Appellate Defenders Issues

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Notes From The Director

by Elaine Alexander

All of us at ADI wish our readers a joyful and productive 2002. Some current matters of interest include:

Paul Bell Memorial Fellowship

I am delighted to announce that Eric Larson was named the 2001 winner of the Paul Bell Memorial Fellowship. The board of directors of ADI awards the fellowship each year to an outstanding newer attorney. The fellowship allows the attorney to attend the National Legal Aid and Defender Association Appellate Defender Training Program in New Orleans, which was November 29-December 1 last year. Past winners have reported that the program is exceptionally well done and proved very helpful to them.

Eric joined the panel a little over a year ago. He is a 1995 graduate of the University of San Diego School of Law.

Caseload Trends

Caseload, throughout the state and in the Fourth Appellate District, has declined this year, accelerating a three-year pattern of level or falling volume. The long-range change is especially noticeable in the criminal area, although there has been a smaller and more recent reduction in dependency cases, as well.

I think the decline is temporary. It is due in part to the overall decline in the crime rate, which in turn reflects the economic boom of a few years ago (of course this has reversed in the last year or so – too soon to be reflected in appellate workload), demographics, and lengthier incarceration of repeat offenders – all of which tend to be cyclical factors. Changes in charging policies by some major district attorney offices (along with the release valve effect of *Romero*) may have reduced the number of persons given extraordinarily high sentences and thus alleviated some of the pressures to appeal, but such policies also tend to fluctuate.

Meanwhile, the present trend is of course impacting on panel attorneys' case offers. Many have noticed a fall-off in the frequency and absolute number of offers over the last few years. Some understandably are concerned that they have done something wrong and their panel status has been downrated.

Especially affected are those whose offices are out of district. The usual policy is offer most appointments to attorneys geographically fairly close to the court, and to use the more remotely located attorneys primarily as a reserve. In ADI's case, Northern California rotations have generally been used as a reserve. Because of the caseload decrease, we will rarely make a

spontaneous offer to such attorneys at the current time, although we do honor reasonably occasional requests for an off-rotation appointment.

What can attorneys do?

- If you are concerned about your panel standing, by all means check with us. You can call Cynthia Sorman, our panel liaison, or ask me for a status report. We would be happy to give you feedback.

- Be attentive to all of the factors that affect the quality of work and take advantage of chances to improve your skills. High-level performance is all the more essential during times of a constricting supply of cases and increasing demand for them. This column over the years has offered numerous tips on the factors that are taken into account in assessing quality. Do a self-inventory or ask us for feedback, and work on any weak areas. Attend seminars, review books and articles on effective practice, keep current on the law.

- You may also use the form for requesting an appointment outside the normal rotation. We try to honor them as long as they are not too frequent or deprive similarly situated attorneys of a fair opportunity for appointments.

- Diversification of an attorney's practice can be a beneficial hedge against temporary shortages in one particular area or another.

Followup on Petitions for Rehearing

Panel attorney Lew Wenzell has offered a great tip in commenting on last issue's article on petitions for rehearing:

One tip I practice is: Before starting to draft the Reply, read the AOB and RB in sequence and then remember the DCA will pick up your Reply right after that. Sometimes Replies tend to be "over-explanatory" because the writer doesn't remember that all three briefs will probably be read together right at the same time.

That is a perceptive observation. The briefs tend to be spaced out over several months from the attorney's vantage point, and we are attending to other matters in the interim. So we need a refresher when we resume work on the case at the reply brief stage. But the court has a different frame of reference. The reply will be more focused and effective if it avoids unnecessary repetition of matters in the AOB and just gets to the point.

New Rules of Court

Elsewhere in the newsletter is a summary of changes in the rules of court effective January 1, 2002. Attorneys are urged to be very attentive to these changes.

As we have already informed the panel, Divisions One and Three are applying a 50-page limit to dependency briefs. Computer-generated dependency briefs in these divisions must have the word count certificate prescribed by new rule 14(c) and may not exceed 14,000 words without court permission. Division Two applies the criminal rule in dependency cases – 75-page limit, with no word count certificate requirement. (Rule 37(c).)

Attorney General's Address

Panel attorneys are urgently reminded to send all mail to the San Diego Attorney General's Office to its **P.O. Box** and to use the **four-digit extension on its Zip Code**. The correct address is:

110 West "A" Street, Suite 1100
P.O. Box 85266
San Diego, CA 92186-5266

Use of the box number and Zip Code extension is critical:

(1) If only the street address and the wrong Zip Code are used, the Attorney General may not get the brief in a timely manner, if it arrives at all. This delays resolution of the case and may prejudice the client, as well as create delay for the AG, the court, and for the attorney's own calendar.

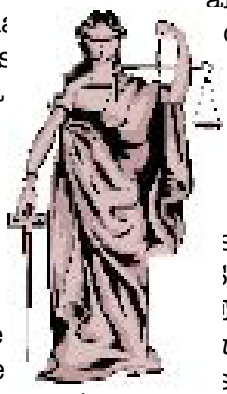
(2) The court might not accept a brief for filing if the proof of service on opposing counsel shows an incorrect address. Again, the result could be delay, added expense, and risk to the client. ADI expects strict compliance with this requirement.

Appellate Practice Pointers

ANDRADE - The Eighth Amendment Lives

By Cindi B. Mishkin

By now, either from clients or friends, you have probably heard of the Ninth Circuit's recent opinion of *Andrade v. Attorney General* (9th Cir. 2001) 270 F.3d 743, wherein the court invoked the Eighth Amendment prohibition against cruel and unusual punishment to invalidate a 50-year-to-life sentence imposed under the Three Strikes law for the commission of two petty thefts. Breathing some life into the Eighth Amendment cruel and unusual punishment argument, the opinion is a good one. Although the Attorney General will petition for a writ of certiorari by early February and the Supreme Court may grant the petition in order to clarify the law on the subject (given tha its most recent discussion on the matter was a memorandum respecting the denial of a petition for writ of certiorari in *Riggs v. California* (1999) 525 U.S. 1114 [119 S.Ct. 890, 142 L.Ed.2d 789]), the opinion nevertheless provides a model by which to structure the Eighth Amendment argument. In addition, it demonstrates why arguments should be federalized. While Mr. Andrade was not able to secure relief in the state court system, he exhausted the federal issue in that arena and, thereafter, succeeded in the Ninth Circuit.



On two different occasions, Mr. Andrade committed a petty theft in San Bernardino; during each occasion, he left a K-Mart with less than $100.00 worth of videotapes. Because he had previously been convicted of a prior misdemeanor petty theft, the government charged him with the commission of two felonies: petty theft with a prior under Penal Code section 666. Because he had suffered three prior first degree (residential) burglary convictions, the government also alleged he qualified for a three-strikes sentence. After a jury found Mr. Andrade guilty of the instant two thefts and found the prior allegations true, the court imposed a 25-years-to-life sentence for each count, to run consecutively as required under the three-strikes law, for a total sentence of 50-years-to-life. The Court of Appeal affirmed the judgment, rejecting – among other arguments – the contention that the 50-year-to-life sentence violated the Eighth Amendment proscription against cruel and unusual punishment; the California Supreme Court denied review. Still unsuccessful in the district court, Mr. Andrade persevered and renewed the issue in the Ninth Circuit. (*Andrade, supra,* 270 F.3d at pp. 748-750.)

