate mental illness, just the opinion of the mother's social worker that she had not "internalized" what she had learned in parenting classes. As the court stated [96 Daily Journal D.A.R. at p. 6360]:

> "Let us be plain. The idea that, despite enduring countless hours of therapy and counseling (much of it predicated on the possibly erroneous assumption that her husband is a child molester), a parent who has faithfully attended required counseling and therapy sessions must still relinquish her child because she has not quite 'internalized' what she has been exposed to has an offensive, Orwellian odor. [Footnote omitted.] The failure to 'internalize' general parenting skills is simply too vague to constitute substantial, credible evidence of detriment. To hold otherwise would come perilously close to allowing legal decisions of monumental importance to the persons involved to be based on nebulous ideas more appropriate to an afternoon talk show than a court of law. ([Citation omitted].)

The court went on to analyze the "confession dilemma" confronting parents whose child[ren] has been alleged to have been molested based upon a false allegation. It noted the very fact the parents continue to deny the allegation now serves as evidence supporting the finding of detriment. Recognizing that innocent children need protection against molestation, it noted it could not be denied it is an outrageous injustice to use the fact of the denial as proof of the parents' guilt. By the same token, it viewed as unjust use of the fact the parent has denied molesting his children as a reason to terminate reunification services.

However, there was another obstacle in this case, in light of the fact no appeal had been taken from the prior determination of the subsequent petition. To address this collateral estoppel problem, the court noted, historically, the mother was entitled to have the circumstances of the jurisdictional finding viewed in light of subsequent events, citing In re Carmaleta B. (1978) 21 Cal.3d 482, In re Nathaniel P. (1989) 211 Cal.App.3d 660, and Cynthia D. v. Superior Court (1993) 5 Cal.4th 242.) It concluded that considered together, the three cases establish that collateral estoppel effect should not be given, at a 12 or 18-month review, to a prior finding of child molestation made a jurisdictional hearing when the accused parents continue to deny that any molestation ever occurred and there is new evidence supporting their denial.

In In re Ronell A. (1996) 44 Cal.App.4th 1352, Division Three of the Second District Court of Appeal has affirmed termination of parental rights, holding it was not an abuse of discretion to conclude reasonable reunification services were provided to the incarcerated mother. The court noted that because the court did not make a finding of detriment to the minor under Welfare and Institutions Code, section 361.5, subdivision (e), reunification services were required for the incarcerated mother, and that the dispositional orders **did** provide reunification services for the mother.

As to the adequacy of the services, the court held it was not feasible to arrange telephone calls and letters because the child was not even two years old when removed, and the mother had specifically requested she not be contacted in prison. The reviewing court noted the mother's own request, made by her to avoid being labelled a child abuser by other inmates, stymied the department's provision of services. It also noted that services were available in the prison, and the fact the mother was only able to participate in programs in the institution towards the end of the sentence was not the fault of the department. It thus concluded the department did make reasonable efforts to ensure mother's meaningful participation in the reunification plan.

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In terms of the reasonableness of the visitation component of the plan, the court noted that prior decisions holding visitation was unreasonable involved cases where the minor was placed within a relatively short distance from the place of incarceration and the mother had substantially complied with the service plan. Here, however, the prison was a full day's drive, and the mother had canceled visits and otherwise failed to comply with the service plan. Most significantly, the mother's incarceration was directly related to abuse she had committed on the dependent child, further distinguishing her case from others. (In re Ronell A., supra, 44 Cal.App.4th at p. 1364.)

As to the father's appeal in that case, the court of appeal rejected the argument that the juvenile court had a sua sponte duty to inquire into whether a guardian ad litem should be appointed for him given his mental incapacity, within the meaning of Code of Civil Procedure section 372 (requiring appointment of guardian ad litem for an incompetent person). It found the father understood the nature of the proceedings against him and was able to participate meaningfully and cooperate with his counsel in representing his interests. (Id., 44 Cal.App.4th 1352.)

Division Three of the Fourth Appellate District has issued another decision dismissing a petition seeking extraordinary relief on the grounds the parent who is named as petitioner did not personally sign the petition, and there was no evidence she consented to it. In Suzanne J. v. Superior Court (1996) 43 Cal.App.4th 1165, the court relied upon its own prior decision in the case of Guillermo G. v. Superior Court (1995) 33 Cal.App.4th 1168, for the proposition that the attorney's declaration is insufficient to show the mother's actual consent to the taking of the petition. However, the opinion indicates the attorney had submitted a declaration under penalty of perjury explaining she had met with the mother and the mother had instructed counsel to file the petition.

Without any citation of authority, the court concluded its action was warranted because, "The dependency scheme is designed to aid those parents who seriously want to maintain a healthy relationship with their children. Requiring parents to make the minimal effort needed to meet with their court-appointed attorney to sign a petition, a verification, or a declaration, either at the time the petition is filed or within a short period of time thereafter, is a rather insignificant burden in the scheme of things."

The court read this unwritten purpose into the juvenile court law to enforce an unwritten requirement of personal consent. Nowhere in the statutory scheme is a parent required to personally sign the notice of intent to file a writ petition, or the petition itself. While petitions seeking extraordinary relief must be verified, verifications by counsel are frequently accepted -- except when fundamental custody rights are implicated, it seems.

