APPELLATE DEFENDERS ISSUES

The Quarterly Newsletter of Appellate Defenders, Inc.

IN MEMORY OF PAUL EDWARD BELL

On July 30, 1997, Paul Edward Bell, the assistant director of Appellate Defenders, Inc., passed away at home after an 18-month bout with lymphoma.

Paul graduated from Seattle University in 1967 with a degree in political science. He attended UCLA Law School and received his law degree in 1970. Paul started his career as a research attorney with the San Bernardino Court of Appeal. In 1974, he started at Appellate Defenders, Inc. (which had been founded in 1972 to handle appeals in San Diego) and was named assistant director in 1979. He was instrumental in getting the current appellate project system off the ground in 1983 and in expanding ADI's responsibilities to the entire Fourth Appellate District. In March of this year Paul was named recipient of the San Diego Criminal Defense Bar Association's Warhorse Award. It honored his distinguished career in indigent defense. The award stated, "His steadfast commitment to indigent defense, his unshakable courage and his unselfish dedication to his profession are a continuing inspiration."

Paul and his wife, Dianne, a school teacher, were married almost 26 years and had two children, Daniel 20, a student at the University of Redlands, and Andra 18, an incoming student at the University of San Diego.

* * *

ADI offers this heartfelt tribute to Paul. It includes passages from the eulogy presented at his funeral by ADI's executive director, Elaine Alexander, who worked with Paul at ADI for almost 24 years, and remembrances from other colleagues and friends:

> *"Strange, isn't it? Each man's life touches so many other lives, and when he isn't around, he leaves an awful hole, doesn't he?"*

Those words were spoken by Clarence, "angel second class," in Paul's favorite movie, It's a Wonderful Life. That is what ADI now remembers and celebrates -- a wonderful life.

Paul's wonderful life was made up of great loves -- love of his family, love of his church, love of his career in the law and his career "home" at ADI, love for an enormous range of human actives -- scouting, trains, hiking, country music. Indeed, the flags at Scout headquarters here have flown at half mast, homage to Paul's service as Scoutmaster of Troop 2.

He loved his career in the law and was very good at it. He had an amazing way of writing complicated arguments simply and understandably. Paul could often come up with a fresh approach to a problem that had stumped everyone else. No wonder he had an impressive record of five wins out of six appearances in the state Supreme Court.

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The law was not an intellectual abstraction to Paul, nor just a means of making a living. As he told Dianne early in their relationship, "I don't care if I don't make a lot of money. I want to help people." To Paul, this was not a platitude: it was a simple truth. He cared about helping the little guy, and it showed in the way he dealt with every case, every client as if they were the most special one of his career.

By the hand of great good fortune Paul and ADI found each other early in his career and gave him a chance to put his love for the law and for helping others into practice. He handled hundreds of cases and worked on countless projects from writing guidebooks and manuals, to promoting employee benefits, organizing volleyball and softball teams, developing new attorneys on the staff and panel, and holding the office up time and again when its very existence was threatened.

Paul sincerely loved ADI. He was the unofficial historian and could be counted on to corral anyone who asked an innocent question about the past and treat them to a complete, detailed -- and lengthy -- story of personalities and events. He once participated in taping a spoof, in which he was addressing a group of captive employees and showing them photo albums of ADI. As the hours spun by, the audience tiptoed off, one by one. By the time Paul got to pictures from 1983, one lone "victim" was left, her hair having turned gray and her face wrinkled. By the 1990's, Paul was alone, but he didn't care: he was still happily talking about ADI.

Everything about life was wonderful to Paul. Outgoing and generous with his time, he could be counted on to help anyone who asked. He had an amazing store of information: ask him a question about almost anything, and you were likely to get not only an answer, but an epic.

Even his illness did not extinguish his joy in people and living. He bore the indignities of being a cancer patient with indomitable dignity, keeping the rest of us going, finding laughter where others would be overwhelmed. Less than a week before he died, Paul visited ADI and told us with delighted amusement how in his most recent hospital stay, he persuaded his nurse and doctor to include a couple glasses of wine in his "liquid diet."

A poem written to honor Paul's 20th anniversary with ADI, about four years ago, concluded:

"Sometimes, it is true, he's a bit loquacious,
But he is always so kind, friendly and gracious,
That we couldn't imagine this place at all
Without our dearly loved friend, Paul."

It **is** hard to imagine ADI without Paul. But he will be remembered for his prodigious knowledge of the law, for his dedication to his family, clients, and community, and for his wonderful smile. His spirit lives on in all of our hearts, and his love for his friends and work will never die. Paul will be in our lives forever.

Donations in Paul's memory may be made to the Wellness Community Center, 8555 Aero Drive, San Diego, CA 92123.■

NOTES FROM THE DIRECTOR
Elaine A. Alexander, Executive Director

The claims picture

The 1996-97 fiscal year ended June 30. All claims that did not reach the Administrative Office of the Courts by that date were processed but will not be paid until adoption of the new state budget.

I'd like to give a kudo to the ADI staff for their strenuous efforts to clear the office of all claims that could be processed in time to send them to the AOC by the deadline. Claims were given higher than normal priority (and "normal" is quite high) down the stretch to June 30. Many employees worked late, and several came in the Saturday of the 28th to finish up the claims and send them express to the AOC. We turned out about one and a half times the usual monthly number in June. I hope these efforts helped mitigate the traditional "dry spell" that comes at the change of fiscal years.

Attorneys' obligations with respect to possession of transcripts and files

The general guide is: as long as you are counsel of record, you should keep possession of the transcripts. If the client asks for them in mid-case, you should decline to send them, even temporarily for copying purposes, because you cannot count on ever getting them back, and you cannot do your job without them. You also should not photocopy anything more than brief excerpts from the record at state expense without specific preapproval from the court. Copies may be made at the client's own expense. If these measures do not satisfy the client's wishes or needs, consult ADI.

Wendes are more difficult, because the client is offered a chance to file a pro per brief and theoretically would need the transcripts. On the other hand, until you are relieved, you are responsible for the case and might need the record if the court orders briefing (as indeed happens sometimes). These cases will require a judgment call as to how likely it is the client will file a pro per brief and need the entire record to do so (note that the client has a personal memory of the proceedings and probably has specific issues in mind already, and the courts do not rigorously enforce on pro pers the requirement of citations to the record). The likelihood of the court's ordering briefing is also a factor. Some attorneys offer the record but do not automatically send it.

The client is entitled to the appellate record at the conclusion of the case. However, there may be circumstances where the client does not want the record. For example, some incarcerated clients for security reasons do not want the details of their case to become known to others. Clients convicted of child molest offenses are frequently in this category. (*Keep this problem in mind in sending correspondence and copies of briefs, as well, and ascertain the client's wishes early in the case*.) If you have doubts, communicate with your client to determine his/her desire as to receipt or disposition of the record and ask for a response in writing. If the client does not say anything one way or the other, you might advise the client that you will assume you have permission to send it unless you hear otherwise within a specified time.

The client file, including briefs, correspondence, research notes, and the like, is the property of the client. The Los Angeles County Bar Association has concluded that, in criminal cases in the absence of written permission agreeing to destruction of the file, it should be kept for the life of the client. (Los Angeles County Bar Assoc. Formal Opinions, Opinion No. 420; see also LACBA Opinion No. 475; Bar Assoc. of San Francisco, Legal Ethics Committee, Formal Opinion 1996-1; Rules of Professional Conduct, rule 3-700(D)(1).) As a practical matter, since most attorneys do not keep track of clients for years after the cases are over,

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that means never throw them away, or else make explicit written arrangements with the client as early as possible for return or disposal.

The client is entitled to the original file on request. Keep a copy for yourself, and advise the client s/he is getting the original and will be responsible for keeping it safe.

Those "little technicalities" that can come back to haunt you

We always advise attorneys that details are important to conveying a professional image and avoiding problems. It is self-evident that correct grammar, spelling, and the like are essential, and most briefs are fairly sound in those respects. It should also be self-evident that complying with the Rules of Court is important, since failure to do so can result in denial of a request, rejection of a pleading, or other, very serious difficulty. However, the courts sometimes do not rigidly enforce the rules, and we attorneys get lax about observing them. That can come back to haunt us. (The court will not necessarily give forewarning that it will start enforcing any particular rule.) Just a few examples of actual or potential problems from rule violations:

Envelope for co-appellant's copy of extension. Division Two recently sent an extension request back to the attorney (and issued a rule 17 notice) for not providing with the request a postage-paid envelope addressed to co-appellant's counsel for the court to use in sending a conformed copy of the document. The last sentence of rule 43 does in fact provide: "The applicant [for an extension request, among other 'routine matters'] shall provide to the clerk addressed, sufficient postage prepaid envelopes for mailing the order granting or denying the application to all parties." The court had not regularly been enforcing the rule in our cases in the past, but it appears we cannot count on such leniency in the future.

Margins in briefs. Failure to comply with the requirements of rule 15 with respect to margins is widespread. If the brief is in Courier font or the equivalent, rule 15, subdivision (c)(5), says the margin next to the binding must be at least 1¼ inches and the opposite margin at least one inch, and each line may be no longer than 6¼ inches. If the brief is proportionally spaced, rule 15, subdivision (d)(3), specifies the left-right margins must be at least 1½ inches and each line may be no longer than 5½ inches. Both fonts require no less than a one-inch top and bottom margin. (See rule 15 for more requirements.) More briefs violate these rules than comply with them, from what I can see. So far the courts in our district have not rejected or stricken such briefs, unless perhaps the violation is flagrant, but why tempt fate?

Size of proportionally spaced font. Rule 15, subdivision (d)(1), says proportionally spaced briefs shall be in type no smaller than 13-point Times New Roman. However, rule 15, subdivision (h), allows a phase-in period until January 1, 1998, during which briefs in type no smaller than 12-point Times New Roman will be accepted if counsel specifies he or she does not have a type equivalent to the 13-point. Again, this rule seems to be honored more in the breach than in the observance. We have heard informal complaints that some judges find the 12-point briefs hard to read, and perhaps the rule will be enforced after January 1, 1998.

These may seem to be small matters, compared with the substance of an argument, and in a sense of course they are. But it would not be a small matter if the court rejected your extension request (as happened in the example above) or struck your brief because of some "little technicality" that could easily be avoided.■

STRIKES LAW UPDATE
by Diane Nichols, Staff Attorney

Since the last newsletter in April 1997, the California Supreme Court has decided three "strikes" case and heard oral arguments in one other key case.

In People v. Davis (1997) 15 Cal.4th 1096, the Court held no express finding of fitness by a juvenile court is needed in order for a prior juvenile adjudication to qualify as a strike. The decision was 4 to 3, with sharply drawn dissents. Because the defendant had two qualifying strikes, the other briefed issue was not reached (whether a prior juvenile adjudication for residential burglary qualifies as a strike although not listed in Welf. & Inst. Code §707, subd. (b)).

The Court held consecutive sentences are not mandatory for multiple current serious or violent felonies "committed on the same occasion" in People v. Hendrix (1997) __Cal.4th__ [97 Daily Journal D.A.R. 10663]. Trial courts, however, retain discretion to sentence consecutively or concurrently in such cases. Both parties conceded the two robberies and two attempted robberies were committed on the "same occasion", so the

Court did not reach the interpretation of "same occasion/same set of operative facts" (subd. (c)(6)). Three concurring justices noted the inconsistency between the majority opinion and appellate decisions finding the phrase means the same as section 654 and is thus inapplicable to cases, like this one, with multiple victims. The troublesome phrase will be interpreted in People v. Nelson (S053008) granted 5-29-97, which is fully briefed but not yet scheduled for arguments.

Finally, in People v. Dotson (1997)_ Cal.4th_ [97 Daily Journal D.A.R. 10667], the Court held separate determinate terms for enhancements (e.g., § 667, subd. (a)) are imposed consecutive to life terms in three strikes cases (even where enhancements were used to calculate minimum indeterminate term in §1170.12, subd. (e)(2)(A)(iii)).