After establishing jurisdiction over the case given the timing of the filing of the notice of appeal (*Andrade, supra,* 270 F.3d at pp. 750-753), the Ninth Circuit began to review the cruel and unusual punishment issue under the rubric of the Antiterrorists Effective Death Penalty Act (AEDPA). To answer the question whether the state court's decision was "contrary to, or involve[d] an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States" (28 U.S.C. § 2254(d)(1)), the appellate court then set forth the established United States Supreme Court law with respect to the Eighth Amendment analysis (*Andrade, supra,* 270 F.3d at pp. 753-758). This discussion is extremely helpful and thoughtfully explains the relationship between the three most recent cases on the issue: *Harmelin v. Michigan* (1991) 501 U.S. 957 [111 S.Ct. 2680, 115 L.Ed.2d 836][life without parole sentence for defendant convicted of possession of more than 650 grams of cocaine found to be constitutional]; *Solem v. Helm* (1983) 463 U.S. 277 [103 S.Ct. 3001, 77 L.Ed.2d 637][life without parole sentence for defendant convicted of seventh non-violent felony offense found not to be constitutional in light of three-factor analysis set forth by the court]; and *Rummel v. Estelle* (1980) 445 U.S. 263 [100 S.Ct. 1133, 63 L.Ed.2d 382][life with the possibility of parole sentence, with eligibility occurring after 12 years of imprisonment, for defendant convicted of three separate felony crimes found to be constitutional]. Harmonizing these three cases, the *Andrade* opinion focused on Justice Kennedy's

concurring opinion in *Harmelin*,[1] which modified the use of the three-factor test first set forth in *Solem*, to direct the analysis. Given this focus, the *Andrade* opinion reaffirms the application of proportionality review within the Eighth Amendment analysis. (*Andrade, supra,* 270 F.3d at pp. 757-758.)

The Eighth Amendment forbids sentences that are grossly disproportionate to the crime committed. In order to begin the analysis whether a sentence violates the Eighth Amendment, one must first ask whether there is an inference of gross disproportionality. (*Andrade, supra,* 270 F.3d at p. 758.) Necessary to this stage of the analysis is a comparison of the punishment and the crime: the first *Solem* factor. The harshness of the penalty, which in a three-strikes sentence is quite high because a defendant receives no good time credit while in prison (*In re Cervera* (2001) 24 Cal.4th 1073), is weighed against the gravity of the offense. (*Andrade, supra,* 758-761.) In its consideration of this question, the *Andrade* court found the facts of the case more analogous to *Solem,* given the minimal, misdemeanor crimes Mr. Andrade had committed, the 50 years he must serve before he is eligible for parole and his non-violent prior crimes, than to *Rummel,* wherein defendant was eligible for parole after serving only 12 years of his sentence. (*Id.* at pp. 760-761.)

If an inference of gross disproportionality is established, the analysis then progresses to an intrajurisdictional comparison: evaluating the harshness of the sentence imposed when compared against the sentences imposed for other criminals in the same jurisdiction – the second *Solem* factor; and an inter-jurisdictional comparison: evaluating whether the defendant could receive a comparable sentence in other jurisdictions – the third *Solem* factor. (*Andrade, supra,* 270 F.3d at pp. 757-758.) The result of the application of these analyses, "informed by objective factors" (*id.* at p. 757), establishes whether the inference of gross disproportionality is actually a determination of gross disproportionality and, thus, whether the imposition of the challenged sentence constitutes a violation of the Eighth Amendment.

In the application of the first comparison, the *Andrade* opinion measured Mr. Andrade's sentence against comparable sentences that are imposed on first time offenders for the most serious violent crimes. (*Andrade, supra,* 270 F.3d at pp. 761-762.) Although the government argued that comparison under this analysis must be made using sentences imposed on other recidivist offenders, the court rejected this limitation. "Although we agree that comparisons to sentences for other recidivists are relevant, the problem with the State's argument is that it attempts to justify the constitutionally-suspect application of a statute by pointing to other applications of the same statute. We find this approach less than convincing." (*Id.* at p. 762.) After performing the analysis, the court found that the results supported the gross disproportionality conclusion. (*Ibid.*) In the application of the second comparison, the *Andrade* opinion found only one other jurisdiction wherein Mr. Andrade would be eligible for a comparable sentence: Louisiana. However, even if he had received such a sentence in Louisiana, it would be vulnerable to attack based on its excessive nature under the state's constitution. (*Andrade, supra,* 270 F.3d at pp. 762-765.)

Ultimately, given the inference of gross disproportionality and the results of the jurisdictional comparisons, the reviewing court concluded Mr. Andrade's sentence was grossly disproportionate to the crimes he committed such that it violated the Eighth Amendment. (*Andrade, supra,* 270 F.3d at p. 766.) Yet this conclusion did not end the analysis. Because the inquiry proceeded under AEDPA, the federal court's disagreement with the state court's conclusion did not resolve the matter. The conclusive factor is whether the state court's decision was contrary to or involved the unreasonable application of clearly established Federal law.

To examine this question, the federal appellate court analyzed how the California appellate court applied the Eighth Amendment analysis. This part of the opinion is very interesting because it questions the Eighth Amendment analysis that has developed within the state Court of Appeal. Because the Court of Appeal's opinion stated "the current validity of the *Solem* proportionality analysis is questionable in light of *Harmelin*," and thereafter focused on *Rummel*, the federal court found this disregard for *Solem* "result[ed] in an unreasonable application of clearly

established Supreme Court law." (*Andrade, supra,* 270 F.3d at p. 766.) Ultimately, the reviewing court found the state court's decision was "irreconcilable with the Supreme Court's decision in *Solem*," and ordered the district court to grant Mr. Andrade's petition for writ of habeas corpus. (*Id.* at p. 767.)

While it may be rare that you represent a defendant who has the same factual background and has committed the same instant crimes as Mr. Andrade, the *Andrade* opinion is nevertheless helpful in structuring the cruel and unusual punishment issue. Use it well!

1

There was no majority opinion issued in *Harmelin*; Justice Scalia wrote the lead opinion, in which Justice Rehnquist joined parts I, II, and III. (*Harmelin, supra,* 510 U.S. at pp. 961-996.) Justice Kennedy wrote a concurring opinion, in which Justices O'Connor and Souter joined. (*Id.* at pp. 996-1009.) These three justices also joined part IV of Justice Scalia's opinion and the ultimate judgment therein. (*Id.* at p. 996 [joinder]; *id.* at pp. 994-996 [part IV].) Three dissenting opinions, authored by Justices White, Marshall, and Stevens, respectively, were also filed.