In In re Sean S. (1996) _ Cal.App.4th _ [96 Daily Journal D.A.R. 6689], Division Three of the Fourth Appellate District dismissed an appeal because the parent's trial attorney signed the notice of appeal, and "there is no evidence Simone actually consented to its filing." (Id., [96 Daily Journal D.A.R. at 6689].) Relying on recent published appellate opinions (In re Alma B. (1994) 21 Cal.App.4th 1037, and Guillermo G. v. Superior Court (1995) 33 Cal.App.4th 1168), which reflect a trend to rewrite the Rules of Court and statutes which expressly empower an attorney to file a notice of appeal on behalf of a client, the decision focuses on what emerges as a new presumption of disinterest by the parent where the parent fails to appear at the selection and implementation hearing and does not personally sign the notice of appeal. Indeed, the opinion goes so far as to presume parental disinterest in children by virtue of the failure to appear.

I hope counsel will continue to oppose such efforts, because it establishes a new suspect classification of appellants for parents involved in dependency proceedings. It has long been the rule that a notice of appeal may be signed by any person on behalf of a party. (See Seeley v. Seymour (1987) 190 Cal.App.3d 844, 853.) A court is required to liberally construe the notice of appeal in favor of its effectiveness **in the absence of clear and convincing evidence that authority was lacking**. The new rule which pertains to dependency appeals only is in conflict with the great weight of authority favoring determination of appeals on their merits and the presumption favoring the sufficiency of the notice of appeal.

(Continued on Page 12)

Res judicata surfaces frequently as a basis for the reviewing courts decisions that issues relating to the appropriateness of reunification plans cannot be raised following later hearings. For this reason, I would like to share a recent family law case, Warga v. Cooper (1996) 44 Cal.App.4th 371, because it has implications in juvenile court, where submissions on reports and stipulations (particularly in Orange County) are quite common. In Warga, the parents of a child stipulated to a child support order in an action for enforcement of a previous judgment including a support order. Thereafter, the father moved for an order to make the District Attorney stop collecting the arrearages, on the grounds the mother had concealed the child. At the hearing, the trial court set aside the stipulated judgment, finding the mother was estopped to collect arrearages due to the concealment.

On appeal, the Third Appellate District held "the doctrine of res judicata precludes `parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action.'" [Citation omitted.] It went on to quote authorities holding that a stipulated judgment is given the same res judicata effect as a contested trial.

If trial counsel submits on reports and recommendations which include certain reunification plan proposals, and do not argue or attempt to modify the proposal, and it is subsequently adopted, a later hearing may find the attorney running into the res judicata wall when arguing the original plan was unreasonable. However, this is not the end of the world. Res judicata principles do **not** preclude you from arguing at subsequent review hearings that a parent's situation --or even the minor's situation-- is different than at the original disposition order and that the appropriateness of the plan should be re-evaluated.

In In re Tabitha G. (1996) __ Cal.App.4th __ [96 Daily Journal D.A.R. 6051], Division One of the Fourth District Court of Appeal has aligned itself with those courts holding that Welfare and Institutions Code section 366.26, subdivision (c)(4) does not create a separate exception to the adoptability finding, and ruled that a bonding study arranged by mother's counsel was discoverable despite the fact it was not court-ordered.

Of note is the fact the court did not address the semantic issue presented in the wording of subdivision (c)(4) which rather plainly presents a disjunctive set of options for the juvenile court: "If the court finds that adoption of the minor or termination of parental rights is not in the interests of the minor, **or** that one of the conditions in subparagraph (A), (B), (C) or (D) of paragraph (1) or in paragraph (2) applies, the court shall either order that the present caretakers or other appropriate persons shall become legal guardians of the minor or order that the minor remain in long term foster care." [Emphasis added.] I hope that a petition for review is contemplated. I can think of no good reason to depart from the rule of statutory construction, applicable in every other context, that the plain meaning of the statute governs.

Respecting the discoverability of the bonding study arranged by mother's counsel, the court of appeal assumed that since the trial court had not ordered it, there was some sinister aspect to it. It described as taking "undue advantage" the efforts of the mother's attorney in obtaining the bonding study in a manner which was less than aboveboard. (Id., [96 Daily Journal D.A.R. 6053].)

I think it depends on whose ox is being gored. There is nothing in the codes which precludes a party from obtaining an evaluation or expert's opinion in the absence of a court order. In civil cases, simultaneous exchange of expert witness lists is only required as to those experts the attorney intends to call at trial. The same is true of discovery in criminal cases: both defense and prosecution are only required to provide discovery regarding witnesses they intend to call at trial. Discovery is not required vis-a-vis witnesses who will not be called to testify at trial.

Interestingly, the court of appeal went to great lengths to establish there was no psychotherapist-patient privilege attached to the report concerning the parent. It concluded the mother was not a "patient" in connection with the bonding study because she was not seeking a diagnosis or treatment of a mental or emotional condition nor was any scientific research involved. This finding cuts both ways: it similarly established there was no privilege guaranteeing the minor a right to the information.

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My fear is that this opinion will have a chilling effect on parents' attorneys who are trying to prepare for trial. The department has a ready list of experts anxious to please, who will prepare reports to be used against parents in dependency proceedings. Parents and attorneys should be afforded the right to prepare their cases as they deem appropriate.

There is nothing inherently sinister in having an expert observe a court-ordered visitation and reporting on the existence, vel non, of a parent-child bond observed during the visit. If the visits are not ordered to be supervised, and if the expert is not a risk of harm to the child, there is no rational basis for a minor to object to the observation of the visit by one qualified to comment on the nature of the relationship. Protests are regularly ignored when a foster parent has proffered a bonding study performed to be used against a parent. No one challenges the county's ability to conduct unannounced home visits to investigate the parents' compliance with court orders, which evidence will later be introduced against the parents in trial. The parent should be afforded no less in terms of the ability to prepare for trial where fundamental familial interests are at stake.