Based on oral arguments in early June, an opinion should issue no later than early September in People v. Fuhrman, granted 11-13-96 (S055920) formerly at 47 Cal.App.4th 1740 [whether prior conviction stayed under §654 can be used as a strike, overruling People v. Pearson; whether a defendant is required to file a petition for writ of habeas corpus in the superior court in a silent record post-Romero case; whether individual counts of a prior conviction can be considered separate strikes].

All other cases listed in the last newsletter are still on review. The Supreme Court has also granted review to the following cases: People v. Williams, granted 3-12-97 (S057534) unpublished [what are standards for exercise of judicial discretion in dismissing strikes and appellate review of orders doing so]; People v. Watson, granted 4-2-97 (S059042) formerly at 51 Cal.App.4th 1341, grant and hold with Dotson; People v. Woodell, granted 5-28-97 (S060180) formerly at 52 Cal.App.4th 1341 [whether out-of-state appellate opinion is part of record with which prosecution can prove nature of prior conviction]; People v. Houck, granted 6-11-97 (S060507) formerly at 53 Cal.App.4th 375, grant and hold with Monge; People v. Graham, granted 6-25-97 (S053934) formerly at 53 Cal.App.4th 1288, grant and hold with Davis; People v. Ramirez, granted 7-16-97 (S061526) formerly at 54 Cal.App.4th 888, grant and hold with Hendrix/Ochoa/Dotson; People v. Benson, granted 7-23-97 (S061678) formerly at 54 Cal.App.4th 282, grant and hold with Fuhrman; People v. Cole, granted 8-13-97 (S061917), formerly at 54 Cal.App.4th 1061, grant and hold with Monge.■

DIVISION TWO PROCEDURES

Many attorneys may not be aware that both waived cases and cases for which oral argument has been requested are now assigned out at the same point in the appellate timeline. In the past, waiving oral argument may not have expedited the decision because they were assigned after the cases for which argument was requested. Thus, under the former procedures, the final opinion would be filed at the same time as the tentative was mailed out in the case which is being argued. Under this former system, there was no benefit to waiving oral argument.

Recent improvements in Division Two's internal procedures have significantly reduced the backlog of pending cases. Because the backlog has been significantly reduced, a waived case is assigned out as soon as the waiver is approved and the draft opinion is prepared in due course. For clients serving very short sentences, there is now an advantage to waiving oral argument.

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Where oral argument has been requested, the tentative opinion may be completed several months beforehand. When the draft is completed, it is circulated among the panel members, and may therefore be completed months earlier.

Thus, whereas in the recent past, the tentative decision may not have been ready until the week before oral argument was calendared, many are now completed and circulated months in advance, and simply "sit on the shelf" until the week before oral argument.

Justice Ramirez feels it is wasteful--in terms of time and shelf-space--to simply retain possession of the tentative opinions until the week before oral argument. So, the court felt counsel might appreciate the opportunity to have the decision earlier, rather than later, by waiving oral argument.

A new notice is now disseminated with the tentative opinion as soon as the tentative opinion has been completed. The notice explains that counsel must confirm oral argument or waive it, using a form which accompanies the tentative opinion. Under the previous procedure, cases in which oral argument has been waived ab initio get circulated and filed as soon as the opinion is ready. If oral argument was requested, counsel had to wait until the week prior to the hearing date in order to receive and review the tentative opinion.

Under the new procedure, the tentative opinion and the new notice will also be distributed as soon as the opinion has been circulated. Counsel will have 10 days in which to decide whether to confirm or waive oral argument.■

"IT'S IN THE MAIL"

Division Two tries to be flexible in accommodating attorneys who are filing documents from outside the county. In this regard, it has followed an unwritten policy of making a computerized docket entry whenever counsel telephones the court on the date a document is due to be filed, to inform the court the document has already been put in the mail. This prevents notices pursuant to Rule 17(a) and (c) from crossing in the mail a brief which was sent prior to the notice's issuance.

However, the clerks do not have the authority to issue "telephone extensions" of time, and do not appreciate it when counsel call on the date the document is due to inform the court counsel is still working on the document. A few attorneys have called on or about the due date and represented to the court clerks that the document is "in the mail," when in fact they are still working on the document. The clerk's office does not appreciate this. One such attorney called a second time, a few days later, to make the same claim, apparently not realizing that the first call had been memorialized in the computerized docket.

An attorney's word is his or her oath, and an attorney's reputation is his or her stock in trade. Those cliches aside, the clerks tend to remember attorneys who have "pulled their chains" in the past, and tend to question their word in future dealings with that attorney. This can have far-reaching impact.

Worse, the few attorneys who misrepresent that a document has been put in the mail when, in fact, it has not, may cause the clerk's office to reevaluate the accommodation policy. This may cause great inconvenience to the vast majority of attorneys, who courteously refrain from calling the court except when their brief is, in fact, already in the mail.

Therefore, if you have not completed your brief on the date it is due, you should promptly request an extension of time in the acceptable format. If you have already sent one to the court and wish to verify its receipt, a call the clerk's office may alert the court that a document is in the mail. However, the practice of telephoning the court to delay issuance of a Rule 17(a) notice, in order to obtain additional time to complete the brief, is not an acceptable one.■

DIVISION TWO ADOPTS A NEW EXTENSION POLICY

Division 2 is going to consider a second extension as a usual "last" extension in the very near future. The policy will commence after the panel is either notified via a mailer, or this newsletter is distributed.

The grant of the second extension will indicate the court will entertain no more extensions for the common reasons; in order to obtain additional time, counsel will need to establish a real urgency (e.g., hospitalization, computer crash, death in the family, amnesia, etc.). Another acceptable reason will be the pendency of some 35(e) requests in Riverside. (Since San Bernardino "35(e)s" are augments, they are automatic extensions.)

However, if the 35(e) request is for one or a few pieces of paper (e.g., an abstract), this will not justify an additional extension as an extraordinary reason. If, however, the 35(e) is extensive (e.g., a transcript of a §1538.5 hearing), then the extension request can be for "30 days after filing of the supplemental record." Normally, the attorney will have 100 days from filing of the record (40 + 30 + 30) and then an additional approximately 30 days if a 17(a),(c) letter issues, absent an unusual third extension.

The change in policy is designed to maintain a steady stream of cases taken under submission, and to avoid a major lull (caused by extensions of briefing time) followed by a storm of cases in which briefing is completed at the same time.■

NEW PERSONNEL AT SAN BERNARDINO SUPERIOR COURT APPEALS DIVISION

A few personnel changes have taken place at the San Bernardino Superior/Municipal Courts. Kim Greve has replaced Edna Malberg, as a supervising clerk in the Appeals Division. Nancy Dugas has replaced Sue Martin as the Court Services Manager. Both have a lot of clerical experience in the San Bernardino Consolidated Superior/Municipal Courts. Karen Enderson is now the Court Services Supervisor.

Henry Espinoza, the Chief Deputy Clerk at Division Two, has been working closely with the new Appeals personnel and has noted many improvements in record preparation and document processing since the transition began. We look forward to working with the new clerical supervisors and hope they stay around for a long time.■

SDPD CRIME LAB ALERT!

San Diego Police Department DNA criminalist Patricia Aiko Lawson has been accused of lying about her credentials, running an embezzlement scheme with impounded money in the police property room, falsifying notes in murder and child abuse cases, and testifying in court that examinations were performed on evidence when they were not done. Supervising Criminalist John Simms and homicide Sgt. Jim Munsterman have been assigned to investigate the lab and Lawson, who has since been reassigned to other duties. District Attorney Paul Pfingst thought the situation was serious enough to warrant notifying members of the Criminal Defense Bar Association. (Please contact ADI is you find Patricia Aiko Lawson was involved in your case.)■

CLAIMS: OUTSIDE PHOTOCOPYING SHOULD NOT BE INCLUDED IN THE BRIEFBINDING EXPENSE

Many panel attorneys are billing their in-house photocopying expenses on the photocopying line and **incorrectly** including their outside photocopying expenses under the brief binding and related costs category. **All** photocopy expenses must be included on the photocopy line. The cost of photocopying will be reimbursed, at not more than $.10 per page, whether the copying is done inside or outside counsel's office. (Continued on page 8)

If counsel represents that photocopying was billed at 10 cents per page or less, receipts will not be required but the **total** number of photocopies made and the cost per page should be itemized. (Or a note on the photocopy line that the rates are mixed and do not exceed 10 cents per copy is acceptable.)

Many panel attorneys have commented that their photocopy shop does not give them this breakdown. In those circumstances, panel attorneys should request the breakdown when the order is placed or ask for the breakdown when the bill is received. Copy shops will provide this information, if requested, and attorneys should be able to easily determine how many photocopies were made and what figures to move to the photocopy expense line. Paralegals will continue to call when the briefbinding expense is more than half the photocopying expense unless the panel attorney has stated that the figure does not include photocopying charges.■

A P P E L L A T E D E F E N D E R SEMINAR ON APPELLATE ADVOCACY IN SANTA ANA, SEPTEMBER 27, 1997

Note: Preregistration is required due to limited seating. (Earn up to 4.0 hours of MCLE Credit.)

Date: Saturday, September 27, 1997
Time: 9:00 a.m. - 1:15 p.m.

Location: Orange County Superior Court, Dept. One, 700 Civic Center Dr., West, Santa Ana.

AGENDA:

View from the Bench: Justices and research attorneys from Divisions II and III;

Ethics for the Appellate Practitioner, Carmela Simoncini;

Law Practice Management for the Appellate Practitioner (Claims, etc.) Elaine Alexander, Howard Cohen;

Breakbout Session (choose one):

Current Topics in Three Strikes, Diane Nichols;
Current Issues in Delinquency, Alisa Shorago;
Current Issues in Dependency Law, Michelle Ben Hur/Cheryl Geyerman, and Carmela Simoncini.

Speakers:

David Sills, Presiding Justice of the Court of Appeal Fourth Appellate District, Division Three;

Thomas Hollenhorst, Associate Justice, Court of Appeal, Fourth Appellate District, Division Two;

Michelle Ben Hur, Research Attorney, Court of Appeal, Fourth Appellate District, Division Three;

Elaine Alexander, Executive Director, Appellate Defenders, Inc.

Cheryl Geyerman, Diane Nichols, Alisa Shorago, Carmela Simoncini, Howard Cohen, Staff Attorneys, Appellate Defenders, Inc.

AND OTHERS TO BE ANNOUNCED

To preregister, please use the form on page 32.■

WE BID STEFANIE SADA FAREWELL

Stefanie Sada, who joined Appellate Defenders on October 1, 1990, as a staff attorney, is now clerking for Justice Paul H. Coffee in the Second District Court of Appeal, Division Six (Ventura). Stefanie's prodigious brief writing capabilities, fun-loving sense of humor, and legal knowledge are greatly missed. Thanks for People v. Whitfield (1994) 7 Cal.4th 437, and good luck writing those opinions, Stefanie!■

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 client. KUDOS are listed alphabetically by attorney name, with straight Romero wins listed in a separate category at the beginning.

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Supplement to the Quarterly Newsletter of Appellate Defenders, Inc.
NUMBER 17 August 1997

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

by Carmela F. Simoncini, Staff Attorney

DEPENDENCY CASES

A. Jurisdictional Issues

In re Stacy T. (1997) 52 Cal.App.4th Supp. 1415, the First District Court of Appeal, Division 4, held that a mother must be advised that her failure to appear at a scheduled conference settlement conference could change the conference into a dispositional hearing. The court did not tell mother that her failure to appear at the settlement conference would result in a "default". Nor did it tell her what serious consequences would flow from such a "default." As a consequence, she was never advised of the very important rights she was waiving by not appearing at the settlement conference. Then, the court compounded the situation by depriving her, through counsel, of the opportunity to cross-examine the very social workers who prepared the reports in support of the jurisdictional facts in the petition. The court must consider the fact that if mother had known of the consequences, she may have appeared at the conference, and may have testified on her own behalf. On this record the violations were substantial and not harmless beyond a reasonable doubt.