Standards of Prejudice[1]

By Howard C. Cohen

In appellate practice, the sine qua non to present an argument is to recognize any potential issue. Once a potential issue is discerned, the practitioner must ascertain the proper standard of review, i.e., how much deference will the appellate court accord the trial court's findings or conclusions. Assuming that the issue remains viable after the application of the correct standard of review, the task remains to demonstrate that the trial error(s) prejudiced appellant's opportunity for a fair trial. One may envision the issue of prejudice with analogy to the field of sports. In football, if an act by a player would otherwise be pass interference, no penalty is assessed if the pass is so errant such that the pass is "uncatchable."

As will be discussed in detail below, there are three standards of prejudice by which legal error in criminal appeals is most frequently assessed. In descending order of benefit for an appellant they are: (1) reversal per se; (2) reversal unless the record demonstrates the error harmless beyond a reasonable doubt, the usual standard for federal constitutional errors, i.e., "*Chapman* error" (*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]; and (3) reversal if the record demonstrates that but for the error, there is a reasonable probability of a more favorable result, i.e., "*Watson* error" *(People v. Watson* (1956) 46 Cal.2d 818). These are not rigidly structured categories allowing for easy pigeonholing of all errors. Their source (e.g. federal Constitution, state law) is one factor. Others include how fundamental or absolute a right or prescribed procedure is, and how difficult and speculative the job of assessing prejudice is. However, while most practitioners and presumably all experienced appellate judges are very aware of the different standards of prejudice, still, what constitutes the apropos level of prejudice may be less understood.

In actuality, in the context of "reversal per se," there is no prejudice to assess. The real battle will be over the *type* of error which occurred. If a federal constitutional error is "structural," reversal per se is required; if a federal error is "only" trial error, then the error falls within the *Chapman* standard. Thus, the real question is whether any error reaches the level of "structural" error. Amongst those errors constituting "structural errors" are the denial of the right to counsel at trial,[2] to an impartial judge, to self-representation, to a constitutionally selected grand jury, and to a public trial (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 [111 S.Ct. 1246, 113 L.Ed.2d 302].) Another example of per se error is *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078; 124 L.Ed.2d 182], in which the court found a constitutionally deficient jury instruction on reasonable doubt constituted "structural error" because the error deprived defendant of his right to trial by jury. The *Sullivan* court noted it is the *jury* who must find the defendant guilty beyond a reasonable doubt, and when the jury is not correctly instructed as to that standard, it is meaningless to ask whether the error affected the decision: there is no valid decision for the error to have affected.

While the omission of instruction on *an* element of an offense may not be reversible

per se (*Neder v. United States* (1999) 527 U.S. 1, 9-12, 16 [119 S.Ct. 1827, 144 L.Ed.2d 35]; see also *People v. Flood* (1998) 18 Cal.4th 470, 502-503), perhaps in some instances, some instructional errors might effectively remove an entire case from the jury's consideration, thus amounting to "structural error" (cf. *id.* at p. 503).[3]

If a federal constitutional error not amounting to a structural error occurs, then the *Chapman* standard applies. Under the principle of *Chapman* error, errors that violate federal constitutional rights require reversal unless the beneficiary of the error can prove beyond a reasonable doubt that it did not affect the result. Thus, assuming the existence of federal constitutional error, *the People* have the burden of persuasion to prove, beyond a reasonable doubt, that the error did not affect the result. But, in an appellate context, what does "beyond a reasonable doubt" mean? The appellate practitioner does not usually argue that the appellate court should consult CALJIC No. 2.90 to determine if "reasonable doubt" exists in the appellate context. In a trial context, the beyond reasonable standard is equated to a "subjective state of near certitude." (*Victor v. Nebraska* (1994) 511 U.S. 1, 15 [114 S.Ct. 1239, 127 L.Ed.2d 583]; *Jackson v. Virginia* (1979) 443 U.S. 307, 315 [99 S.Ct. 2781, 61 L.Ed.2d 560].) One may well argue that in an appellate context, the judges collectively should utilize the same subjective state, i.e., have they been persuaded to a near certainty that the error did not affect the result? In *People v. Powell* (1967) 67 Cal.2d 32, 56-57, the California Supreme Court, in reliance upon precedent from the Supreme Court of the United States voiced a variation on the formulation: "[W]e are compelled to conclude there is at least a reasonable 'possibility' that the evidence complained of 'might have contributed to the conviction' (*Fahy v. Connecticut* (1963) 375 U.S. 85, 86 [84 S.Ct. 229; 11 L.Ed.2d 171, 173]) . . ."

Perhaps the most troublesome standard to appreciate is "*Watson*" error. State courts determine whether errors of state law or procedure are harmless. In *Cooper v. California* (1967) 386 U.S. 58, 62 [87 S.Ct. 788; 17 L.Ed.2d 730], the United States Supreme Court held that when state standards alone have been violated, the state is free to apply its own harmless error rule, which could be subsequently unreviewable by the United States Supreme Court. Article VI, section 13 of the California Constitution, as interpreted by the California Supreme Court, governs a prejudice analysis of non-federal constitutional errors. Section 13 provides:

No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

In *People v. Watson, supra*, 46 Cal.2d 818, 836, the California Supreme Court reviewed the history and interpretation of the constitutional provision since its adoption in 1911 and described the test as follows:

[A] "miscarriage of justice" should be declared only when the court, "after examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.

But what *does* this formulation actually mean? Some cases have suggested the standard means "more likely than not." (See cases cited in *People v. Howard* (1987) 190 Cal.App.3d 41, 47-48, fn. 4.) However, this convention appears erroneous.

For example, in *Watson* itself, the court states that if the probabilities are equally balanced, prejudice is shown (*People v. Watson, supra,* 46 Cal.2d 818, 837), and, of necessity, a balance is a lesser burden than preponderance. However, the *Watson* court did *not limit* its standard of prejudice to requiring a demonstration of balance. Rather, the test for prejudice requires reasonable probabilities rather than mere possibilities. (*Ibid.*) But "probabilities" does not imply preponderance. In *College Hospital Inc. v. Superior* Court (1994) 8 Cal.4th 704, 715, the Supreme Court noted, with original emphasis:

We have made it clear that a "probability" in [the context of a the determination of harmless error] does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility.* ([Citing *Watson*]; cf. *Strickland v. Washington* (1984) 466 U.S. 668, 693-694, 697, 698 [80 L.Ed.2d

674, 697-700, 104 S.Ct. 2052] ["reasonable probability" does not mean "more likely than not," but merely "probability sufficient to undermine confidence in the outcome"].)

In other words, appellate defense counsel should argue that a reasonable chance for a more favorable result may occur on retrial without the error, and the appellate court should weigh the error in just such a manner.

The above standards of prejudice are those most frequently confronted, but others do arise. One which does arise with some regularity is the "*Strickland*" standard, employed when an issue of ineffective assistance of counsel (IAC) is addressed: whether there is a "reasonable probability" that, "but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. 668, 693-694; see also *Lockhart v. Fretwell* (1993) 506 U.S. 364, 369-370 [113 S.Ct. 838, 122 L.Ed.2d 180]; *Kimmelman v. Morrison* (1986) 477 U.S. 365 [106 S.Ct. 2574; 91 L.Ed.2d 305][*Strickland* "reasonable probability" test for prejudice was the appropriate standard by which to evaluate counsel's failure to bring a suppression motion]; *In re Cordero* (1988) 46 Cal.3d 161, 179-180; *People v. Ledesma* (1987) 43 Cal.3d 171.)