FREEDOM FROM CUSTODY CASES

Following proceedings to terminate a parent's custody and control pursuant to Family Code section 7820, et seq., an indigent parent appealing from such a judgment is entitled to appointment of counsel. In In re Chanel S. (1996) __ Cal.App.4th __ [96 Daily Journal D.A.R. 6171], the parents were divorced in 1993. The father subsequently remarried and stepparent adoption proceedings ensued. The trial court terminated the mother's parental rights based upon mental disability and abandonment. The mother appealed and requested appointment of counsel.

The Fourth District Court of Appeal, Division Three, requested briefing on the issue of the mother's right to appointed counsel because two appellate decisions had reached contrary conclusions on the issue. In the interim, the California Supreme Court had decided In re Bryce C. (1995) 12 Cal.4th 226, on which the court relied in concluding the indigent appellant parent in a proceeding under section 7800 et seq., is entitled to appointment of counsel.

On the merits of the issue presented regarding the failure to comply with section 7851's requirement that an investigator interview the children, the court noted the investigator's failure to do so was premised on the age of the children. It held there was no failure to prepare an investigation report as required by Family Code section 7850 because two separate detailed reports were prepared and submitted, and that the investigator's excuse from interviewing the children complied with section 7851. It therefore affirmed the termination of rights.

INDIAN CHILD WELFARE CASES

A case which has been reviewed at previous stages has seen its final chapter with an interpretation of the ICWA which follows a recent trend. In In re Alexandria Y. (1996) __ Cal.App.4th _ [96 Daily Journal D.A.R. 6372] the Fourth District Court of Appeal, Division Three, affirmed a termination of parental rights despite the court's refusal to transfer jurisdiction to the Seminole Nation of Oklahoma and refusal to follow the ICWA placement preferences.

Prior to the selection and implementation hearing, the Seminole Nation had declined transfer but requested that the trial court follow the ICWA placement preferences. In proceedings which were the subject of a prior appeal, the trial court's conclusion the ICWA was inapplicable despite the fact the tribe determined Alexandria was an Indian child, was reversed, but on non-ICWA grounds. When proceedings resumed, the mother, who was a registered member of the tribe, petitioned to transfer jurisdiction to the tribal court. The Seminole Nation orally joined the request, and the mother joined in the Tribe's motion to enforce the ICWA placement preferences. By this time, Alexandria had been in a foster home since she was 15 months old, and a bonding study noted that removal from that home would be detrimental.

The trial court concluded the petition to transfer jurisdiction was untimely, and that transfer would result in an inconvenient forum and be contrary to Alexandria's best interests. Subsequently, the mother relinquished her parental rights, and, after a selection and implementation hearing was set, the Seminole Nation filed a motion requesting a change of placement based upon the ICWA preferences. This motion was denied, the selection and implementation hearing proceeded, and an appeal was filed by the Seminole Nation.

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The court of appeal affirmed the termination of rights and the trial court's declination to follow the ICWA placement preferences based upon its interpretation of the "existing Indian family doctrine." It noted that cases following the "existing Indian family doctrine" refuse to apply the ICWA to situations where an Indian child is not being removed from an existing Indian family, because in that situation the underlying policies of the ICWA are not furthered.

The court concluded the ICWA was not applicable under any version of the doctrine because neither the child nor her mother had any relationship with the Seminole Nation, much less a significant one. The court noted the mother was raised by a non-Indian family, her extended family is non-Indian, and there was no evidence presented to suggest the mother had ever been exposed to her Indian heritage as a child or pursued such an interest as an adult. (There was no discussion of whether this circumstance was the consequence of some previous failure to follow the ICWA.) It thus held the court's refusal to transfer jurisdiction and to apply the ICWA's placement preferences were proper.

GUARDIANSHIPS AND CONSERVATORSHIPS

The court of appeal approved the denial of compensation in a case in which a probate court refused to approve payment of fees for legal services for a conservator, where the legal services were rendered by the husband of the conservatee. In Conservatorship of Bryant (1996) 45 Cal.App.4th 117, Division One of the Fourth District held the language and history of Probate Code section 2645 made it clear the Legislature intended that two separate and distinct criteria be met before compensation may be awarded: (1) a right to fees, and (2) that the representation by a person related to the conservatee, as opposed to representation otherwise available, benefitted the conservatorship estate. (Id., 45 Cal.App.4th at p. 123.)

In reaching this conclusion, the majority of the reviewing court looked to the intent underlying the amendment to the statute in question, which was passed as part of an effort to combat "financial abuse" of elderly and dependent persons.

KUDOS AND ANECDOTES

I had the pleasure of co-writing an amicus curiae brief on behalf of the parents for the California Public Defenders Association in In re Sade C. along with Brad Bristow of C.C.A.P., and recently attended oral argument. The justices questioned whether federal constitutional guarantees relating to the right to counsel should be extended to non-criminal defendants. Justice Kennard repeated several times her view that Anders applies only to criminal defendants because it arises from the Sixth Amendment, and since Wende was based upon Anders, she asked why Wende review should be extended to dependency cases. Justice Baxter also asked some tough questions, indicating his view of the merits of extending Wende to dependency cases.

Ironically, there was no opposition to the appellant's position in Sade C., yet the overall tone of the two most vocal justices at oral argument seemed to disfavor it. The remainder of the court was rather quiet during the hearing, so it is difficult to peg the possible outcome. I personally think all counsel should think twice before filing a Wende brief in any dependency, guardianship, or conservatorship appeal.