In In re Nemis M. (1996) 50 Cal.App.4th 1344, the Second District Court of Appeal, Division 4, found that a father's nonappearance at a dependency hearing does not justify a default judgment, and that reliance on minor's hearsay statements is erroneous. Fifteen year old Nemis was removed from parental custody based upon the court's finding that her 18 year old brother had sexually molested her. Nemis is severely emotionally disturbed, mildly retarded, and communicatively handicapped.

Despite the fact the trial court found her to be an incompetent witness, the court ruled that a PRC Report which included Nemis's statements admissible. Nemis' parents had to leave the court on the fifth day of the trial because the father experienced chest pains, although neither told anyone before they left. The case trailed to two days later, when the father was present, although he did not wish to be present in the courtroom because he was too emotionally upset. The trial court proceeded by way of default against the father, over his attorney's objections. The Second District Court of Appeal found that a parent who is ordered to appear in court and who willfully fails to appear is in contempt, but not in "default." (W&I §213, In re Brian W. (1996) 48 Cal.App.4th 429, 434.) The deprivation of the father's due process right to confront and cross examine witnesses was harmful error, because the social services worker who prepared the PRC report was allowed to testify after the father was declared to be "in default". The trial court made no specific finding of competency in terms of Nemis's precourt statements. The appellate court remanded with directions for the juvenile court to conduct further proceedings to determine whether Nemis's statements bear the indicia of reliability standard under the "child dependency exception" to the hearsay rule.

In In re Eric H. (1997) 54 Cal.App.4th 955, the Fifth District Court of Appeal held that a court does not need to permit a parent to present evidence supporting a dependency petition when the county human services agency and counsel for the child agree the petition should be dismissed for lack of evidence.
Basically, this was a custody battle gone bad, with the child accusing the father of physical abuse. The court appointed psychologist found that Eric was not a "credible reporter" and that mother was

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very manipulative and had told Eric that his father was a child abuser. On Aug. 7, 1995, the court found the allegations of physical abuse not true and awarded sole legal and physical custody to the father, with regular visitation for mother.

Eric then made several reports of sexual abuse by his father, first to his therapist, then to a paralegal and licensed clinical social worker, who reported the allegations to the Agency. An Agency social worker was unable to substantiate any abuse. Mother brought Eric to the Sheriff's office on Dec. 2, 1995, and Eric was removed from custody of his father and placed in foster care. Mother then accused the agency social worker assigned to the case of hitting Eric. These claims were determined to be unfounded. Eric denied the sexual abuse allegations to the social worker.

After many interviews with Eric and a court appointed doctor, the doctor concluded that the allegations were unfounded. Eric was interviewed on videotape by a "specialist", which the doctor stated in a report placed a reasonable doubt in her mind that there was a possibility that Eric was touched inappropriately. Mother wanted to admit this videotape into evidence at the jurisdictional\disposititonal hearing. The trial court concluded that, unlike the minor, a parent had a right to present evidence only if the court denied the motion to dismiss the petition. The court then found that the allegations in the petition had not been proven by a preponderance of the evidence and dismissed the dependency petition without prejudice.

The Court of Appeal found that under W&I §350(c), this was appropriate, as the mother's parental rights and Eric's best interests required nothing more, under the facts of this case.

Although not a dependency decision, the recent case of Doyle v. Superior Court (Caldwell) (1996) 50 Cal.App.4th 1878, warrants some attention. In that case, the Sixth District held a party cannot be forced to submit to a mental examination if his/her current mental condition is not disputed. The Caldwell holding arose in the context of cross-complaints filed in a defamation/sexual harassment action. Caldwell had been terminated from employment based upon the petitioner's (Doyle) claim of sexual harassment, and sued the employer for defamation. Doyle sought damages for the hostile environment, citing lost income, benefits, and severe emotional distress and mental anguish. A mental examination of Doyle was sought on the ground her mental state was at issue. She refused on the ground she had only claimed garden-variety emotional distress damages for past mental distress, and that her current mental state was not at issue. A special master overruled Doyle's objections and ordered her to submit to psychological testing.

The Court of Appeal agreed with Doyle and issued a peremptory writ of mandate directing the superior court to vacate the orders overruling her objections and compelling the mental exam. The court distinguished the facts of this case from others where the plaintiff has claimed emotional distress damages for past **and** continuing emotional distress. In such a situation, the current mental state of the litigant is placed in issue by the pleadings, and discovery is warranted.

How does this figure into the dependency scheme? I would like to tell you how many times we see transcripts of minute orders of jurisdictional proceedings in which a psychological examination of a parent is ordered despite the absence of allegations of any mental illness in the petition, or the evidence of any mental condition introduced in the adjudicatory hearing. Case law supports a parent's ability to refuse an examination when ordered at a detention hearing. (See Laurie S. v. Superior Court (1994) 26 Cal.App.4th 195.) I think the Caldwell principle could be argued when the court orders an evaluation after jurisdiction has been found on a non-mental illness ground, for dispositional purposes. Check it out.

A neat case was decided by the Third District Court of Appeal in In re Alysha S. (1996) 51 Cal.App.4th 393. In that case, the parties agreed to an amendment to a petition and then submitted on the reports for the jurisdictional phase. The petition, which was filed in September, 1995, alleged a failure to protect under W&I §300, subd. (b), based upon failure to supervise or protect by the inability of the parent to provide regular care due to mental illness, developmental disability or substance abuse. The supporting facts alleged an incident in 1994 in which the mother allegedly observed an inappropriate touching of the minor. The petition additionally alleged the father had been violent to the mother in 1994 and had been incarcerated for domestic violence, although he was currently residing with mother. The court made jurisdictional findings and the father appealed the disposition contending the allegations did not support a finding of jurisdiction.

Preliminarily, the Court of Appeal noted the appeal was akin to a demurrer, and was not in the nature of a substantial evidence claim. Such an issue could be raised for the first time on appeal. In this regard, the court noted the only pleaded fact relating

to failure to supervise the minor was the fact the father was incarcerated. However, the pleading further alleged the mother was now living with the father, so there were no pleaded facts supporting the lack of supervision to support jurisdiction.

As to the failure to protect the minor, the court acknowledged that a father who repeatedly beats the mother in the child's presence may expose a child to emotional trauma and thus fail to protect the child. However, there were no pleaded facts to support this theory, either. The remaining theory was that the father had inappropriately touched the minor, thus failing to protect her. However, because the pleading did not allege that any touching continued beyond July, 1994, it did not establish the minor was currently at any risk of serious physical harm. The Court of Appeal reached this conclusion by highlighting the statutory language contained within §300(b) which provides a minor "shall continue to be a dependent child only so long as necessary to protect the minor from risk of suffering serious physical harm or illness."

B. Dispositional Issues

In In re Miguel O. (1997) 52 Cal.App.4th 661, the Sixth District Court of Appeals found that an ongoing police investigation into family's drug activities justifies denying mother's request to place children with their aunt. The Court of Appeal found that while the mother's interest in the placement of her children with relatives was important, it did not give rise to the same level of importance as the right to contest the charges against the removal of the children from her custody.

In Miguel O., mother was convicted and sentenced to 7 years in prison for drug charges, along with her husband who was sentenced to 5 years. Both were ordered to be deported after their release. Mother's request to have the children placed with their aunt was denied, as the aunt was the subject of an ongoing police investigation regarding drugs. At the contested jurisdictional/dispositional hearing, a detective stated that he believed the children's physical safety would be in danger if they were placed with the aunt, but asserted that his reasons were privileged under Evidence Code §1040 and §1041.

The Court of Appeal found that the trial court fulfilled its duty to protect the children's best interests. Although W&I §361.3 gives relatives priority in consideration for placement, it does not require placement with relatives nor give the parents the right to determine placement.

In In re Christopher H. (1996) 50 Cal.App.4th 1001, the Fifth District Court of Appeal found that a father's random drug testing as a condition for reunification with his son is within the court's discretion. The appellate court found that the father's current incarceration and wo prior arrests for driving under the influence,
and a positive blood test for methamphetamine was sufficient for the trial court to address drug

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testing in the reunification plan, although there was no evidence that this problem had affected his ability to care for Christopher. The appellate court found that because Christopher is a high risk infant with ongoing medical problems, he requires a stable, sober caregiver.

The appellate court further held that the trial court's order of "reasonable" visitation during father's incarceration did not constitute an unlawful delegation of the power to set visitation to the DSS, because DSS's role in managing the details of "reasonable" visitation is limited and subject to the juvenile court's supervision and control over its exercise.

In In re Alexis M. (1997) 54 Cal.App.4th 848, the Fourth District Court of Appeal, Division 3, found that a father convicted of murdering his son need not be offered reunification services with his surviving daughter. Father was convicted of felony child abuse arising out of the January 1994 death of his four month old son. Alexis M. was born in September 1994. Father was arrested in November 1994, and a petition to declare Alexis a dependent of the juvenile court was filed the same day as father's arrest.

Father was accorded presumed father status in March of 1996 and given reunification services then, but the services were terminated in November, 1996, when, at a 12 month review, the court found reunification would be detrimental to Alexis. While father had been convicted of felony child abuse in Sept. 1996, that fact was not one of the bases of the trial court's decision.

Changes in W&I §361.5(b)(4), effective January 1, 1997, make the law less favorable to these types of cases. While before 1997, it stated that reunification services "need not" be provided a parent who "has been convicted of causing the death of another child through abuse or neglect", there is no longer the requirement of a conviction - simply clear and convincing evidence that the parent has "caused" the death of another minor.

The appellate court found that because the removal of Alexis arose out of the very incident which gave rise to the felony conviction, and father did not contest the allegations in the petition, it would have been an abuse of the juvenile court's discretion to have offered father reunification services. The appellate court further stated that "Our statement in In re Brittany S. (1993) 17 Cal.App.4th 1399, 1402, about the inappropriateness of "go to prison, lose your child" obviously does not apply in cases where the very reason a parent is in prison in the first place is the death of another child from child abuse, particularly an infant sibling." (W&I §361.5(b).)

Division Three of the Fourth Appellate District has held that a 50 mile geographical limitation of the visitation component of reunification plans is arbitrary and must be set aside. In re Jonathan M. (1997) 53 Cal.App.4th 1234, reached the Court of Appeal by way of a writ petition filed prior to the disposition hearing, requesting the court to consider an ongoing dispute between the Orange County Public Defender and the local County Counsel concerning whether the Orange County Social Services Agency has a policy regarding arbitrary distance limits beyond which visitation with dependent children need not be provided to incarcerated parents as part of their reunification services. The Public Defender presented evidence to the Court of Appeal demonstrating the existence of a policy to request that the juvenile court order no visitation if the parent is incarcerated more than 50 miles from the child's placement.

In that case, the appellate court held reunification services are to be provided to the parent, particularly those described in paragraphs (A) through (C) of W&I §361.5, subd. (e)(1), unless to do so would be detrimental to the minor. To base a detriment finding on geography alone was clearly improper, although distance is a factor to be considered in the analysis. It concluded the instant policy of limiting visitation to parents who are incarcerated within 50 miles was arbitrary, stating, "In short, the court may not abdicate its responsibility to create a reasonable visitation and transportation order by the simple talisman of a mileage limitation." (Id., 53 Cal.App.4th at p. 1238.)

In In re Heather A. (1996) 52 Cal.App.4th 183, the Second District Court of Appeal, Division 3, affirmed a dispositional order of removal in a domestic violence case, despite the fact the children were not exposed to harm as primary abuse victims. In that case, the trial court heard testimony at the disposition hearing regarding the father's abuse of the twin minors' stepmother, Ramona. The testimony revealed the minors were present in the household and observed some of the injuries to Ramona. Ramona was not the first wife he had battered.

An expert testified at the dispositional hearing as to the secondary abuse they had suffered,

associated with the domestic violence to which they were exposed. The expert defined "secondary abuse" as a label for a concept which he had documented, regarding how children are affected by what goes on around them as well as what is directly done to them. He attributed some of the "learned helplessness" which is a feature of Battered Women's Syndrome, to such childhood experiences.