As with the *Watson* standard, it does *not* mean "more likely than not" (*Strickland v. Washington, supra,* 466 U.S. 668, 693), though it is unclear whether the *Strickland* standard is the same as or more stringent than *Watson.* (See *College Hospital Inc. v. Superior Court, supra*, 8 Cal.4th 704, 715.) Moreover, the "*Strickland*" standard is not necessarily based merely on the ultimate outcome. For instance, in *Kyles v. Whitley* (1995) 514 U.S. 419, 434 [115 S.Ct. 1555, 131 L.Ed.2d 490], Justice Souter in addressing the nondisclosure of favorable evidence, the standard of prejudice for which is similar to IAC (*United States v. Bagley* (1985) 473 U.S. 667, 682 [105 S.Ct. 3375, 87 L.Ed.2d 481]),[4] Utilizing a sports analogy once again, in the parlance of one venerable professional basketball announcer, "No harm, no foul." wrote: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a *fair trial*, understood as a trial resulting in a verdict worthy of confidence." (Compare, however, *People v. Clark* (1993) 5 Cal.4th 950, 995, citing to *People v. Easley* (1988) 46 Cal.3d 712, 725 [where *result* is equated with disposition.)

[1] The following article summarizes and condenses portions of a far more comprehensive article on standards of prejudice to be published in the imminent revision of the *Appellate Defenders, Inc. Appellate Practice Manual*, now being edited.

[2]Where a trial court improperly requires joint representation over timely objection, "conflicted" counsel is equivalent to no counsel, and reversal per se results, at least in capital cases. (*Holloway v. Arkansas* (1978) 435 U.S. 475, 488-490 [98 S.CT. 1173, 55 L.Ed.2d 426.) In dictum, the Supreme Court has also stated that a defendant who shows a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 349-350 [100 S.Ct. 1708, 64 L.Ed.2d 333].) In *Wood v. Georgia* (1981) 450 U.S. 261, 272, fn. 18, italics original [101 S.Ct. 1097, 67 L.Ed.2d 220], the Supreme Court wrote that "[*Cuyler v. Sullivan*, *supra*, 446 U.S. at p. 347] *mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or should know that a particular conflict exists.' . . . ."

[3] In *Flood*, the court need not have and, hence, did not decide this latter question. One may, however, well imagine a circumstance where the trial court becomes confused and instructs on an offense closely related to the charged offense but which differs on a number of elements.

[4] In actuality, it may be misleading to describe *Strickland* as posing a standard of "prejudice." The California Supreme Court in *In re Sassounian* (1995) 9 Cal.4th 535, 544-545, fn. 7, stated, with emphasis added, "A showing by the prisoner of the favorableness and materiality of any evidence not disclosed by the prosecution necessarily establishes at *one stroke* what in other contexts are separately considered under the rubrics of 'error' and 'prejudice.' For, here, there is *no 'error' unless there is also 'prejudice.'* (See *United States v. Bagley*, *supra*, 473 U.S. at p. 678 [87 L.Ed.2d at pp. 490-491] [holding that 'a constitutional error occurs, and the conviction must be reversed, only if the evidence is [both favorable and] material in the sense that its suppression undermines confidence in the outcome']; cf. *Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-696 [80 L.Ed.2d at pp. 693-699] [holding that counsel's assistance is ineffective in violation of the Sixth Amendment, and the judgment must fall, only if counsel's performance is deficient and prejudicial].)"

KEEP THOSE BRIEFS BRIEF

By Neil Auwarter

One court of appeal recently voiced the often-heard complaint that some appellate briefs are too long.

Appellate attorneys generally *know* how to write succinctly, but often choose not to for a variety of reasons. Accordingly, the focus of the article is less on *how* to be brief than on persuading attorneys to employ the skill of brevity they already possess.

Like the author who penned a 3-volume treatise entitled, "The Lost Art of Simplicity," appellate attorneys sometimes approach a brief with the view that, "If it's in my head and it relates to the topic being addressed, I must write it." After all, it is natural to want to display one's knowledge, particularly knowledge acquired through arduous research. The attorney forms an attachment to information acquired during the research process and is often reluctant to write a brief that does not reflect the full extent of that research. Similarly, having thoroughly read the reporter's transcript and taken copious notes, it can be tempting to set out an exhaustive statement of facts even where many of those facts bear no relation to the issues raised.

But as the recent emanation from the Court of Appeal suggests, briefs that are needlessly drawn-out and over-inclusive are seldom appreciated by the reader. An overlong brief risks putting off the reader, who may then view the brief in a negative light or decide to scan the arguments rather than read them carefully. An overlong brief is thus a disservice to both the court and the client. In brief writing, as in the art of conversation, it is well to remember the old admonition, "Just because it happened to you doesn't make it interesting."

While the attorney's fondness for his or her own knowledge is one culprit, another is that our education system typically rewards long-windedness and punishes brevity. From grade school on, students are given writing projects that are required to *reach* a certain length. Children learn early how to stretch a minimal amount of information to the required length through verbosity, repetition, and the inclusion of nonessential information. Traditional writing instruction focuses primarily on grammatical correctness and organization, rather than brevity and directness. For example, children are seldom given a writing assignment requiring them to address a subject in *less than* a set page or word limit. In the schoolhouse, a longer paper is generally thought to be a better paper. Thus, the time-honored art of overwriting is taught and rewarded all the way through college.

When the student reaches law school, he or she is often shocked to learn from a legal writing instructor that the prose that has carried them so far is grotesquely bloated. The law student soon finds that "legal writing" is as much *un*learning the art of overwriting as it is learning new writing techniques. The first year of law school is a particularly good time for the law student to call old teachers and college professors and lecture them on their shortcomings in this area. After completing this gratifying task, the law student is emotionally prepared to unlearn much of what was learned before. Unlearn they do, and after three years of law school and a summer clerkship or two, most lawyers are able to write succinctly when they so desire.

Why is it, then, that bloated and overlong briefing is a virtually constant complaint heard from appellate justices and their research attorneys?

Part of the answer may be that, like anyone suffering from the human condition, attorneys are prone to fall back into old habits. Another factor, particularly in indigent criminal appeals, is that some attorneys feel they are being paid by the page. This is a misimpression but an understandable one. Panel attorneys know that the appellate projects use a prima facie issue classification system that begins with–that's right–page length. As in Mrs. Abernathy's 7th grade social studies class, it may once again seem that more is better. But the page length of an issue is only the starting point for issue classification. An argument's density, complexity, and high writing quality can push the issue classification upward from the prima facie starting point. Conversely, wordiness, needless repetition, and string citing tend to push the classification below the prima facie starting point. This same view of issue

classification is reflected in the claim audits periodically performed by the AOC.