HOT RESOURCES

1) Haralambie, "The Child's Attorney, A Guide to Representing Children in Custody, Adoption, and Protection Cases" (A.B.A. Sect. Fam. Law Pub. 1993). This work includes articles by various experts and authors to flush out some of the special problems and requirements inherent in representing a child, and recommends approaches to practitioners who represent children.

Copies may be obtained by contacting the office of Publications Planning & Marketing, American Bar Association, 750 N. Lake Shore Drive, Chicago, Illinois, 60611.

2) Jones, "The Indian Child Welfare Act Handbook, A Legal Guide to the Custody and Adoption of Native America Children," (A.B.A. Sect. Fam. Law. Pub. 1995).

This volume includes text as well as forms and checklists. In addition, the appendix includes a list of Tribal Entities recognized and eligible to receive services from the B.I.A., Tribal addresses of Federally Recognized Tribes, and a listing of tribal courts and/or ICWA contacts. For copies, see the address listed above.

3) DeHart, "International Child Abductions, A Guide to Applying the Hague Convention, with Forms" (A.B.A. Sect. Fam. Law Pub. 1993). The volume contains the text of the Convention, legislative history and resolutions, forms, and addresses of corresponding agencies in foreign countries. For copies, see the address listed in #1, above.

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4) Guralnick, "Interstate Child Custody Litigation - Tools, Techniques, and Strategies" (A.B.A. Sect. Fam. Law Pub. 1993). This volume, published also by the A.B.A., deals mostly with UCCJA issues and strategies. For copies, see the address under #1, above.

5) Alexander, "Big Mother: The State's Use of Mental Health Experts in Dependency Cases" (24 Pac.L.J. 1465, 1993). This article was cited at length in the recent decision of Blanca P. v. Superior Court, discussed ante.

THAT'S ALL FOR NOW, folks. Remember, stand firm, walk tall, keep a stiff upper lip, as well as your Civil Tongues.■

KUDOS

We know that excellent work often goes unrecognized because it is done in unsuccessful cases. But we think it is important to recognize successful efforts so we can all be aware of issues that may benefit our clients. Kudos are listed alphabetically by attorney name. ["A" indicates a panel assisted case, "I" a panel independent case, and "ADI" a staff case.]

Fay Arfa, P. v. Morales, #E015296, Abstract of judgment amended where sentencing court imposed middle term, but abstract incorrectly stated court had imposed upper term. (A)

Neil Auwarter, 1) P. v. Chagolla, #E017325, Trial court granted defendant's motion for 14 days presentence custody credits. Court had erroneously denied the credits on the ground PC §2900.5 and §4019 were inapplicable in "strikes" cases. 2) P. v. Feather, #D023885, court of appeal struck condition of probation requiring defendant to register as a narcotics offender. Defendant's offense of possessing anabolic steroids for sale is not subject to the registration requirement of H&S §11590, but trial court had tried to circumvent this fact by making registration a condition of probation. 3) P. v. Leon, #D023599, court of appeal struck 6-month armed with a firearm (§12022(c)) enhancement attached to consecutive subordinate term for methamphetamine possession as violative of §1170.1(a)'s proscription of subordinate term enhancements for non-violent felonies. (ADI)

J. Peter Axelrod, P. v. Claybon, #D023118, True findings on two counts attempted robbery, one count assault with a deadly weapon, and accompanying enhancements for personal use of a firearm and GBI reversed for insufficiency of the evidence. Court ordered that, on remand, juvenile court should reconsider CYA commitment in view of comments at sentencing indicating the reversed counts weighed heavily in decision that a less restrictive placement would be inappropriate. (I)

Elizabeth Barranco, P. v. Banks, , #D023252, Theft conviction reversed because it was a lesser included offense of the robbery conviction. (I)

John Bishop, P. v Hunter, #E015373, Conviction for conspiracy to commit willful, deliberate and premeditated murder with malice aforethought reversed because jury instructions failed to inform the jury of the definition of deliberate and premeditated, and that appellant must have formed an intent to kill to be guilty of the crime. (I)

(Continued on Page 16)

Christopher Blake/Anthony Dain, P. v. Bell, #D019480, Published reversal. Appellant was convicted of eight counts of rent skimming. Statute of limitations barred three counts. Remaining five convictions were deemed one conviction by operation of law. (I)

Christopher Blake, P. v. Perez-Silva, #D024067, GBI enhancement ordered stayed and erroneous imposition of bodily injury enhancement as to another count deleted. (I)

Susan Bookout, P. v. Duclos, #G015770, One-year sentence for assault with firearm stayed because trial court violated §654 by sentencing consecutively for this crime and false imprisonment when both crimes were part of single transaction. (A)

J. Thomas Bowden/Martin Nebrida Buchanan, P. v. Bell, #D019480, Published reversal. Statute of limitations barred five convictions involving rent skimming and remaining five convictions were deemed one conviction by operation of law. (Rent skimming requires that in a two-year period the defendant must have knowingly and willfully as to five parcels of residential property engaged in rent skimming. Rent skimming is using revenue from the rental of a parcel of residential real estate at any time during the first year after acquiring that property without first applying the revenue to the payments due on all mortgages and deeds of trust encumbering that property.) Trial court prejudicially erred in instructing on the statute of limitations regarding counts 13 to 21 involving forgery and filing a false instrument convictions. (Counts 8 **and** 17 were dismissed at trial court level.) Resentencing ordered. (I)