On appeal, the court noted the father's psychological profile showed an inclination towards violence and hostility, which manifested in one domestic relationship after another. Thus, even if father had no further contact with Ramona, there was reason to believe he would enter another relationship and repeat the same violent pattern. It noted the concept of "secondary abuse" had been recognized in In re Jon N. (1986) 179 Cal.App.3d 156, 161, and that Battered Womens' Syndrome was a form of secondary abuse, which includes a "pattern of learned helplessness and dependency, originating in childhood. It observed if the minors' previous exposure to the father's acts of domestic violence had not already sown the seeds for Battered Women's Syndrome, further exposure to him could do so, thus resulting in substantial danger to their future physical health.

C. Review Hearing Issues

In In re Sue E. (1997) __Cal.App.4th__ [97 Daily Journal D.A.R. 5091], the Second District Court of Appeal found that a failure to challenge an order setting a §366.26 hearing terminating parental rights does not effect the right to appeal from matters which may later occur during, or in connection with, the §366.26 hearing.

The appellate court concluded that §366.26 (1)(2) is properly construed as precluding subsequent review on appeal only of the decision to set a §366.62 hearing, unless a writ of petition challenging the order setting such hearing is timely filed. Failure to file a writ petition pursuant to rule 39.1B of the California Rules of Court does not affect appellate rights with respect to any matters which may arise after the §366.62 hearing has been set, including matters arising during the §366.26 hearing itself.

The Juvenile Courts have not been totally shielded from the conflicts in the Middle East. The Third District Court of Appeal, applying truly democratic principles, has held that the political leanings and involvement of a parent cannot support dependency jurisdiction. In Nahid H. v. Superior Court (1997) 53 Cal.App.4th 1051, the court considered a Rule 39.1B writ which was filed following a hearing which referred the matter for a hearing pursuant to W&I §366.26. The decision ordered the juvenile court to vacate the referral order and establish a reunification plan. The first portion of the decision addresses the technical problems related to trial counsel's use of Judicial Council forms for petitions seeking extraordinary relief. It cautioned counsel to "function as professionals, not as mere scriveners." (Id., 53 Cal.App.4th at p. 1056.)

To summarize briefly a lengthy and complicated case history, the case arose when an Iranian mother, who was politically active in a group which was opposed to Khomeini during the Iran-Iraq war, sent her two daughters to America for refuge. The mother escaped to Iraq, but,

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lacking papers, was unable to emigrate herself. Once in America, the children found themselves in the home of an Iranian countryman who molested one of the girls. The mom was unable to attend the earlier hearings during the course of the dependency because of her lack of visa.

In the meantime, the daughters, now teenagers, had gotten a taste of America. By the time the mother escaped the Middle East, a year after the dependency was declared (approximately 1993), the two daughters did not wish to live with her for fear of losing their newfound freedoms, and for fear of being recruited into the mother's political group.

Although the mother had contact with the social worker as early as October, 1994, she was not provided with a reunification plan or allowed to speak with the girls. Apparently, the reunification plan was delayed because the social worker was unable to identify the mother as the mother until she came to America. She was not permitted to speak on the telephone with her daughters because they did not wish to talk to her. The mother was finally able to make her way to the United States in July, 1995.

The report filed a few days after her arrival concluded that although the mother clearly loved her children, her allegiance to the Mujahedin took precedence. Thus, even after the girls verified their mother's identity, the social worker did not move forward with reunification because the girls did not wish to pursue it. The worker opined, "Without their consent to reunify, it would be a detriment to their emotional well-being to pursue that." (Nahid H. v. Superior Court, supra, 53 Cal.App.4th at p. 1065.)

In April, 1996, the mother filed a petition for modification of the previous permanent plan of long term foster care, pursuant to W&I §388. Just prior to the hearing on that petition, the Department sought a change in the permanent plan from long-term foster care to adoption. The juvenile court denied the §388, but continued the dependency.

The Court of Appeal concluded there was little support for the juvenile court's finding that the conditions warranting assumption of original dependency jurisdiction still exist. It observed there was no evidence that return of the minors to the mother's care would pose a risk of sexual abuse (the original basis for assumption of jurisdiction), nor was there support for the suggestion that mother's political involvement would cause serious physical harm or emotional damage to the minors.

Recalling the student protests of the 1960's, the court recognized parents may entertain political beliefs different from their children, but no one would seriously propose that political differences between parent and child--even major ones-- would support the dependency jurisdiction of the juvenile court, absent substantial risk of palpable harm to the child. The court further noted that evidence of risk of physical harm in this case was speculative, and that no such risk was found as a fact by the court.

The court also disposed of the argument that the children were exposed to risk of emotional harm if returned to their mother. "The record is remarkable for the absence of psychological evaluations or structured therapy involving either the mother or the minors to ascertain and ameliorate the causes of the estrangement between them. ¶ If ever a case called for reunification efforts, this is it. Mother rescued her children from the perils of war, in the process enduring a protracted separation from them. Yet the Department taxes her with failure to come to the United States sooner than she did despite evidence it was not possible for her to do so." (Id., 53 Cal.App.4th at p. 1070.)

The court also remarked how the Department continued to insist it had provided the one year of services to the mother, despite the fact mother was trapped in Iraq during that time. In short, the Court held it was error to conclude further reunification efforts were not in the minors' best interests.

D. Permanent Plan

In In re Anna M. (1997) 54 Cal.App.4th 463, the Fourth District Court of Appeal, Division 3, held that due process requires oral and written notice advising mother of hearing terminating parental rights. At the time of the 18 month hearing, Kim, the mother of two daughters who were placed in protective custody because of mother's drug abuse, had completed parenting classes, was consistently testing negative for drugs and was in counseling. She did not have suitable housing or steady employment.

The Department of Social Services recommended referral to a §366.26 hearing and a permanent plan of guardianship, based primarily on the minors' "close bond with their mother." The children had been living with their father's cousins at this time, and all parties agreed that the cousins should be granted guardianship over the girls. At least three times the court emphasized the likelihood of guardianship as the permanent plan, albeit not guaranteeing that result. However, just a few weeks before the permanency hearing, the children were removed from the cousins, because one of the

cousins had suffered a stroke and was unable to care for the children.

DSS filed a new report on the day of the permanency hearing stating that the children were adoptable, and recommended that parental rights should be terminated. Mother did not appear at this hearing and her counsel's request for a continuance was denied. The court granted a 90 day continuance for DSS to conduct further placement assessment, but emphasized that the day to present evidence was "today". Mother's counsel did not put on a case nor argue against terminating mother's parental rights. Mother was present in court 90 days later when her children were freed for adoption and her parental rights were terminated.

The appellate court found that all parties agreed that the court did not, either in statutory language or the functional equivalent, advise mother that at the next hearing it was required to "select and implement a plan of adoption, legal guardianship, or long term foster care." (W&I §366.23, (b)(6).) The oral notice was not framed in language adequate to notify mother of what was truly at stake in the §366.26 hearing.

Compounding the insufficiency of the oral notice, was the complete lack of written notice. Mother's attorney did not raise the lack of notice issue, if counsel had, the court would have had no choice but to continue. Yet DSS objected to any continuance to accommodate mother's interest. Prejudice occasioned by lack of notice, coupled with lack of advocacy, virtually leaps from the record. (In re Anna M., supra, 54 Cal.App.4th at p. 469.) Mother has a due process right to a fair hearing.

In In re Dustin R. (1997) 54 Cal.App.4th 1131 [mod. at 55 Cal.App.4th 923c], Division Two of the First Appellate District found that even though mother completed all of the reunification plan requirements, her failure to meet the objectives of the reunification plan supported the order for long-term foster care. In Dustin R., three children were placed in foster homes after one of the daughter's legs was broken. Father was incarcerated after pleading guilty to breaking his daughter's leg. The parents participated in supervised visits with all of the children, and the foster parents noted that father appeared uncomfortable around all of the children. The parents attended therapy sessions, which caused the therapist to recommend psychological evaluations for both parents, which the parents submitted to without objection. Based on these tests, the court found that mother lacked the ability to protect her children from the father, who it was found would have difficulty in adequately addressing his children's needs.

Mother's attendance at therapy sessions was good, although therapists found she was in "denial". Therapists found the children to be "emotionally disturbed". At the 12 month hearing, SSA stated the parents seemed to be "going through the motions" without ever directly dealing with the abuse, or recognizing that their children were disturbed. At the 18 month review, mother did acknowledge her husband's

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responsibility for the daughter's broken leg, and accepted some responsibility for failing to protect her from the injury.

The juvenile court followed In re Joesph B. (1996) 42 Cal.App.4th 890, which held that after the parents completed the reunification plan, the children should be returned, unless the court finds by a preponderance of the evidence that a return of the child would create a substantial risk of harm to the child. Instead, the juvenile court found by a preponderance of the evidence that although the parents had made substantial progress in complying with the case plan, they had not alleviated or mitigated the causes necessitating placement of the children in foster care.

First District upheld this decision, stating that simply complying with the reunification plan by attending the required therapy sessions and visiting the children is to be considered by the court, however, it is not determinative. The court must also consider the parents' progress and their capacity to meet the objectives of the plan.

In In re Tamika W. (1997) 54 Cal.App.4th 1446, Division Two of the Second Appellate District found that despite mother's claim of changed circumstances, the appointment of Tamika's older half brother as guardian was correct. Apparently, mother had been unable to care for Tamika, age nine, without the assistance of relatives for all of Tamika's life. It was alleged mother had beat Tamika, was a substance abuser, failed to send Tamika to school on a regular basis, and would leave Tamika with various relatives without making provisions for her care or supervision. On the other hand, the court found that Jimmy, Jamika's 29 year old half-brother was providing very good care for Tamika, and that Tamika was very bonded with him.

During the year Jamika lived with Jimmy and his fiancee, mother visited once. Mother did not comply with court ordered drug counseling or parent education classes. Despite notice, Mother did not appear at the six month or year review hearing, and appeared at the court for the guardianship hearing late, after it had been concluded. The court did not terminate mother's parental rights when it declared Jimmy guardian on March 20, 1996.

On April 25, 1996, mother filed a §388 petition, stating various changed circumstances, and requesting the court to set aside the guardianship order and reinstate reunification services. On May 7, 1996, the court ordered the hearing on the petition for modification to be heard on May 22, 1996. DCFS contended the petition was not timely filed. Without any testimony from mother, the court vacated its order as to a hearing for modification of the guardianship order, although it did permit a hearing as to visitation rights.

The Second District Court found that the order on May 7 was not a final order, and was not precluded by Code of Civil Procedure §1008, because the court was correcting an erroneous ruling and not acting on a motion for reconsideration. The appellate court also found that the trial court did not abuse its discretion when it failed to provide mother with a §388 hearing concerning the guardianship, because it concluded the best interests of Jamika would not be promoted by modifying the guardianship order. The appellate court further stated that mother is not precluded from petitioning anew for modification pursuant to §388, should there be a significant change of circumstance.

In In re Jose V. (1996) 50 Cal.App.4th 1792, the Sixth District Court of Appeal found that the trial court did not err in failing to consider guardianship rather than adoption after termination of parental rights. When Jose V. was born on Oct. 6, 1992, his mother, Monica F. was 14 years old. Jose was taken into protective custody in Aug. 1993, when Monica's foster parent reported that Monica had taken methamphetamine in the presence of the baby, and that he had licked some off of her hand. Jose's presumed father was incarcerated in CYA for three counts of assault with a deadly weapon.

Jose was adjudged a dependant child of the court on January 13, 1994. He was placed with his maternal grandmother, and Monica was permitted to reside in the home. The family had a history of drug abuse, domestic violence, and dysfunction. At a six month review, Monica had failed to comply with the terms of the service plan. She had a new boyfriend, and gave birth to a baby girl on January 4, 1995. Their relationship was reported to be abusive, although Monica was providing weekly negative drug tests. On Jan. 23, 1995 the court extended services for 6 months, on the "substantial probability" of reunification.