Another reason briefs are sometimes too long is that it can actually take time and effort to trim and tighten them. As Mark Twain once ended a correspondence, "If I had more time I would have written you a shorter letter." Twain recognized that good writing is in part a reductive process and that reducing takes time. One particular area where this time is well spent is the use of brief bank arguments. Tailor brief bank arguments to the case at hand, and pare away nonessential material. For example, avoid long, boilerplate explanations of basic legal rules; these have drawn particular criticism from the court.

In some cases, the panel attorney may be rightly concerned that a tight, compact brief will not fully reflect the amount of research and analysis that went into the making of an argument. For instance, the attorney may reasonably read several cases and consider an angle of argument that ultimately does not further the client's position meaningfully. In such cases, the panel attorney can include with the claim a note alerting the staff attorney to this fact, which will be considered in classifying the issue. If the research was on an issue not raised in the brief, then it should be claimed s as an unbriefed issue. But information unnecessary to the argument should not find its way into the brief merely for the sake of documenting the attorney's research or "padding" the arguments.

For detailed suggestions on brevity and all aspects of legal writing (including starting sentences with "but," as I have done in this article), I recommend Bryan A. Garner's *Legal Writing in Plain English* (University of Chicago Press, 2001). Brevity in statements of case and facts is addressed in William Robinson's *How to Write Effective Statements in Criminal Appeals*, which can be found on the ADI Web site on the 2000 Appellate Advocacy College page.

CUMULATIVE ERROR AND EXHAUSTION

By Howard C. Cohen

On occasion, we see a "cumulative error" argument included in briefing. "Cumulative error" refers to the contention that if multiple errors exist but none, in and of itself is sufficient to cause prejudice, nevertheless, the combination of the multiple errors does create prejudice. That is, " a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. (Citations.) [¶] . . . . In the circumstances of this case, the sheer number of instances of prosecutorial misconduct and other errors raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone. (Citation.)" (*People v. Hill* (1998) 17 Cal.4th 800, 844-845.) Cumulative error may occur when there are multiple errors of the same type, e.g., erroneous instruction, ineffective assistance of counsel, prosecutorial error or misconduct,[1] or in combination with other error. (*Id.* at pp. 844-846.)

Counsel should be alert to argue that multiple errors may compound one another. "Consider[ing the multiple errors] together, we conclude they create a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors." (*People v. Hill*, *supra*, 17 Cal.4th at p. 847.)

While counsel need not make a specific, separate "cumulative error" argument whenever there are multiple errors which may produce a "negative synergistic effect," counsel will be well advised to argue that errors, "individually or collectively" produced prejudice. The failure to state expressly that one is relying on "cumulative error" may be deemed a failure to exhaust state remedies if there exist multiple errors of federal constitutional dimension which in the aggregate may have produced prejudice.

A failure of counsel to argue cumulative error and, hence, the lack of an opportunity for the state court to address has been held contrary to the Antiterrorism and Effective Death Penalty Act, i.e., Title 28 United States Code section 2254, subdivision (b)(1). (*Gonzales v. McKune* (Feb. 6, 2002, 10th Cir., No. 00-3003) __ F.3d __ [2002 U.S. App. LEXIS 1820, p. *7.)

[1] *Hill* dealt primarily with multiple instances prosecutorial error sufficiently egregious magnitude to constitute "prosecutorial misconduct." (Compare *Hill*, *supra*, 13 Cal.4th at p. 823, fn. 1, with pp. 844-848.) The Supreme Court noted the history of the particular prosecutor and referred to an unpublished opinion which had referred to the prosecutor's misconduct and identified her as the prosecutor who had committed misconduct in two published cases where her identity had not been disclosed. (*Id.* at p. 847.) The court also concluded that its reference to an unpublished opinion via judicial notice did not violate the prohibitions of California Rules of Court, rule 977. (*Hill*, *supra*, 13 Cal.4th at p. 847, fn. 9.) Presumably, the past history or pattern of conduct of a defense counsel, judge, or law enforcement agent, etc., could similarly be demonstrated by means of unpublished opinions where relevant.

Compensation Pointers

Keep Those Printouts!

Each time a claim is reviewed by ADI and transmitted to the AOC for approval and payment, ADI will print out a copy of the recommendation and mail it to the panel attorney. This letter provides the attorney with information regarding how much was claimed for each particular service and how much time was recommended. In cases were a reduction was recommended, there will be a comment from ADI to explain the proposed reduction. Maintaining a copy of this printout is valuable for three main reasons:

1) Check the printout against your claim form to ensure that the information transmitted to the AOC accurately reflects the amount you claimed. ADI checks each claim a minimum of three times prior to sending the claim to the AOC; however, on rare occasions, mistakes can occur.

2) In the case of an interim claim, look to see where reduction in payments were made in order to provide additional justification at the time of the final claim. Often, services rendered may be more complex than they might outwardly appear. Therefore, additional justification or explanation submitted at the time of the final claim regarding time spent on a particular service may enable ADI to increase the recommendation for that service.

3) Tax season is fast approaching. Record keeping for a small office is a monstrous task, and the added push of tax preparation makes the task more onerous. As much as ADI would like to offer assistance to our panel members, due to limited staff and resources, we are unable to conduct searches for panel attorneys to determine which cases may still require claims or to track the amounts paid at the interim stage.

Use of Previously Briefed Materials

Just a reminder: The courts have directed that use of previous briefing should be considered in determining what is reasonable compensation. As a result, in every brief in which a panel member has utilized previously briefed materials, the panel member must submit a completed "Use of Previous Briefing" form to our office along with the request for compensation. This rule applies to all previously briefed materials, not just materials addressing the Three Strikes law. A copy of the "Use of Previous Briefing" form is located on ADI's Web site, under "Compensation Claims." <http://www.adi-sandiego.com/Claims/recycled_material.pdf>

In The News

2002 ANNUAL DEFENDER DINNER

The Annual Defender Dinner will be held on Friday, April 19, 2002, at the Wyndham Emerald Plaza Hotel located at 402 W. Broadway, San Diego. Cocktails (no host) at 5:00 p.m. Dinner at 6:00 p.m. Guest speaker will be Judy Clarke, former Executive Director of Federal Defenders of San Diego and currently the Executive Director of the Federal Defenders of Eastern Washington and Idaho. She has represented Susan Smith, Ted Kaczynski, and many other difficult cases. In 1998, the National Law Journal named Ms. Clarke one of the top 50 women lawyers in the United States. The Stan Conant Award for exceptional excellence and unselfish devotion to protecting the rights of the indigent accused and the Paul Bell Award for exceptional excellence in representation of the indigent accused on appeal will be awarded. For further information about the event, one may contact: Amy Spintman at Appellate Defenders at 619-696-0282 or als@adi-sandiego.com.

ADI'S SOCIAL CORNER

By Anna M. Jauregui

Our November 29, 2001, the "Holiday Lunch" social was a success. It took place at Fillippi's in Little Italy. Great food, company and location. We enjoyed sharing pizza, antipasto salad and spumoni with our panel colleagues. We look forward to maintaining this new tradition. We are still planning our Open House to take place this year. Hope to see many of you then.