Robert Boyce, P. v. Gales, #D022006, Court erred in enhancing defendant's sentence for a serious felony conviction which occurred after the current offense. People conceded argument. Case reversed to allow defendant to withdraw guilty plea. (I)

Philip Bronson, P. v. Herrera, #G017359, In People's appeal from two strikes case, the Court of Appeal upheld trial court's reduction of second degree burglary and petty theft with a prior to misdemeanors under PC §17, subd. (b). (I)

Martin Nebrida Buchanan, P. v. Askew, #D022630, "Strikes" sentence modified because strike admission was invalid. (I)

Robert Castle, P. v. Einsmann, #G016602, Judgment reversed and remanded to the lower court with directions to hold a hearing on defendant's request for appointment of new counsel. The trial court's failure to rule on defendant's request for new counsel at all was error and not harmless under the circumstances of the case. (A)

Kathy Chavez, P. v. Belanger, #G017338, People's appeal. Superior court properly exercised its discretion in declaring a "wobbler" offense a misdemeanor although the offense was charged under the three strikes law. The court also found that the trial judge gave an "indicated sentence" at a pretrial conference rather than engaged in plea bargaining by stating the offense would be reduced to a misdemeanor. (I)

Ward Clay, P. v. Bolster, #D023425, Receiving stolen property conviction reversed on Jaramillo grounds. (I)

Michael Dashjian, P. v. Curtis, #E015885, Client's conviction for fraudulently obtaining food stamps (W&I §10980 (c)(2)) and perjury (PC §118) reversed for failure to prosecute within the three-year statutory period. Remand is barred as the accusatory pleading cannot be amended to show it was timely filed. (I)

Linn Davis, P. v. Watkins, #E016356, Remand for resentencing at which time trial court directed to exercise discretion notwithstanding that aggravating factors outnumber mitigating. (A)

Carl Fabian, 1) P. v. Mendoza, #D021846, Conviction for possessing a controlled substance ordered stricken as opposed to stayed because it is a necessarily lesser included offense
of conviction for possessing cocaine base for sale. (A) 2) P. v. Reyes, #D021273, Judgment reversed because court refused to grant defendant's request for continuance after it had granted his motion for self-representation. Reyes had made several Marsden motions unsuccessfully and finally was successful with a Faretta request following the grant of a mistrial which resulted when his previous trial attorney failed to join in his waiver of jury. Although the court granted his renewed request, it erred in not allowing him "reasonable" continuance to prepare his defense. (I)

Patrick Morgan Ford, P. v. Garg, #D023195, Trial court erred in ordering defendant to pay $10,000 to each of the two victims for pre-January 1, 1990 losses. (I)

Cliff Gardner, P. v. Ross, #D022692, Three strikes sentence reversed because trial court erroneously believed it did not have the discretion to reduce charge to misdemeanor. (I)

Dorothy Hampton, In re Elise W., #D024784, The Court found there was substantial evidence to support jurisdiction, but reversed the disposition order which limited mother's access and ability to care for her newborn daughter. In this case, the trial court placed the newborn minor with father and excluded mother from the family home. The Court reversed the removal order and ordered a new dispositional hearing because there were reasonable means to protect the minor without excluding mother from the home. (I)

(Continued on Page 17)

Marianne Harguindeguy, P. v. Jones, #D022531, Two counts of child molestation reversed on the ground the trial court erred in admitting evidence of remote and dissimilar acts of child molestation in violation of Evidence Code §1101, subd. (a). (A)

Julie Sullwold Hernandez, P. v. Dunn, #D021854, Judgment reversed because trial court erred by admitting defendant's confession which was obtained in violation of his constitutional right to remain silent. (A)

Handy Horiye, P. v. Gonzalez, #D021856, Case remanded for resentencing to allow trial court to exercise discretion as to whether offense should be reduced to a misdemeanor. (I)

Debra Huston, P. v. Pierre, #D021656, Simple cocaine base possession count stricken as LIO of possession for sale; appellant awarded 66 additional presentence custody credits where trial court had erroneously construed the 20% credits limit of the strikes law to apply to PC §4019. (A)

Charles Johnson, P. v. Marshall, #E016306, Court reversed count 1 (PC §288(a)) because statute of limitations on that count had elapsed. (I)

James Johnson, P. v. Sarate, #D023728, Trial court erred in imposing concurrent terms for counts two and three which should have been stayed pursuant to PC §654. (I)

Michaelyn Jones, P. v. Tello, #G018156, Conviction for cocaine possession reversed based on trial counsel's ineffectiveness in failing to move to suppress fruits of an improper Terry pat-down. Court held defendant's presence in a car whose driver was smoking a marijuana joint was not an adequate basis for officers to pat defendant down. (A)

Greg Kane, P. v. Clark, #D023104, Partial reversal: conviction for violation of H&S §11370.1, subd. (a) possession of methamphetamine while armed with a loaded, operable firearm reversed. The single-shot shotgun did not have a shell in the firing chamber. However, there were three shells located in covered compartment in the rear of the gun's stock. Giving the statute its "reasonable and commonplace interpretation" as long as no shell was in the firing position the weapon cannot be considered loaded. The court rejected the invitation to apply PC §12031, subd. (g)'s broad definition of loaded. (I)

Judy Keim, P. v. Torres, #E015723, Reversed and remanded with directions to reconsider defendant's motion for new trial because trial court had erred in ruling on defendant's motion for new trial by failing to weigh the evidence independently. (A)

Ivy Kessel, P. v. Castiglioni, #D023090, Court of Appeal orders terms for solicitation to commit murder and conspiracy to commit murder stayed pursuant to §654 where appellant was also convicted of first degree murder. (A)