In June, Jose was placed in foster care because he was experiencing developmental delays and behavioral problems. In July of 1995 Jose was placed with his great Aunt Lucy. On August 10, 1995, Monica had a positive drug test. She did not keep in contact with the social worker and was generally uncooperative. The §366.26 hearing was held March 1, 1996. Monica visited with Jose at Aunt Lucy's house once during this time, in a

supervised visit. Jose thrived in Lucy's home, and Lucy testified she was willing to adopt Jose or be his guardian. The trial court terminated parental rights and ordered Jose placed for adoption. The appellate court holds that if the court finds the child adoptable and finds no exceptions are shown under subdivision §366.26(c)(1)(A) through (D), the court is entitled to presume that termination of parental rights and adoption will be the plan best serving the child's needs. In the absence of compelling evidence to rebut the presumption, the court need not consider less permanent alternatives.

In In re Lorenzo C. (1997) 54 Cal.App.4th 1330 [mod. at 55 Cal.App.4th 923f], the Fifth District Court of Appeal found that the social service agency has no burden to acquire and introduce at the permanency planning hearing evidence specifically directed to the issue of whether the minor would benefit from continued contact with the parent. The trial court terminated the father's parental rights and placed the 2 year old child for adoption, although the father had physical custody of the child for one year, and was presently incarcerated at the time of the order.

The appellate court found that the father had waived his right the issue of a bonding report for purposes of appeal because he did not ask the juvenile court to order a bonding study. This argument also fails on its merits because there is no requirement in statutory or case law that a court must secure a bonding study as a condition precedent to a termination order.

In the appellate court's view, the juvenile court did not abuse its discretion by considering the child's bonds with his prospective adoptive parents or comparing this bond with the bonding between the child and his father. Furthermore, if the agency concludes that the minor is adoptable and argues for termination of parental rights at a .26 hearing, the agency's objective is in direct conflict with a parent who desires to avoid termination in order to maintain a link with the child. To require the agency to produce evidence about whether the child might benefit from continued parental contact would compel the agency to bring up facts not essential to its case at the .26 hearing.

On the other hand, it is reasonable to impose the burden of proof on the parent who objects to termination based on the alleged existence of the exception identified in §336.26(c)(1)(A).

In In re Sara H. (1997) 52 Cal.App.4th 198, the Sixth Appellate District refused to conduct an independent review of the record on appeal from an order terminating parental rights pursuant to W&I §366.26. In that case, the appointed attorney filed a brief acknowledging the decision in In re Sade C. (1996) 13 Cal.4th 952, but asking the court to exercise its discretion to grant review. The Court of Appeal concluded Sade C. did not leave the door open for "discretionary" independent review. So, for those of you doing appeals in the Sixth District, find an issue.

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FREEDOM FROM CUSTODY CASES

The United States Supreme Court has reversed a Mississippi order terminating the parental rights of the mother where the state required payment of a transcript fee by the indigent parent. In M.L.B. v. S.L.J. (1996) 519 U.S.___ [136 L.Ed.2d 473, 117 S.Ct.__], the stepparent filed a petition to terminate parental rights of the mother in order to facilitate a stepparent adoption.

After a hearing, the Mississippi trial court ruled, without discussing the evidence which established, that the natural father and his second wife had met their burden of proof by clear and convincing evidence. The mother filed a notice of appeal and was able to scrape together the nominal filing fee, but could not afford the record preparation fee of $2,352.36. Her petition seeking leave to appeal in forma pauperis was denied, and that ruling was affirmed through the state Supreme Court.

On certiorari, the majority observed that "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked 'of basic importance in our society,' [citation omitted], rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." Justice Ginsberg went on to note that the parent's interest was precious and fundamental, while the state's interest was financial, and cautioned that "we place decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice.' [Citation omitted.]

Because the Court felt termination decrees "wor[k] a unique kind of deprivation," involving the "awesome authority of the State 'to destroy permanently all legal recognition of the parental relationship,'" it did not feel the right to free transcripts should be restricted to criminal cases. Justices Thomas, Scalia and Rehnquist dissented.

PATERNITY CASES

In the recent case of Lozano v. Scalier (1996) 51 Cal.App.4th 843, the court held that in order to bring a wrongful death action, the father of a child born out of wedlock need not have acknowledged the child after its birth in a written and witnessed document. In that case, 10-month old Raymond was killed in a car accident involving a car driven by his mother, the defendant in the action. The "natural" father filed a wrongful death action against the mom. The mom admitted liability up to the limits of her insurance policy, but she asserted the father lacked standing to sue inasmuch as he had never acknowledged Raymond as his child in writing during the child's lifetime. The trial court found dad had standing because he acknowledged Raymond as his child and contributed to his support.

The Court of Appeal (Div. One, First District) held there was no such prerequisite. Code of Civil Procedure §377.60 provides that where a decedent leaves no spouse or child, an action may be brought by "persons who would be entitled to the property of the decedent by intestate succession." The Probate Code determines intestate succession according to relationship without regard for marital status of the parents, thus eliminating the distinction between legitimate and illegitimate children.

The defendant's premise arose from her interpretation of Probate Code §6452 which precludes the father of an illegitimate child from inheriting from the child unless both the following requirements were met: (1) the parent acknowledged the child, and (2) the parent contributed to the support or care of the child. As to the first requirement, the defendant's position was that the acknowledgment had to be in writing, signed in the presence of witnesses, as required by former provisions of Probate Code §255.

On appeal, the Court noted the revised provisions relating to intestate succession were part of the major overhaul which gave us the revised provisions of the Family Law Act and the Uniform Parentage Act. Indeed, the new section 255 of the Probate Code expressly provides that succession to a child's estate depends upon the existence of a parent-child relationship as established pursuant to the Uniform Parentage Act. Thus, there were found to be no requirements of the written, witnessed, acknowledgment of paternity to give father standing to sue for wrongful death. Does anyone but me see an incongruity in laws relating to paternity?

In In re Marriage of Rebecca and David R. (1997) 54 Cal.App.4th 471, the Fourth District Court of Appeal found that the statutory parentage presumption doesn't apply in marriage if blood tests ordered on the court's motion prove otherwise. During divorce proceedings, Rebecca informed her husband of 17 years, David, that he was not the biological father of their two children. The court, on its own motion, ordered blood testing, as recommended by the family mediator, and the tests confirmed that David is not the biological father of the children.

Nonetheless, the trial court found David could not be relieved of his parental responsibilities

because Family Code §7540 establishes a conclusive presumption that the child of wife cohabiting with her husband, who is not impotent or sterile, is a child of the marriage.

The appellate court found that a court which orders blood testing on its own motion under Family Code §7551 must determine paternity on the basis of the blood tests, not the social relationships involved. "We therefore publish this opinion to emphasize to trial courts that they should not routinely order blood test in such cases but instead must exercise their discretion when acting under §7551. This result follows from the statutory scheme which clearly states that when such blood tests are ordered, the trial court must follow their results." (§7554,7541(a).)

The appellate court also suggested that the Legislature reconsider the current statutory scheme, so that the trial court could order blood tests on its own motion or on suggestion or motion of a party, but then allow the trial court to exercise its discretion to determine paternity on the basis of the blood tests. If this change were made, the trial court could consider such factors such as the age of the child, the presence or absence of bonding and a close familial relationship between the presumed father and the child, and/or the presence or absence of any relationship with the biological father. (Id. at 5112.)

On another front, the Second District Court of Appeal has concluded that despite test results disproving paternity, a prior admission of fatherhood was enough for res judicata to prevent relitigation of the issue. In Robert J. v. Leslie M. (1997) 51 Cal.App.4th 1642, Robert admitted being the legal father of Ryan in April, 1990, when served by the District Attorney's Child Support Division with an action to establish paternity in order to seek reimbursement for AFDC payments to Leslie. At that time, Robert stipulated to paternity and agreed to pay support, in lieu of requesting blood tests, because he feared the suit would jeopardize his chances of joining the San Diego Sheriff's Office.

However, apparently Robert had occasionally asked Leslie to have blood tests run to ascertain if he was Robert's biological father. In July, 1994, she agreed and the tests excluded Robert as the father. He then filed an action to establish nonpaternity and sought to have it consolidated with the County's action. The trial court ruled the doctrine of res judicata precluded relitigation of the paternity issue.

On appeal, the reviewing court noted that Robert did not even have standing to bring an action to declare nonpaternity. Under Family Code §7630, subdivision (a)(2), only a presumed father may bring an action for declaration of nonpaternity, and at no time was Robert a presumed father. As to the question of whether the prior stipulation had res judicata affect, the Court of Appeal held it did. It noted appellant's predicament (being required to support a child to whom he has no biological relationship) was of his own creation, and that it was final even if it

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factual underpinning is erroneous.

As to Robert's claim his due process rights require a declaration of nonpaternity, the court noted that timely establishment of his nonpaternity would have carried the day in 1990, but that time had passed and there were other interests at stake. By reason of Robert's admission of paternity, Ryan was prevented from learning the identity of his biological father, and he has an interest in having a legal father. The mother also has an interest in having a legal father for her son, and the State of California has an interest in the sanctity and finality of its family law judgments and in obtaining support for the children of single parents. It was thus not unfair to foreclose relitigation of paternity.

INDIAN CHILD WELFARE CASES

Division Two of the First Appellate District found that California's de-facto parent doctrine is not pre-empted by the federal Indian Child Welfare Act. (In re Brandon M. (1997) 54 Cal.App.4th 1387.) Roger H. was Brandon's step father for many years, and after Brandon's mother and Roger were divorced, and mother and Brandon moved to California, Brandon continued to visit Roger in Arkansas every year. Brandon is a recognized member of the Stewart's Point Rancheria tribe of the Pomo Indians.

The juvenile court retained jurisdiction over Brandon and his two half brothers (Roger's sons) after it was alleged mother's home was without adequate food, heat, or water, and drugs were found in the home, including the children's rooms. At the six month hearing, the court declared Roger de facto parent of Brandon. The tribe filed two pleadings supporting this finding. The three boys then were sent to live with Roger for a 90 day trial period, after which they would be returned to mother.

The First District found the only cases on point rejected the argument that IWCA pre-empts federal law when applicable to juvenile law. (In re Pedro N. (1995) 35 Cal.App.4th 183, 190; Slone v Inyo County Juvenile Court (1991) 230 Cal.App.3rd 263, 266-268.) The court found no conflict between any provision of the IWCA and application of California's de facto parent doctrine, and took special note that the tribe had filed two pleadings to support the court's ruling.

PRIVATE ADOPTIONS, GUARDIANSHIPS AND CONSERVATORSHIPS

The California Supreme Court granted review in the case of Adoption Petition of Mark and Stacy A. (1996) S057197 on January 22, 1997. I mentioned the case in the last issue of Civil Tongues (the modified opinion was reported at 96 Daily Journal D.A.R 12289 on rehearing; formerly at 48 Cal.App.4th 1858). The appellate opinion ruled that the parent's act of signing a refusal to consent to an adoption within the six-month period provided by statute, negated any inference of an intent to abandon the infant. The adoptive couple petitioned for review. I will keep you informed of the status of the case.

In guardianships, the Second District Court of Appeal, Division 7, recently held the parent's burden of proof, on a petition to regain custody of a child who has been made subject of a guardianship, is preponderance of the evidence. In In re Michael D. (1996) 51 Cal.App.4th 1074, Michael's grandparents were awarded guardianship of the minor at the permanency planning hearing. At a post-permanency planning hearing, the department sought to terminate juvenile court jurisdiction.

Prior to that hearing, the mother filed a petition to modify the permanent plan and terminate the guardianship based upon her changed circumstances. By this time, extended visits between parent and child had taken place and Michael wanted to live with his mother. The department argued the guardianship could not be terminated absent evidence of detriment to the child inflicted by the guardian.

The trial court found the mother had carried her burden of proof of showing changed circumstances and found it was in Michael's best interests to be returned to her custody. The department and the guardian appealed. On review, the Court of Appeal affirmed the trial court's finding, concluding the parent's burden of proof to modify a permanent plan is by a preponderance of evidence. Thus, when a parent satisfied his or her burden of proof, the juvenile court acts within its discretion in granting a petition for modification even though the change in placement results in termination of a legal guardianship conditionally established while the child was a dependent.