Welcome Our Recent Admittees

Anita P. Jog

Anita has worked as a law clerk at ADI since February 2000. Anita graduated with honors from the University of San Diego School of Law in May, 2001. She received the Joseph P. Busch Award for Outstanding Student in Criminal Justice. She became a ADI staff attorney in December, 2001, after being sworn in as a member of the California State Bar. Prior to becoming an attorney, Anita was a high school Latin teacher. Anita is married and has two children.

Josh Proctor

Josh first joined ADI in February 2000, as a law clerk. He is originally from a small town on the plains in northeastern Colorado. Josh graduated with a degree in history from Colorado State University in May 1998. At Colorado State, Josh competed on the track team in the hurdles and sprints. Josh graduated from the University of San Diego School of Law in May 2001, and became an ADI staff attorney in December 2001. Josh's wife, Jeannette, is an elementary school teacher in San Diego.

4TH APPELLATE DISTRICT COURT NEWS

Meet the Newest California Supreme Court Justice and the Newest Associate Justices of the Court of Appeal.

JUSTICE CARLOS R. MORENO APPOINTED TO THE CALIFORNIA SUPREME COURT

By Anna M. Jauregui

Justice Carlos R. Moreno was sworn in as associate justice of the California Supreme Court on October 18, 2001, following his nomination by Governor Gray Davis. He takes the position left vacant by Justice Stanley Mosk, who died in June 2001.

Justice Moreno attended Yale University and received a B.A. in political science. Graduate of Stanford Law School, he started his career with the Los Angeles City Attorney's Office, where he handled criminal and civil consumer protection cases and politically sensitive and legislative matters as special counsel to the city attorney. Thereafter, he worked for a Los Angeles firm in commercial litigation.

He was first appointed to the Los Angeles Municipal Court in autumn of 1986 by Governor George Deukmejian and was assigned to the Compton Judicial District. He handled criminal matters and supervised the court's civil department. In 1993, he was elevated to the Los Angeles Superior Court by Governor Pete Wilson. He was assigned to the Los Angeles downtown criminal court, where he presided over felony trials. In 1998, the United States Senate confirmed Justice Moreno to the United States District Court, Central District of California, following his nomination by President Bill Clinton. While there, he handled complex criminal and civil cases. (http://www.courtinfo.ca.gov/courts/supreme/justices/moreno.htm.)

Justice Moreno, whose parents immigrated from Mexico, grew up in Los Angeles. At his confirmation hearing, he was described "as a man who has never forgotten his roots and has tried to mentor other minorities throughout his life," "an American success story," and as a person whose "career is a study in focus, a study in achievement and a study in commitment." (Dolan, M., *Moreno Sworn In as Justice of California Supreme Court*, Los Angeles Times, p. 2 @ http://www.latimes.com/news/local/la-000083334oct19.story?coll=la-headlines-california-manual.) Governor Davis commented that Justice Moreno will be a "'a great source of pride to the Latino community and every Californian who believes in hard work and the American Dream.'" (*Id.* at p. 3.)

Recently, Justice Moreno shared with the writer some of his impressions of his new experience: "It's been a smooth transition. I enjoy the work. It is intellectually challenging. The issues we are deciding are extremely significant. I enjoy spending time with my colleagues, all of whom have the same commitment in reaching the correct result based on the law. They are collegial and open-minded." He also added, "I've been overwhelmed by the response my appointment has generated. I've been to so many functions. It's been fun."

Despite his very active schedule, when Justice Moreno returns home to Los Angeles, he enjoys his routine family activities. He is married, has two children, and cares for his niece. He likes spending time with the kids, going to the theater, listening to opera, and the gem of peace and quiet.
Welcome, Justice Moreno!

Introducing Our New Court of Appeal Justices

By Howard Cohen

Justice Richard Aronson

Justice Richard Aronson was born and raised in the San Fernando Valley of Los Angeles. He attended Notre Dame High School in Sherman Oaks before attending University of San Diego, first as an undergraduate, gaining a B.A. in political science (1968-1972), and then law school (1972-1975). The motion picture, "Anatomy of a Murder" (which a noted law professor at U.C.L.A. has described as "probably the finest pure trial movie ever made"), had spurred his interest in law.

The future justice's intent was to accept the first job offer which would afford him trial experience, and that opportunity came from the San Bernardino County District Attorney's Office. There, advancement was quick and he was trying felonies within a year and a half. After this initial experience with prosecution, he joined his uncle in criminal defense in Santa Ana for a year before joining the staff of the Office of the Orange County Public Defender, where he practiced for eight years.

In 1989, he was introduced to the appellate court when he became the senior research attorney in the chambers of the Honorable Sheila Prell Sonenshine. At Division Three, he enjoyed the role of a neutral, that is, to reach the "right result" rather than having to advocate a particular position. After working a year and a half with Division Three, he was appointed to serve as an Orange County Commissioner. His initial assignment was in civil law and motion for a year and a half. Then, he became the first Orange County Commissioner to be assigned to handle trials. Friends urged him to apply for judicial appointment. However, sadly, he had lost his wife as well as a child (the latter to cystic fibrosis – he remains a member of the Cystic Fibrosis Guild of Orange County). Rather than seek appointment, he wanted to devote himself to his son, who is now in high school. He is remarried and has a stepson who is attending college.

By 1996, he pursued a judicial position and was appointed. With the exception of six or seven months in family law, he served in criminal law departments 1991-1997 and, thereafter, in civil departments, until October 2000, when he was assigned as a pro tem appellate judge. His application culminated in his recent appointment. He enjoys oral argument and will readily engage counsel with questions. He will especially do so in "close" cases, i.e., defined as not the mere "perfunctory," rudimentary appeals.

While Justice Aronson was on the trial bench, litigators were especially complimentary about his temperament, demeanor, and work ethic. Amongst the plaudits – and just a sampling – are remarks such as "Fair, conscientious, patient, insightful"; "Very down to earth. Common-sense oriented. He's a born judge"; "[M]ost affable judge [in Orange County]. Very easygoing"; "Very bright"; "Willing to listen"; "You're always on a level playing field with [him]."

Perhaps his easy-going manner derives from the endorphins generated by exercise. Justice Aronson loves to run, does so four to five times a week, and competes in 10K's. He also loves to read, especially Ameican

Justice Eileen Moore

Justice Eileen Moore was raised in a family of six children in Philadelphia. Her family belonged to labor unions, and later, she joined a union. After graduating from high school, she faced three prospects: becoming a clerk-typist, going to college to become a teacher, or studying to be a nurse. She rejected the first. Reserving their limited finances for her brothers' education, her family did not have the funds for the second. She opted for the third upon receipt of a scholarship and worked her way through nursing school. Three years later, she accepted a commission as a second lieutenant in the Army's Nurse Corps and became a combat nurse during the Vietnam conflict. Nursing encompasses much more than the administration of medicine. She has written about reading a loving letter from a family to a pilot-husband-father who had lost both legs and an arm. She sang songs from their common Irish heritage, showed him a picture of his son, and saw a tear roll down his cheek, which indicated he could hear her. Eventually she had to take a rest, only to find another soldier in the bed and be informed the pilot had died a few minutes

after she had left. She is a member of the Vietnam Veterans of America.