Charles Khoury, P. v. Mingo, #D022992, Remanded for resentencing. Superior Court imposed unauthorized sentence by (1) failing to orally impose sentence separately for each count (instead imposing a "blanket" life term under the strikes law after convictions of second degree burglary and petty theft), and (2) failing to impose or strike punishment for 6 PC §667.5(b) enhancements. (Superior court erroneously "stayed" the 6 prison prior terms rather than striking the punishment under PC §1170.1(h).) The sentence was unauthorized for those reasons and because of numerous discrepancies between the abstract, the minutes and the oral pronouncement of judgment. Court of Appeal also noted that on remand, the superior court had discretion to declare the wobbler offense a misdemeanor and, depending on the (then unpublished) opinion in Romero, to exercise discretion to strike the prior conviction allegations(s). Note: Court of Appeal questioned (without deciding) whether a trial court had discretion to impose punishment for a lesser offense (here, a misdemeanor) rather than the greater offense under P. v. Norell (1996) 13 Cal.4th 1, when a sentence under the three strikes law is mandated. Court of Appeal found Legislature had "arguably" eliminated trial court's discretion to do so by the stated intent to "ensure longer prison terms" under three strikes law. (A)

Kimberly Knill, In re Elise W., #D024784, The Court found there was substantial evidence to support jurisdiction, but reversed the disposition order which limited mother's access and ability to care for her newborn daughter. In this case, the trial court placed the newborn minor with father and excluded mother from the family home. The Court reversed the removal order and ordered a new dispositional hearing because there were reasonable means to protect the minor without excluding mother from the home. (A)

Marleigh Kopas, P. v. Orona, #E016105, Trial Court erred in considering improper factors to deny probation, which had been recommended by probation department and prosecutor. Remanded to reconsider denial of probation without use of improper factors. (A)

(Continued on Page 18)

Janice Lagerlof, 1) P. v. Fernandez, #D021856, Case remanded to allow sentencing court to exercise discretion as to whether offense should be reduced to a wobbler. (A) 2) P. v. Schiltz, #D022907, Three strikes case: Conviction for transportation of methamphetamine reversed. Court erred in denying §1118.1 motion as to this count. Court also found trial counsel was ineffective for failing to argue possession count should be reduced to a misdemeanor under §17(b). Case remanded to trial court for consideration of §17(b) treatment. (I)

John Lanahan, P. v. Hood, #D023364, Judgment modified to strike the 4th amendment waiver as a condition of probation because there was no nexus between the search condition and the single incident of criminal activity. Judgment also modified to strike provisions requiring appellant to pay the costs of presentence investigation and continued probation supervision. (I)

David Macher, P. v. Townsell, #E015435, Case remanded for a determination of restitution to be awarded and additional custody credit. (A)

Linda Casey Mackey, P. v. Watson, #D023255, Imposition of $3,382 restitution fine, $888 probation costs, and $43 per month probation supervision costs were improper under the facts of this case. (I)

Lee Madinger, P. v. Jones, #E015255, Court ordered stay of sentence on ADW count, where trial court imposed term for robbery of the same victim. The evidence clearly established the ADW was committed for the purpose of furthering the robbery. Thus, §654 barred imposition of sentence on ADW count. (A)

Gregory Marshall, P. v. Leday, #D022288, Remanded for resentencing because court erroneously determined it had no discretion to reduce to a misdemeanor pursuant to PC §17(b). (I)

Thomas Mauriello, P. v. Heart, #D022363, Court reversed and remanded conviction for sale where trial court applied improper standard in addressing defendant's motion for new trial, based upon insufficiency of the evidence to support the verdict. Court ordered further proceedings on new trial motion. (A)

Martha McGill, P. v. Uriostegui, #G016673, Where hearsay out-of-state police reports were admitted without a showing of good cause over appellant's objection at a probation revocation hearing, the matter was reversed and remanded to determine whether good cause existed pursuant to People v. Arreola (1994) 7 Cal.4th 1144. (A)

Kevin McLean, P. v. Renko, #D023059, Published reversal: 25-years-to-life sentence under strikes law reversed because it was based on two juvenile adjudications which lacked express finding that minor was fit under juvenile law. PC §667(d)(3)(c) defines a prior juvenile adjudication as a strikes prior only when the defendant was expressly found to be a fit subject for treatment under the juvenile law. (A)

Susan Metsch, 1) P. v. Granados, #E015463, Misdemeanor assault ordered stayed pursuant to PC §654 when committed in conjunction with PC §422, making a terrorist threat. (A) 2) P. v. Duong P., #G015927, Judgment modified to reduce the sentence by one year because the trial court erred in imposing an enhancement pursuant to §12022.5 and §12022.7 for a single offense. (A)

Dennis Mieskoski, Jr., P. v. Martinez, #D023259, Two, 1-year enhancements alleged pursuant to PC §12022, subd. (a) ordered stricken where they were imposed in addition to two §12022, subd. (b) enhancements. Penal Code §1170.1, subd. (e) allows only the greatest enhancement under §12022 to be imposed where multiple enhancements are pled and proven. (A)

Cindi Mishkin, 1) P. v. Rodriguez, #D022635, In this three strikes case, the court reversed and remanded for wobbler determination. 2) P. v. Russell, #E016388, In a strikes case, defendant enters plea bargain whereby if he admits to the robbery & gun use, the court would sentence defendant to the mitigated term of the robbery - doubled - and the mitigated term of the enhancement. Defendant pleads, but court fails to take the admission of the prior serious felony conviction. Court of Appeal reverses. "Section 667 expressly states the prior felony conviction must be `pled & proved.'" (ADI)