It also found there was substantial evidence to support the trial court's conclusion that return of the child to mother's custody was in the minor's best interests. The evidence was uncontradicted and the minor's testimony constituted powerful demonstrative evidence it would be in his best interest to allow him to "live with Mommy." There was no further risk in the mother's home and his

consistent preference for living with his mother supported the juvenile court's findings.

MISCELLANEOUS CASES THAT DON'T FIT ANYPLACE ELSE

In re Patrick H. (1997) 54 Cal.App.4th 1346, the First District Appellate Court that a juvenile that was found incompetent was erroneously committed to a state hospital to regain competency. At the time of the alleged offenses, (burglary, assault upon a peace officer, etc.) 16 year old Patrick was a patient at Napa State hospital. The juvenile court found Patrick incompetent and under Penal Code §1370 committed him to the hospital "for purposes of being treated in order to regain his trial competency."

The appellate court found that the juvenile court erred by applying adult Penal Code rules to a juvenile proceeding. Once the juvenile court "borrowed from Pen. Code §1367 and used as a yardstick the definition of incompetency set forth in that section" (In re James H. (1978) 77 Cal.App.3d 169,176.), it should no longer have continued with the adult statutory scheme. Instead, once the court found that the minor could not cooperate with his counsel, it should have turned to §705 and proceed under either §6550 or §4011.6, whichever was appropriate. (In re Mary T. (1985) 176 Cal.App.3d 38,43.) Rather than issuing a 90 day commitment order, the appropriate step at that time would have been to refer Patrick to a facility for a 72 hour treatment and evaluation.

The appellate court further found that once Patrick was found incompetent, the juvenile court should have referred him for an early evaluation for possible initiation of LPS civil commitment proceedings. (See §§705, 6550; 4011.6)

In People v. Mora (1996) 51 Cal.App.4th 1349, the First District Court of Appeal, Division 4, held that notwithstanding the termination of the rights of the biological father, he could be convicted of battering the mother of his child. In this case, a jury convicted Mora of violating PC §273.5, battering the mother of his child, and found true an allegation he had suffered a prior prison term. He appealed on the grounds the termination of his (and the mother's) parental rights barred a conviction for battering the mother of his child.

The reviewing court interpreted §273.5 as being intended to deter domestic violence. The statute serves to "protect partners in a special relationship from which society demands, and the victim may reasonably expect, stability and safety." (Id., 51 Cal.App.4th at p. 1355.] Thus, the law which once protected married persons has evolved to also protect unmarried cohabitants and now, persons whose past intimate relations resulted in the birth of a child.

The court thus concluded that severance of the parent child relationship was irrelevant because it only affected the legal status and continuing relationship of parent and child.

I am disturbed by the circular reasoning of this case. I do not think the State should have it both ways: be able to sever familial relationships

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expeditiously when it wishes to free a child for doption by others on the one hand, but still retain the fiction of a relationship in order to establish a basis for criminal liability which disappeared with the relationship.

If the person is guilty of assault and/or battery, that should be sufficient without regard for his biological connection, now severed, to any child of the victim. After all, the child is no longer hers, either, and with the evaporation of her relationship to the child evaporates the State's interest in preserving any "special relationship from which society demands, and the victim may reasonably expect, stability and safety." A petition for review was filed on February 10, 1997.

PROCEDURAL NOTES AND TIPS

In reading transcripts of dependency proceedings, I notice trial attorneys still "submit on recommendations" at hearings, despite case law which interprets such a submission as invited error. Please keep in mind that "submitting on reports" is different from "submitting on recommendations." In the former situation, much like the slow plea in criminal cases, appellate review of the sufficiency of the evidence is preserved. (See In re Tommy E. (1992) 7 Cal.App.4th 1234, 1236-1237.) However, the latter situation is considered a party's agreement with the recommendation in the social worker's report. (In re Richard K. (1994) 25 Cal.App.4th 580, 589; see also Steve J. v. Superior Court (1995) 35 Cal.App.4th 798.)

If you intend to appeal from an order of the juvenile court on any ground, take care to not inadvertently waive the issue by using the wrong terminology.

IDENTIFYING PARTIES IN DEPENDENCY APPEALS

Dependency cases are rather strange animals. They are not civil, not criminal, not administrative, and not adversarial. The "best interest of the child" philosophy, which forms the anlage of the entire juvenile court system, has led to the development of informal procedures by which information is gathered from many sources to develop an appropriate plan for the child.

This has led to liberal policies permitting non-traditional parties to obtain standing to present their views in juvenile court. Relatives are afforded standing, de facto and foster parents are afforded standing, and any other interested party may be heard on the issue of what decision would be in the child's best interests.

The Superior Court typically lists all persons who appear with counsel, or who ask to be heard, as "parties." When a notice of appeal is filed, the Superior Court clerk sends a notice of the filing to all persons/parties who appeared at the proceeding which is the subject of the appeal. The question arises, "Is everyone a party to the appeal?" Unfortunately, the Rules of Court are not terribly clear on this issue. But here are a few guidelines.

Rule 39(a) of the California Rules of Court provides the rules governing appeals from the superior court in criminal cases are applicable to all appeals from the juvenile court and any appeal in an action under Civil Code section [formerly] 232, except where otherwise provided. Subdivision (b) of Rule 39 requires the clerk to serve a notice of filing the notice of appeal "to each party other than the appellant, and all attorneys of record. In a juvenile dependency case, the clerk shall also mail a notification to any de facto parent, any court-appointed special advocate, and to the tribe of an Indian Child." These individuals and/or entities are considered "parties" in the Juvenile Court proceedings.

On appeal, the "aggrieved party," who files the notice of appeal, is the "appellant." Any "adverse party" is the "respondent." (Code Civ.Proc., §902; Pen. Code, §1236.) Rule 16(b) requires proof of the deposit of one copy of the brief with the clerk of the superior court for delivery to the judge who presided at the trial of the case.

Thus, to be safe, when determining who should be served with a copy of a brief in a dependency appeal, adopt the following checklist: Identify the "parties." A look at the notice of filing the notice of appeal by the superior court clerk will tell you who the parties are. Of course, for some of the parties, there may be successor counsel. For instance, if a party is entitled to appointed counsel on appeal, the Court of Appeal will have made a new appointment order after the notice of appeal has been processed.

However, a copy of the appointment order is served on all parties to the appeal. The next question is, what parties does the court consider a party to the appeal? Sometimes even the Court of Appeal has a question as to who should be party to the appeal. It is not always easy to tell, because oftentimes, in an abundance of caution, the superior court clerk will

list everyone who appeared at the hearing which is the subject of the appeal. This can include relatives, foster parents, etc.

Here are some determining factors which might help identify the players. You already know who the appellant is. If appellant was afforded appointed counsel, you will have received a conformed copy of the appointment order with the name and address of appointed counsel. If you represent the appellant, you will need to provide a courtesy copy of your brief to trial counsel, as well as all adverse parties on the appeal.

County Counsel, which usually represents the Department of Social Services at the trial level, usually represents the Department on appeal. If the District Attorney's office filed the petition (in those counties not using County Counsel for that purpose), either the D.A. or the Attorney General will represent the agency on appeal. [We do not see many D.A. cases in the Fourth District anymore, but if you are in a county where the D.A. is the petitioner, check with that office to see who will handle the appeal.] The county will, no doubt, have at least a passing interest in the appeal, even if County Counsel is not the de jure respondent. It would therefore be advisable to serve County Counsel (or other office as appropriate in counties where the D.A. petitions on behalf of dependent children) with a copy of the brief.

The minor will also be a party to any appeal from a dependency order or judgment. By statute, the minor is afforded appointed counsel on appeal. Thus, the Court of Appeal will serve all parties with a copy of the conformed appointment order so you can determine who represents the minor on appeal.

De Facto parents and relatives have standing to appeal if they are aggrieved under current case law. Do they need to be served with a copy of the brief? That is not so clear since the non-adversarial nature of dependency proceedings does not make it clear that everyone who is not an appellant is a respondent.

Look to see if the relative or de facto parent has an <u>independent legal interest</u> which would warrant a position on appeal. Frequently, the relative or de facto parent may personally appear to support the position of one of the other represented parties in the trial level. If the individual is not asserting an independent legal position in the trial proceedings (such as their own right to custody of a dependency child), my view is such person probably is not a party to the appeal. In those situations, the position of that individual will probably be covered by the represented party with whose position the relative or de factor parent joined.

A de facto parent or relative who presented an independent position at the trial level, will probably have an independent position on appeal. Unless it is pretty obvious that counsel for one party adequately presented the position of another party or person with an interest in the proceedings, the safe thing is to provide a copy of the brief to the additional parties. Any party who appeared in the trial level with counsel probably has a sincere enough **independent** interest in the proceedings to be afforded at least a courtesy copy of the brief.

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What about a parent who is not the appellant? I would treat the other parent as a respondent, irrespective of whether or not the parent requested appointment of counsel on the appeal.

KUDOS AND ANECDOTES

Roland (Pete) Simoncini prevailed in a motion to declare two minors unavailable as witnesses to testify against their parents in a death penalty prosecution, in a ruling made on February 18, 1996. The minors had testified at the preliminary hearing in People v. Gonzalez, et al., and had begun to exhibit signs of severe post-traumatic stress syndrome. Several experts were called to testify at the in limine proceeding, and were unanimous in their opinions that the children would suffer further if called to testify against their parents. The prognoses were further bleakened by the fact the children would have to
come to grips with feeling responsible if the death penalty were imposed, as well as being responsible for their siblings orphanhood if the death penalty were imposed as a consequence of their testimony.

Given the District Attorney's acknowledgment the case could be proven without the testimony of the children, and the long range ramifications, the trial court found the evidence overwhelming that the children were unavailable within the meaning of Evidence Code §240.

Judith Klein recently obtained relief in the nature of a writ of mandate from Division One of the Fourth District Court of Appeal, in an unpublished decision. In the case, the mother had completed the reunification plan requirements, the child had been returned, but was later re-removed when the mother had a relapse of her drug problems. The mother immediately got accepted into an outpatient program, because she was working, but refused to enter an inpatient program, so services were terminated and the matter referred for a hearing pursuant to W&I §366.26.

The Court of Appeal rejected arguments related to the adequacy of the services provided, but granted the writ in order to compel continuation of the services. The Court stated it did not disagree with the Department that it would be more difficult to succeed in an outpatient program rather than an inpatient program, but "there were many roads which may be traveled to get to a particular goal. Tammy, knowing her choice is more difficult, has selected one avenue and the Department has required another. We believe the court abused its discretion in requiring Tammy to accomplish reunification the Department's way or not at all and in not extending services beyond the 12-month hearing so she could attempt an outpatient program." (Typed opn., p. 6-7, Tammy S. v. Superior Court (S.D.D.S.S.) [Unpublished opinion filed 7/8/96; D025951].)

HOT RESOURCES

Appellate Defenders, Inc., has obtained a copy of the ABC program entitled "Junk Science: What You Know May Not Be So." One segment deals with fallacy underlying the presumption that babies born under the influence of crack cocaine are irreparably damaged. If you did not have an opportunity to view the program in its entirety when it aired, and would like to see it, please contact Elaine Sinagra at A.D.I. (696-0284, ext. 45) to schedule a private showing. Using experts such as the doctor who has been trying to de-bunk the crack-baby myth might be helpful to both trial and appellate practitioners in drug-baby cases.■

KUDOS **(Continued from page 8)**

Straight Romero Remands (attorney names only):

Fay Arfa, J. Peter Axelrod, Russell Babcock, Sylvia Baiz, Douglas Benedon, Christopher Blake, J. Thomas Bowden, Gordon Brownell, Stephen Buckley, Elizabeth Bumer, Dacia Burz, Dennis Cava, Dawn Chan, Ward Clay, Marjorie Cohn/Jerome Wallingford, Anthony Dain, Scott Davenport, Cara DeVito, Carl Fabian, Patrick Ford, Mark Greenberg, Mark Hart, Robert Howell, Sharon Jones, David Kelly, Eleanor Kraft, Jill Lansing, Stephen Lathrop, Thomas Lawrence, Kevin McLean, George Mertens, Gary Nelson, Diane Nichols, Debi Ramos, J. Michael Roake, Michael Satris, Steven Schorr, George Schraer, John Schuck, Richard Schwartzberg, Terrence Scott, Athena Shudde, John Staley, Howard Stechel, Ava Stralla, Joseph Tavano, Stephen Temko/Benjamin Pavone, Roberta Thyfault, Alisa Weisman, Nancy Weiss, and Jeffrey Wilens.