After a number of years of nursing in different locales, she and her family came to the Los Angeles area for family occupational opportunities. Once in southern California, she decided to pursue her bachelor's degree at the University of California at Irvine, where she registered as a sophomore and majored in history. She profited from the Vera Christie Project for women which offered counseling in career paths. The resulted of the counseling was the recommendation to pursue law, and, as the saying goes, "the rest is history."

She attended Pepperdine University, School of Law. During law school, she worked as a summer intern at the San Diego District Attorney's Office. After law school, Justice Moore joined a civil litigation firm for which she worked for ten years before her appointment to the Orange County Superior Court. As a superior court judge, she was assigned to civil departments for five years. Thereafter, she served in criminal law departments for four years, before returning briefly to civil departments, just prior to her appointment to the appellate bench. In her service in both civil and criminal departments, she noted the "different practices" in the "different practices," e.g., the battle of briefs in the former, but not the latter; the greater familiarity of civil attorneys with instructions; the greater politeness amongst criminal practitioners; the better preparation in evidentiary matters in the criminal arena; and the criminal practitioners' appealing to the sensitivities of the court.

In the midst of her superior court tenure, she was assigned as a pro tem appellate judge for the Fourth Appellate District, Division Three, and then to the appellate department of the superior court. These assignments "whet her appetite" for appellate law. Justice Moore became a justice of the Fourth District, Division Three, in December 2000. When asked how she is enjoying her task, she quickly responded with a smile, "[there's] not a greater job in the world." She has noted that the biggest difference between being a trial and an appellate judge is, by far, the interaction with the other judges. Whereas a trial judge runs a one-judge show, "the judicial interaction and commentary is constant in the Court of Appeal." She also enjoys being a "generalist," rather than specializing in either civil or criminal law, thus staying abreast of all the law. Because she has far more information before she takes the appellate bench than she did as a trial judge, Justice Moore will usually have no questions at oral argument unless she requires clarification on a particular fact or legal position. She has also been somewhat surprised when attorneys resent certain questions from the bench (which the attorneys may not have anticipated) or not being treated to any questions at all.

Justice Moore's feelings can be gleaned from a number of her writings which demonstrate a general caring and sensitivity to bias. She has championed courtroom accommodation for the hearing impaired, the necessity to improve the court interpreter system, as well as the need for peremptory challenges, all to ensure fairness. She has astutely observed that few people will admit bias to simplistic boilerplate questions; rather, the examiner must probe for hidden prejudices. While these concerns were penned from a trial judge's perspective, her commitment to openness and fairness will undoubtedly continue in her appellate role.

Justice Kathleen O'Leary

Justice Kathleen O'Leary was born in Worcester, Massachusetts, the child of a classic Irish-Catholic, Democratic, father was a "cop" family. She remains, at heart, a Red Sox, Patriots, Celtics fan. Her chambers are adorned with not one, but two, Irish flags. Though she has a proud Irish heritage, she inherited a tolerance of others from her father, and she encourages diversity.

Her family moved to the Los Angeles area when she was high school-aged. She then attended Marymount College, majoring in political science, before attending Southwestern Law School. During law school, she interned with the Los Angeles City Attorney's Office. She found litigation "dynamic" with "never a boring moment." After law school she first worked as a legislative assistant to an assemblyman before joining the staff of the Orange County Public Defender's Office in 1976.

She was a public defender for only five years, followed by a six month stint in private practice, when she was appointed to the West

Orange County Municipal Court by Governor Brown. She credits her appointment at least in part to the administration's desire to have a more diverse bench with appointments of women and younger appointees. She served five years on the municipal court bench, including one year as assistant presiding judge and two years as presiding judge. She then was elevated to the superior court by Governor Deukmejian. As in the municipal court, she served as assistant presiding judge, this time for two years. She also served an unprecedented three terms as presiding judge, and her third term was interrupted by her appointment to the Court of Appeal.

Justice O'Leary's prior service in the administration of her courts has focused her on systemic issues rather than the administering of a single calendar. She presided over the superior court during a "sea change" in both personnel and technology. Strategic planning and organization has appealed to her. She was also nominated and served on the Judicial Council, which came as "a little bit of a surprise," since she had not thought about that prospect.

Throughout her judicial career, Justice O'Leary has been active in judicial and other law-related education efforts. She has chaired the Governing Committee of the California Center for Judicial Education and Research. In addition to her educational efforts for the California judiciary, she has also taught the Hawaii judiciary and at the National Center for State Courts.

Her experiences in both the education of the judiciary and in the administration of the courts brings Justice O'Leary to her role as an appellate jurist with an appreciation of the permanent development of jurisprudence. She especially likes the exchange amongst the justices. She notes that a trial judge is more or less alone; he or she may seek advice from other trial judges, but the latter do not have the incentive which emanates from the responsibility. In contrast, the appellate bench is more collegial, and the other justices do have a vested interest in the outcome of decisions. One frustration she has encountered as an appellate judge is the proper interpretation and application of law which is "legislated in a vacuum," without perhaps a recognition of the law's long term impact. She would most likely welcome an analysis of any proposition argued in terms of any far-reaching consequences.

Justice O'Leary has emphasized that an attorney's reputation is paramount. Once a reputation is established, it will carry on for a number of years. As an example, the justice has found that, at times, there is little nexus between the authority cited and the proposition asserted. Also, while she does enjoy a valuable oral argument and understands major points will be highlighted, she would rather counsel not present argument which is merely repetitive to briefing, as she is well aware of the arguments in the briefs. Counsel will discover, if they have not already, that Justice O'Leary does not engage in dialogue "just for the sake of saying something." However, if a new perspective is presented, she would be quite receptive.

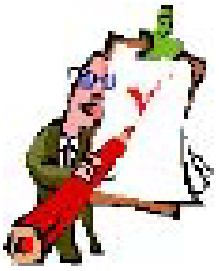
Additional Court News

California Supreme Court Docket Now On-Line

By Amanda F. Doerrer

The California Supreme Court is now on-line! On January 29, 2002, the California Supreme Court launched its case information Web site that allows litigants, attorneys, and the public to quickly access up-to-date information about pending high court cases. Users can search for case information by various means: Supreme Court, Court of Appeal, or superior court case number; or the name of an attorney of record, a party; or the case title. Key features of the site include access to the court docket, viewing party addresses, contact information, and lower court information. Additionally, just as with the Court of Appeal cases, users can sign up for E-mail notification of updated case activity, such as notification of ordered granting review, notification when briefing is filed, and notification of when a disposition is filed. Thanks to the implementation of this Web site, the necessity to make a telephone call to the Supreme Court Clerk's Office will no longer be necessary to obtain case status information. The service is a great time saver for both appellate counsel and the court staff.

The California Supreme Court case information Web site has been linked up with the case information Web site of the Court of Appeal for easy access. To view case information from any Court of Appeal matter or from any matter pending before the California Supreme Court go to <http://appellatecases.courtinfo.ca.gov>. For the convenience of the panel, ADI has placed a link to the case information Web site on the top navigation bar of our Web site. (Look for the scales of justice).