Anne Moore, 1) P. v. Moreno, #D021699, Conviction for receiving stolen property reversed where defendant was convicted of vehicle taking for same offense. Evidence failed to establish defendant's 1980 conviction under §245 (a) was a serious felony. In 1980 §245 (a) covered both ADW and assault w/GBI. People failed to establish defendant used deadly weapon in commission of offense - 5 year prior was stricken. [Pre-strikes case.] (A) 2) P. v. Garcia, #D021463, Reversed based on trial court's error in denying defendant to present his theory of self-defense to the jury. (I)

David Morse, P. v. Pacheco, #E015347, Trial Court praised a prosecution witness (investigative officer), extolling his "good faith" and honesty, before the jury. Trial court also praised the prosecutor [for dismissing charges against co-defendant mid-way through defendant's trial]. Court of Appeal found trial counsel's failure to object to this, plus failure to object to other damaging hearsay evidence, constituted ineffective assistance of counsel. (A)

(Continued on Page 19)

Diane Nichols, P. v. Galindo, #G017705, Magistrate's order changing felony case to misdemeanor case is appealable (if at all) by the People in appellate department of superior court (not Court of Appeal). People's appeal in three strikes case dismissed on defendant's motion. (ADI)

Ronda Norris, 1) P. v. Hoopaugh, #G016868, Judgment and sentence (county jail term) affirmed after People appealed. Court followed Perez, Vessell, and Trausch in finding superior courts have discretion to declare a "wobbler" offense to be a misdemeanor, thereby avoiding the mandatory sentencing provisions under the "three strikes" law. The Court also struck the concurrent terms imposed in violation of PC §654. (ADI) 2) P. v. Keith, #G017652, Motion to dismiss People's appeal granted because appeal was not authorized by PC §1238. Follows People v. Bailey (5/22/96) [96 Daily Journal D.A.R. 5971]. Court of Appeal has no jurisdiction to hear appeal. 3) P. v. Bashaw, #G017591, Motion to dismiss People's appeal granted because appeal not authorized by PC §1238. Follows People v. Bailey (5/22/96) [96 Daily Journal D.A.R. 5971]. Court of Appeal has no jurisdiction to hear appeal. (ADI)

Shawn O'Laughlin, P. v. Lewis, #D023238, One of two strike priors reversed because evidence insufficient. Two documents submitted out of several, were inadmissible hearsay and one of the two was prepared after judgment and therefore not part of the record of conviction. (I)

John Olson, P. v. Johnson, #G017916, Defendant convicted of petty theft from a department store and robbing two security guards. Defendant put on a new pair of jeans under his own and left the store. Two guards observed this, followed him outside, and attempted to detain him. Defendant ran, successfully evading the guards. The guards claim defendant yelled he was armed and to "back-off." A friend of defendant's who witnessed the incident testified defendant said nothing, but simply outran the guards. The Court of Appeal reversed and remanded for failure to instruct on petty theft as a lesser included offense of robbery. Unpublished, relies on P. v. Brew (1991) 2 Cal.App.4th 99. (I)

David Rankin, P. v. Velasquez, #D021930, Despite guilty plea, court reversed receiving stolen property conviction because appellant also pled to stealing the property. Court refused to reverse the burglary and robbery convictions under the Interstate Agreement on Detainers (IAD.) Although court agreed that IAD applied to out-of-state jails, not just prisons, and that prosecution should be estopped from asserting appellant failed to comply with IAD, court found that appellant failed to prove a detainer was lodged against him, and so IAD was not implicated. On ancillary writ, superior court gave appellant credit for 8 months of the year he served in an Arizona jail. (ADI)

Stefanie Sada, P. v Eylar, #G017780, People's appeal from superior court order declaring wobbler offense a misdemeanor dismissed per §1238 (d), which requires the People to file a writ when challenging a probation order. (ADI)

Steven Schorr, P. v. Reyes, #D022484, Conviction for receiving stolen property reversed because defendant was also convicted of driving or taking the vehicle. (I)

Corinne Shulman, P. v. Kalomas, #D023129, Burglary conviction reversed based on insufficiency of the evidence. Trial court did not err in ordering concurrent 25-years-to-life terms because §667(c)(6) provides for an exception in that it applies the principle of §654; the trial court applied a §654 analysis; the prosecution did not object and instead encouraged the trial court to apply concurrent terms. (I)

Carmela Simoncini, 1) P. v. Cedazo, #D023766, Sentence reversed where trial court modified sentence in defendant's absence to increase term upon receiving a letter from Department of Corrections. Sentencing court had originally imposed a 1/3 midterm sentence to run consecutive to another sentence previously imposed by another court. However, that term had already expired prior to the commitment so the Department of Corrections requested a correction. Ex Parte, the trial court imposed a 3 year upper term sentence for VC §10851. 2) P. v. Surovik, #E017074, Supreme Court granted writ of habeas corpus and ordered immediate release and discharge of petitioner. There was no factual dispute that the trial court purported to sentence petitioner to state prison for an alleged violation of probation occurring more than 5 years after the order granting probation, and the Attorney General conceded the trial court's lack of jurisdiction. 3) P. v. Montellano, #E016529, Order denying motion to withdraw guilty plea on a second strike case reversed where, at first pretrial hearing, defendant sought OR release to be with his mother who was undergoing surgery for a brain tumor. Even though court had verification by the mother's doctor, the D.A. would not agree to an OR release unless defendant pled guilty, and made a Cruz waiver. Defendant appeared as promised and requested withdrawal of the plea based on duress. The Court of Appeal found the undisputed facts showed appellant entered the plea under duress. (ADI)