Patricia Andreoni, P. v. Ordonez, #E017309, Misdemeanor count concerning the unlawful use of a driver's license reversed because evidence upon which conviction was based was obtained in violation of Miranda: defendant under arrest and in constructive custody of law enforcement while in hospital.

Fay Arfa, P. v. Boske, #E017644, Judgment modified to give a total of 593 days of pre-sentence custody credits. (I)

Russell Babcock, P. v. Trujillo, #E017889,

Imposition of separate, unstayed sentence for two kidnappings & the carjacking violated PC §654. Remand for resentencing because the appellate court could not tell what sentence the trial court would have imposed based on a fuller understanding of the law. (I)

Michael Bacall, P. v. Rogelio L., #D027075, The minor could not be found guilty of both assault with a semi-automatic firearm and assault with a firearm because the latter is a LIO of the former. (I)

Susan Bauguess, P. v. Henderson, #G018569, Court's order reducing wobbler to misdemeanor in strike case affirmed on appeal. (I)

Douglas Benedon, P. v. Charlton, #E017439, Abstract of judgment ordered corrected to omit erroneous reference to a four year concurrent term pursuant to PC §1192.7, subd. (c)(8). (A) 2) P. v. Joel E., #G019685, Wobbler case remanded for court to determine whether crime is a misdemeanor or felony. Court's reference to offense as felony in the commitment order not dispositive because it appeared it was merely reciting wording of charging petition. (I)

Christopher Blake, P. v. Walker, #D027284, Third strike case reversed because of defective modification to CALJIC No. 2.90. (I)

Jill Bojarski, P. v. Davis, #E017556, Prejudicial error when trial judge dismissed a juror during deliberations and reversed conviction for possession of cocaine for sale. Juror disagreed with other jurors, which foreperson related to court with a complaint that the juror was refusing to deliberate. The excused juror denied refusing to deliberate saying she disagreed with the majority. Rather than resolve the disputed facts by clarifying the issue with other jurors, court assumed foreperson was correct and kicked the juror off. (I)

Robert Boyce, P. v. Miller, #D025692, Factual basis for true finding insufficient when based on alleged incident occurring after count to which pled and which was later dismissed. (I) 2) P. v. Salazar, #D021367, Trial court abused its discretion in excusing juror without any inquiry as to location of the jury or his probable arrival time. (I) 3) P. v. Williams, #D025838, Remanded for resentencing - trial court had authority to modify illegal sentence during pendency of appeal, but not without defendant being present. (I)

Martin Nebrida Buchanan, P. v. Johnson, #E018424, Romero remand. Court declines to find waiver based on defendant's failure to request court strike the prior on its own motion. (I) 2) P. v. Harrison, #D025024, #D025023 & #D024993, People concede under PC §654, defendant cannot be sentenced on both count 1 & count 3. Limitations of PC §1170.1, subd. (a) apply to sentence imposed under the 3 strikes law such that court could only impose 1/3 the mid-term for the firearm use enhancement associated with count 2, for which punishment had been imposed consecutive to count 1. Remand for Romero. (I)

Marilyn Burkhardt, P. v. Williams, #E018226, Three-year GBI enhancement stricken pursuant to PC §1170.1, subd. (e) where defendant also received a gun use (§12022.5, subd.(c)) enhancement. (I)

Gregory Cannon, P. v. Gates, #D024928, Conviction of robbery reversed where trial court modified CALJIC No. 2.90 re "beyond reasonable doubt" to include the wording "firmly convinced." (A)

Susan Cardine, P. v. Moore, #D026804, Same prison prior alleged in two separate informations, which were later combined, can only be imposed once. Prison prior stricken. (I) 2) P. v. Quezada, #G019517, Reversed & remanded where court improperly delegated responsibility for determining restitution amount to probation officer and imposed over broad condition of probation. (I)

Ward Clay, P. v. Kirkland, #D026273, Romero remand where defendant admitted the priors, but objected to their use. There was no evidentiary hearing on the validity of the priors. (I)

Howard Cohen, P. v. Ricardo B., #E017980, Where evidence & juvenile court's findings as to firearm use or arming were equivocal, matter remanded to juvenile court for unambiguous finding on firearm use or arming. 2) P. v. Erlich, #D026477, Three counts of contempt for failure to pay child support annulled. (ADI)

Paul Couenhoven, P. v. Moriarity, #E017377, Remand pursuant to Romero in non-silent record case. Also, concurrent 25 years to life term for forgery stayed pursuant to PC §654 where 25 year to life term also imposed for burglary of bank where forgery committed. (I)

Anthony Dain, P. v. Contreras, #D024396, PC §4019 credits improperly calculated at 20%. (I)

Michael Dashjian, P. v. Satterfield, #E018004, Guilty plea reversed because appellant erroneously told he could appeal the denial of his Miranda motion. (I) 2) P. v. Mills, #E017318, Five-year consecutive gun use enhancement stayed pursuant to §654 because substantive count to which it attached was also stayed per §654. (A)

Linn Davis, P. v. Gonzales, #E019138, Sentence on conspiracy to possess cocaine for sale stayed per PC §654 in light of sentence on underlying substantive offenses. (I)

Scott Davenport, P. v. Lacey, #E017922, Restitution order modified from $1,434 to $1,000 to conform to trial judge's oral pronouncement. (A)

(Continued on page 26)

Linn Davis, P. v. Snider, #E018702, Concurrent term ordered stayed pursuant to PC §654. (I) 2) P. v. Gonzales, #E019138, Sentence on conspiracy to possess cocaine for sale stayed per PC §654 in light of sentence on underlying substantive offenses. (I)

John Dodd, P. v. Ford, #E017320, §654 prohibits punishing defendant for using a firearm in the commission of the robbery and for being an ex-felon in possession of a firearm; sentence for ex-felon in possession charge stayed. (I) 2) P. v. McCurdy, #D025058, Conviction of attempted residential burglary reversed where trial court erroneously refused a defense request to give LIO instruction on trespass. (I)

Michele Douglass, P. v. Ponce, #E018178, Trial court improperly denied strikes defendant full PC §4019 presentence custody conduct credits. (A)

Brett Duxbury, P. v. Morales, #D024392, Conviction for offering to sell meth and possession of burglary tools reversed. Case remanded for new sentencing on remaining counts related to appellant's involvement in a car-theft ring. (A)

John Edwards, P. v. Zapari, #D025889, Simple possession of meth reversed where defendant was also convicted of possession for sale. (A)

Lori Fields, In re Andrea D., #G020348, Order terminating reunification services and ordering long term foster care reversed. Court abused its discretion by imposing a geographical limitation on child's visits to incarcerated mother without a finding of detriment. Trial court ordered to reinstate reunification services. (A)

Patrick Ford, P. v. Berg, #D025527, Prior conviction used as a serious felony prior and a strike prior is stricken. The prior assault did not qualify because defendant did not personally use a firearm. (I)

Cliff Gardner, P. v. Houck, #D025704, Where a prior conviction results from a trial, the transcript of the preliminary hearing of that case is not part of the "record of conviction" (People v. Reed (1996) 13 Cal.4th 217) which can be used to prove the nature of the conviction in a subsequent proceeding. (I) 2) P. v. Thomas, #D024991, Case remanded for retrial on allegations of second prison prior & second serious violent felony prior where jury returned written true findings as to these allegations but the findings forms were neither read nor recorded in open court. (I)

Harvey Goldhammer, P. v. Jimenez, #E019167, Kidnap for rape or sexual battery conviction reduced to simple kidnap because sexual battery not an enumerated offense under PC §208, subd. (d), and insufficient evidence of intent to rape. (I)

Melody Harris, P. v. Rivera, #D026081, People's appeal, judgment affirmed. Trial court did not abuse discretion when it reduced wobbler to misdemeanor in 3 strikes case and sentenced defendant to one year county jail rather than 25-years to life. (I)

Mark Hart, P. v. Castro, #G018694, Sentencing remand ordered where trial court indicated its intent to give same sentence as codefendant but sentence imposed was greater than that imposed on codefendant. (I)

Julie Sullwold Hernandez, P. v. Palacio, #G018086, Per PC §1170.1, lesser enhancement for use of a sword stricken because greater enhancement for inflicting great bodily injury also imposed. Also, the concurrent sentence for corporal injury to a spouse was ordered stayed pursuant to PC §654. (A)

Donal Hill, P. v. Lopez, #D026080, One year consecutive sentence for assault arising from a melee ordered stayed pursuant to PC §654. (I)

Robert Howell, P. v. Williams, #D023604, Romero remand and defendant entitled to 8 days additional credits. (I)

R. Charles Johnson, P. v. Marshall, #E016306, Molestation count reversed because statute of limitations applied and PC §803(g) did not extend that statute because barred by ex post facto clause of Federal & State constitutions. (I)

Sharon Jones, P. v. Acosta, #E017705, Partial reversal and remand for resentencing because parties below confused about defendant's 1989 conviction - it was not a "strike prior," so admission set aside. Romero remand as to other strike prior. (I)

Greg Kane, P. v. McKissack, #D024557, 1) Reversal based on Wheeler error. 2) Record did not establish jury's true findings that appellant was convicted of a serious felony re: his prior conviction for spousal battery involved personal use of a deadly weapon - a knife. Court found insufficient evidence appellant personally used a knife. (A)

Ronald Kaplan, P. v. Pineda, #G018972, Abstract of judgment ordered corrected to reflect oral pronouncement of judgment. (I)

David Kay, P. v. Jesus N., #D025555, Evidence of robbery was insufficient where the stolen property had been recovered prior to any force being used. (ADI)

Judy Keim, P. v. Morales, #D026777, Judgment vacated to allow trial court the opportunity to comply with the provision of PC §10000 (Diversion Statute). Trial court erred in finding pre-trial diversion unavailable for strikes defendant who met eligibility requirements, but whom court ruled was ineligible to divert under strikes law. (A)

Charles Khoury, P. v. Gallegos, #E015983, Three assault convictions reversed because there was no evidence as to the size of the bullet which struck them during the gun battle between appellant and attempted murder victim; they were struck with a

bullet that was compatible with the gun fired by the attempted murder victim, not with appellant's gun. (I)

Marleigh Kopas, P. v. Kiley, #G018188, Receiving stolen property conviction reversed because defendant cannot be convicted of both receiving and acquiring the property (credit cards) with the intent to defraud under PC §484e. Also Romero remand in silent record case. (A)

Daniel Koryn, P. v. McDowell, #E018545, Conviction for receiving stolen property reversed where defendant convicted of stealing same property. (A)

Carlton Lacy, P. v. Gonzalez, #G017882, Sentence under PC §12022(c) stayed per PC §654 where defendant also sentenced under PC §12020(a). (I)

Harold LaFlamme, In re Erik S., et al., #G020140, In a minor's appeal, held it was reversible error for the trial court to terminate jurisdiction upon an oral request by the social services agency on the day of the hearing. A petition for modification (W&I §388) must be filed and the parties given notice and opportunity to be heard. (I)

Gregory Marshall, P. v. Turk, #D024174, Abuse of discretion in trial court's granting of appellant's Faretta motion for purpose of sentencing. (I) 2) P. v. Johnson, #E017220, Abstract of judgment ordered corrected to reflect actual sentence imposed. (I)

Marilee Marshall, P. v. Saitta, #E017447, Third strike Romero remand in shoplifting case with non-silent record. Case also remanded with directions for trial court to recalendar and rehear the defendant's motion for disclosure of juror names originally made by defendant to investigate juror misconduct for a new trial motion. (I)

David McKinney, P. v. Hughes, #D024964, 1) In a conviction for a 1992 burglary, trial court committed error by instructing jury with post People v. Montoya (1994) 7 Cal.4th 1027 instruction, directing one is guilty of aiding & abetting a burglary if he formed the intent to aid & abet at any time before the direct perpetrator left the premises. In light of the prosecution's closing argument that defendant was guilty either as a direct perpetrator or an aider & abettor, this error was prejudicial. 2) Texas prior conviction does not qualify as a prior conviction enhancement because evidence does not show
defendant knowingly & voluntarily gave up his privilege of self-incrimination during the prior plea. (I)

Susan Metsch, P. v. Paul G., #D026399, ADW charge was not supported by threat to use knife where there was no attempt to strike the victim and defendant was not close enough to strike victim. (I)

Cindi Mishkin, P. v. Bennett, #D026557, Where defendant's convictions for possession of meth for sale and possession of meth arose out of same act, the latter crime is a LIO of the former such that the conviction for the latter crime cannot stand. (ADI)

Elizabeth Missakian, P. v. Vidaca, #E018064, Concurrent sentence for possession of methamphetamine stayed per PC §654 where defendant also received sentence for transporting same drug. (I)

Gary Nelson, P. v. Nash, #D025911, Although appeal dismissed as moot, conviction reversed on companion habeas petition for prosecutor's failure to turn over 911 tape that contained statement damaging to credibility of the accusing witness. (I)

Laurel Nelson, P. v. Cantrell, #E016743, First degree burglary reduced to second because of insufficient evidence that dwelling was inhabited; remanded for resentencing. (A)

Blair Nicholas/Neil Auwarter, P. v. Harrell, #D024812, Receiving stolen property conviction reversed where defendant was convicted of taking or driving the same vehicle (VC §10851); prior prison term improperly "stayed" deemed stricken; People barred by failure to object under Scott from challenging reasons for striking prior. (ADI)

Kenneth Noel, P. v. Shumate, #D025394, In light of People v. Norrell 96 13 Cal.4th 1, the case was remanded because the trial court indicated it wished to sentence defendant on the lesser offense but did not believe it had the discretion to do so. (A)

Ralph Novotney, Jr., P. v. Crain, #E016915, Trial court erred in staying two unimposed prison term enhancements; amendment of abstract ordered to reflect they are stricken. (A)

John Olson, P. v. Alfaro, #E018271, 1) P. v. Alfaro, #E018271, Insufficient evidence to prove theft by false pretenses because store clerk knew items defendant was "returning" were stolen, but evidence was sufficient to prove attempted petty theft (a misdemeanor), judgment modified as such. Romero remand. (I) 2) P. v. Garcia, #G018614, Conviction for unlawful taking a vehicle stayed per PC §654 where it was part and parcel of burglary conviction. (I)

Richard Power, P. v. Turner, #D025967, Robbery conviction reversed because evidence insufficient to show appellant ever gained control of the property. Romero remand. (I)

David Rankin, P. v. Pinal, #E018829, Three year GBI enhancement stricken because firearm use enhancement also imposed. 2) P. v. Olguin, #E018234, Direct restitution to Medi-Cal to reimburse cost of treating victim stricken because unauthorized. (ADI)

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Andrew Rubin, P. v. Moore, #D024988, Romero remand, but on remand the trial court must also consider whether sentence must be imposed consecutive to another sentence. Further, although restitution issue was deemed waived by lack of objection, objection may be made at remand. (I) 2) P. v. Pittman, #E017726, Concurrent term for meth possession stayed pursuant to PC §654 where defendant was also sentenced for transporting the same meth. (I)

Stefanie Sada, P. v. Hansen, #E017235, Defendant awarded additional 103 days presentence credit because attempted lewd conduct is not a violent felony under §2933.1. 2) P. v. Aubert, #G018569, Court's order reducing wobbler to misdemeanor in strike case affirmed on appeal. 3) P. v. Miranda, #G018062, Case remanded so court could consider striking prior convictions. Although court had indicated it would not strike strikes if it could, it also indicated it thought 35 years to life too high. Because mandatory 5-year enhancements must be imposed on remand, court may revisit earlier ruling and decide to strike a prior. (ADI)

Richard Schwartzberg, P. v. Nguyen, #G018322, PC §12022 enhancement stayed because substantive count (assault with automatic firearm) includes arming element as an essential element of the offense. (I) 2) P. v. Penton, #E018062, Remand so court can consider striking prior conviction or reducing current offense to misdemeanor under PC §17(b). (I)

Patricia Scott, P. v. Jacob R., #D026608, Case remanded for express finding as to whether the offense was a misdemeanor or felony under W&I §702. (ADI)

Terrence Scott, P. v. Arredondo, #G018247, Kidnapping conviction which was reduced to a misdemeanor at a sentencing hearing subsequent to defendant's initial sentencing hearing after defendant reoffended does not constitute a prior conviction under PC §667, subd. (a). [The conviction, however, still qualifies as a strike prior.] (I)

R. Clayton Seaman, P. v. Hernandez, #D024403, Published opinion - court reversed six violent sex offenses involving two victims because trial court abused its discretion by admitting evidence from "Sherlock," the police data base computer system. (I) 2) P. v. Jordan, #E017220, Abstract of judgment ordered corrected to reflect actual sentence imposed. (I)

Maureen Shanahan, P. v. Callaway, #E018584, Possession of meth conviction reversed based upon illegal search of motorist. (I)

J. Courtney Shevelson, P. v. Gonzales, #D023713, Failure to instruct the jury on an element of the offense of exhibiting harmful matter to a minor. (I) 2) P. v. Riddle, #D024441, Conviction for possession of syringes (in prison) to inject controlled substances reversed. People had relied heavily upon appellant's conviction of possession of cocaine for which he was imprisoned. That conviction was on appeal at time of the instant trial. On the earlier appeal, the appellate court reversed on insufficiency of evidence. The court reverses here because (1) admission of conviction later reversed & (2) prejudicial impact of cocaine possession outweighed probative value. (I) 3) P. v. Burroughs, #E016609, Defendant's confession to parole officer was obtained in violation of Miranda. (I)

Athena Shudde, P. v. Garcia, #D026536, Juvenile case remanded for trial court to determine whether offenses are misdemeanors or felonies. (I) 2) P. v. Fayne, #E019883, Motion for additional credits granted by the superior court where court had not given PC §4019 50% credit for pre-trial custody pursuant to People v. Hill. (I)

Alice Shotton, In re Anna M., #G020653, Reversal of parental termination where court noted, "Prejudice [to the mother] occasioned by lack of notice, coupled with lack of advocacy, virtually leaps from the record." (I)

Corinne Shulman, P. v. Hamilton, #E017839, Consecutive sentences held to be error because trial court abused its discretion in finding the robbery and carjacking did not arise out of the same set of operative facts, and PC §654 bars consecutive sentences. Appellant entitled to PC §4019 credits; Romero remand. (I)

Stuart Skelton, P. v. Baldwin, #D025304, Simple possession reversed as LIO of possession for sale. (I)

Theresa Osterman Stevenson, P. v. Clinton C., #D027325, Dispositional remand for juvenile court to state whether assault is a misdemeanor or a felony. (A)

Jeffrey Stuetz, P. v. Hall, #E017230, First degree murder conviction reversed where trial court, without holding a full hearing, improperly excused hold-out juror who was attempting to communicate to the court her belief that another juror was being coerced by the majority and that she was being harassed; respondent conceded sentencing errors which were not discussed in opinion. (I)

Robert Swain, P. v. Castaneda, #D024992, Reversal for failure to give unanimity instruction sua sponte when facts showed possession of heroin conviction could have been based either on heroin found in bedroom or heroin found in defendant's pocket during later search. Error compounded by erroneous admission of testimony that typical heroin dealers are Hispanic males, when defendant was charged with possession of heroin. (A)

(Continued on page 29)

Roberta Thyfault, P. v. Clifford, #D024328, Where defendant sentenced for conviction of second degree murder, sentences for robbery, torture and false imprisonment by violence should be stayed pursuant to PC §654. AG conceded the error. (I) 2) P. v. Rosbrugh, #E017073, Abstract ordered changed to reflect

Steven Torres, P. v. Beguette, #D025388, Conviction of carrying weapon in public place reversed because court failed to substantially instruct on all elements of offense. (A) 2) P. v. Gonzalez, #G019760, Stipulated reversal of defendant's judgment entered into by the parties where 2 of the 6 days of trial testimony were lost based on reporter's inability to transcribe them. Defendant will enter into negotiated plea which allows him the opportunity to turn his felony convictions into misdemeanors should he successfully complete probation. (A)

David Tucker/Howard Cohen, P. v. Serrano, #E016424, VC §10851 conviction reduced to former PC §499b, joyriding, unless the People choose to retry, since the jury was not instructed on the latter as a LIO and omission was not harmless. (I/ADI)

Paul Ward, P. v. Rammal, #D024286, Sentence and admission of priors reversed and remanded because trial court failed to fully advise on rights. (A)

Kyle Wesendorf, P. v. Chavarria, #E017598, Abstract of judgment ordered modified to reflect dismissal of two prison priors. (A)

Michael Weinman, P. v. Clough, #G018696, People's appeal dismissed because an order granting probation is not appealable. DA appealed misdemeanor reduction in three strikes case. No trial court error in reducing felony. 2) P. v. Ross, #G019007, Court of Appeal affirmed judgment reducing defendant's offense to a misdemeanor and, therefore, strike law inapplicable. (ADI)

Richard Weinthal, P. v. Bess, #E017243, PC §667.5(b) prior stricken because court imposed two, one year enhancements for one period of confinement. (A)

Alisa Weisman, P. v. Williams, #D026217, Receiving stolen property conviction reversed because it was based on property taken from a robbery for which defendant was also convicted. Prior prison term enhancements ordered stricken rather than stayed. Case was remanded for a determination of the amount of victim restitution although there was no objection. However, appellant waived right to have the court specify the losses to which victim restitution pertains by not objecting below. (I)

Nancy Weiss, P. v. Parker, #G018374, Sentence remand for trial judge to determine whether to strike enhancements erroneously stayed. (A)

Jerry Whatley, P. v. Preciado, #E017400, VC §10851 reversed because court failed to instruct on joyriding as LIO. (I) 2) P. v. Crandle, #E017236, Where neither change of plea form nor reporter's transcript of admission of prior conviction allegations contains an admission to a PC §667.5, subd. (b) allegation, no enhancement, based on the unadmitted allegation, can be imposed. (I)

Sharon Wrubel, P. v. Conti, #E016557, True finding as to prison prior reversed & prison prior term stricken. (I) 2) P. v. Delatova, #E017067, Second degree murder conviction reversed for instructional error regarding jury's consideration of victim's violent character. (I) 2) P. v. Love, #E017760, Burglary conviction reversed because trial court erred in refusing to instruct jury with defendant's LRO, unauthorized entry of property. (I)■

Correction:

ADI's April newsletter was incorrectly numbered 30. The correct issue number is 31.■

USERS SURVEY - ADI BRIEFBANK

In an effort to assess whether or not it is sufficiently valuable to panel attorneys to continue to make the briefbank available for sale, ADI has prepared the following questionnaire for present purchasers. Please fill it out and return it to Appellate Defenders, Inc., Attention: Elaine Sinagra, 233 A Street, Suite 1200, San Diego, CA 92101. If you use both the criminal and civil briefbank, please make a copy of this form and fill out one evaluation for each. Thank you for your assistance.

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Please feel free to add any comments on a separate sheet of paper, including, but not limited to, any suggestions for improving the brief bank.

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(Please see page 8 for further details)

Date: Saturday, September 27, 1997 Time: 9:00 a.m. - 1:15 p.m.

Location: Orange County Superior Court, Dept. One, Santa Ana

Cost: $35.00 which includes written materials, light snacks and beverages

Preregistration is required as seating is limited.

To register please make your check payable to Appellate Defenders, Inc. and send your check and this form to: Appellate Advocacy Seminar, Appellate Defenders, Inc., 233 "A" St., Suite 1200, San Diego, CA 92101. (For additional information call: Patrick DuNah (619) 696-0284, ext. 31.)

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Breakout Session (Choose One):

___ **Current Topics in Three Strikes**

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