Stuart Skelton, 1) P. v. Myer, #D022931, Three strikes case remanded for resentencing. Defense counsel made no argument on client's behalf at sentencing, specifically stating Romero decision

precluded court from imposing any sentence but 25-years-to-life. As a result of counsel's interpretation of Romero, defense counsel informed the court it lacked ability to strike under §1385, to reduce offense to a misdemeanor (despite wobbler status), or to determine sentence of 25 to life constituted cruel and unusual punishment, and failed to have a psychological evaluation prepared and submitted to the court. Court of Appeal found failure to prepare/submit psychological evaluation, to argue for 17(b) treatment, or to argue cruel and unusual punishment constituted IAC. (A) 2) P. v. Danner, #D024399, Conviction for simple possession reversed where it was a lesser included offense of possession for sale. (A)

Barbara Smith, P. v. Mercado, #D021453, While affirming the judgment, the Court of Appeal corrected pre-judgment custody credits after the trial court failed to act on a Fares request. (A)

John Steinberg, P. v. Townley, #E015859, Consecutive 25-to-life term stayed per PC §654. (A)

Jeffrey Stuetz, P. v. Allen, #D022754, Court of Appeal ordered abstract of judgment modified to reflect trial court's exercise of discretion to strike defendant's prison prior enhancement. (I)

Robert Swain, P. v. Garrett, #D021933, Judgment modified to strike one count of possession for sale of methamphetamine when defendant was sitting in vehicle with two other persons who were involved in a transaction. Appellant never had actual or constructive possession of the drugs and she was not driving. The Court of Appeal found there was insufficient evidence of her constructive possession for sale. (A)

Joseph Tavano, In re Elise W., #D024784, The Court found there was substantial evidence to support jurisdiction, but reversed the disposition order which limited mother's access and ability to care for her newborn daughter. In this case, the trial court placed the newborn minor with father and excluded mother from the family home. The Court reversed the removal order and ordered a new dispositional hearing because there were reasonable means to protect the minor without excluding mother from the home. (I)

Robert Tayac/Neil Auwarter, P. v. Townsend, #D021865, Conviction for false imprisonment ordered stricken as an LIO of kidnap for extortion where defendant was convicted of both crimes. (ADI)

Roberta Thyfault, P. v. Norman, #D021865, Conviction for false imprisonment ordered stricken as an LIO of kidnap for extortion where defendant was convicted of both crimes. (I)

Beatrice Tillman, P. v. Jones, #E015145, Reversal. The Court held that appellant's motion to suppress evidence should have been granted because appellant's arrest and resulting search were not supported by probable cause to believe appellant was committing a trespass. (ADI)

Christine Vento, P. v. Williams, #E014792, One count of carjacking reversed where appellant carjacked woman and child in car. There was insufficient evidence of the fear element with respect to the child. (A)

Jerome Wallingford, P. v. Jones, #D021601, Four 1-year "excessive taking" enhancements under §12022.6 reversed because jury found that amounts taken during charged robberies exceeded only $25,000 and statute had been amended to increase minimum amount to $50,000. Restitution fine reduced to statutory minimum of $200 because court did not orally impose any fine as part of judgment, even though abstract reflected fine of $10,000. (I)

John Ward, P. v. Miles, #D021865, Conviction for false imprisonment ordered stricken as an LIO of kidnap for extortion where defendant was convicted of both crimes. (I)

Sharon Waters, P. v. Trejo, #E016034, One count of possessing methamphetamine for sale stayed pursuant to PC §654 where it derived from the same transaction as second count of selling or transporting same methamphetamine. (A)

Michael Weinman, P. v. Smith, #E016218, Appeal stayed pending the outcome of a habeas corpus filed in superior court. Defendant committed a new offense in prison for which she received both a parole violation term and a new prison term. The department of corrections' position was to impose the parole violation term subsequent to the current prison term and prior to commencing the new prison term. Thus, petitioner would have been punished twice for the same offense. The superior court granted the petition and ordered the department of corrections to allow defendant's new prison term to begin when she would have been otherwise released on the current offense. (ADI)

Jerry Whatley, P. v. Padilla, #E015774, Abstract of judgment amended to correct the restitution fine to $1,000 rather than $6,000. (A)

Jane Winer, In re Chanel & Chelsea S., #G018373, Based on In re Bryce C. (1995) 12 Cal.4th 226, court held an indigent appellant parent in a proceeding under W&I Code §7800 et. seq. is entitled to appointment of counsel. (I)

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Harry Zimmerman, 1) In re Tabitha G., #D024093, Published affirmance. Court holds there are only four exceptions to selecting adoption as specified under W&I §366.26, subds. (c)(1)(A)-(D). The legislation did not intend §366.26, subd. (c)(4) to be a fifth "best interests" exception. The bonding study obtained by mother's counsel without court approval was not protected by the attorney work product doctrine which is a qualified, not absolute, privilege. Since the purpose of the bonding study was to obtain evidence of the nature of the relationship between the mother and the child, the bonding study did not fall within the psychotherapist-patient privilege. (A) 2) P. v. Gonzales, #D023560, A judge who has been peremptorily challenged under 170.6 may not rule on a rehearing request following a juvenile disposition. The remedy is to remand for another judge to rule on the rehearing request. (I)■

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