NEW RULE ON TRANSMISSION OF EXHIBITS AND NEW DIVISION II POLICY

By Cindi B. Mishkin

Division Two has begun a new policy with respect to the transmission of exhibits to the Court of Appeal. It used to be that exhibits relevant to the appellate issues raised were transmitted to the reviewing court pursuant to California Rules of Court, rule 10(d). But the rules have recently been changed, and the new rule relevant to the transfer of exhibits is now rule 18. Under this new rule, the transfer of exhibits should be made "within 10 days after the last respondent's brief is filed or could be filed under rule 17. . . ." (Cal. Rules of Court, rule 18(a).)

Division Two, however, desires to review the relevant exhibits before this deadline. Therefore, a request for transfer should be made directly to Division Two, rather than the trial court. This request for early transmission should be made at the time the opening brief is filed. Conveniently, the Court of Appeal has included a form to request transmission of exhibits with each notice that the appellate record has been filed. See also ADI's Web site for a sample form.

Links In The Law

ADI's Web Site News

What's New At ADI's Web Site?

By Amanda F. Doerrer

Each quarter we like to update you on the recent developments at ADI's Web site. Each month ADI provides updates on upcoming MCLE seminars, profiles a new on-line resource, updates the Kudos section, and relays news from the Judicial Council. This quarter, in the following article, we focus on how to find professional responsibility resources on the Internet.

On-line Resources For Avoiding Ethical Pitfalls

By Amanda F. Doerrer

The old saying "A pound of prevention, is better than a Gallon of cure" definitely applies to avoiding ethical dilemmas. A breakdown in client communication accounts for the majority of ethical problems encountered by attorneys.[1] Likewise, the majority of complaints A.D.I. receives from defendant's concerning his or her appointed appellate counsel are due to a lack of effective communication between appointed counsel and the client.

There are several tips that you can employ to help avoid professional responsibility issues and State Bar complaints from clients:

1) Review the Professional Responsibility Code regularly.

2) Trust your intuitions.
If something just doesn't "feel" right, it probably is not. Do not ignore your instincts; rather, investigate ethical questions immediately.

3) Establish a buddy system.
Whenever something does not pass the "smell" test, a good idea is to run the problematic situation by a buddy. A buddy can be a trusted associate or a member of the A.D.I. staff. Open discussion of potential ethical concerns can help you spot true ethical problems and come up with effective solutions.

4) Document everything!
- Put notes in your case file.
- Write to your client at each stage of the case to explain the current case status.

5) Consult the California State Bar Ethics Hotline.
The Ethics Hotline is a confidential research service for attorneys to help attorneys identify and analyze their professional responsibilities. Although staff members cannot provide legal counsel, advice, or opinions, they can discuss issues and authorities. Callers will be referred to statutes, rules, cases, and bar opinions to assist in reaching an informed decision about the ethical question. Attorneys may reach the Ethics Hotline from 9:00 a.m. to 5:00 p.m. (Pacific Time) on weekdays by calling 800.238.4427 (800.2.ETHICS) within California or 415.538.2150 from outside of California. All calls to the Ethics Hotline generally are confidential.

6) Do Your Research.
Anytime a situation causes you to pause and think "What should I do?" or "Is this proper?" the following resources can help you from stepping into an ethical pit hole.

On-line Ethics Resources
A.D.I. has complied a listing of several available on-line resources that offer professional responsibility assistance. The best source is the State Bar of California's Ethics Web Site <http://www.calbar.org/ethics.html> which includes the following:

1) California Rules of Professional Conduct <http://www.calbar.org/pub250/crpc.htm>

2) Business and Professions Code sections 6000, et. seq. <http://www.calbar.org/pub250/sbact.htm>

3) California Committee on Professional Responsibility and Conduct Ethics Opinions <http://www.calbar.org/2pub/3eth/3ethndx.htm>. This page contains the full text of the ethics opinions issued by the State Bar of California Committee on Professional Responsibility and Conduct. These advisory opinions regarding the ethical propriety of hypothetical attorney conduct, althougth not binding, are often cited in the decisions of the Supreme Court, the Court of Appeal, and the State Bar Court Review Department. The opinions can be searched by key words or by phrases.

4) The *Ethics Hotliner* Newsletter <http://www.calbar.org/2eth/3hotline/hotliner_index.htm> This is a bi-annual newsletter from the California State Bar that highlights news and developments in California professional responsibility. Each issue addresses new and amended Rules of Professional Conduct, new cases, new and proposed ethics opinions, and provides reports on the survey data compiled by the Ethics Hotline.

Another frequently missed resource is your local county bar association. For example, the San Diego County Bar association offers a free, anonymous hotline for its members with questions regarding legal ethics (619-231-0781), and the Los Angeles County Bar Association posts their county bar ethic opinions on their Web site (<http://www.lacba.org/showpage.cfm?pageid=427>).

Nationally, there are several on-line resources for attorneys. The American Bar Association's Center for Professional Responsibility <www.abanet.org/cpr/home.html> provides the full text of the Model Rules of Professional Conduct, annotated with comments and comparisons to the Model Code as well as summaries of recent opinions of the ABA's Standing Committee on Ethics and Professional Responsibility. The site also offers links to the California codes. A key feature of the ABA site is the "EthicSearch" service. Here, attorneys can E-mail ethics questions and receive back citations to the authorities that should help them find the answer.

The American Legal Ethics Library <http://wwwsecure.law.cornell.edu/ethics> is hosted by the Cornell Legal Information Institute. The digital library contains the full text of or links to the professional conduct codes of most U.S. states as well as the American Bar Association's model code. A key feature of this site is the narrative on professional conduct law from major law firms across the US. The materials are organized by both state and topic, and all are fully searchable.

The Association of Professional Responsibility Lawyers <http://www.aprl.net> is a national association of lawyers concentrating in the fields of professional responsibility and legal ethics. APRL provides a national clearinghouse of information regarding recent developments and emerging issues in the areas of admission to practice law, professional ethics, disciplinary standards and procedures, and professional liability.

Another great site is CrossingtheBar.com <http://www.crossingthebar.com>. CrossingtheBar is dedicated to offering information and commentary on the multijurisdictional practice of law. The site provides documents by the American Bar Association Commission on Multijurisdictional Practice, state admission rules, state unlawful practice of law statutes, case summaries, a newsletter, and more.

Looking for a comprehensive site? Check out Legal Ethics <http://www.legalethics.com>. They maintain a comprehensive collection of links to ethics-related articles, other ethics sites, state ethics boards, and related research sources. The site also provides basic information on each state's ethics agency and conduct rules. A key feature of this site is that it offers a service for tracking and publishing state and local ethics rulings.

A final resource to review is the Web site of the National Organization of Bar Counsel <http://www.nobc.org>. It offers commentary and case summaries pertaining to legal ethics issues. Also, you can find a private list serve where NOBC members can exchange ideas and have questions answered.

[1]Cal.Bar *Ethics Hotliner*, "Good Client Relations", David Bell <http://www.calbar.org/2eth/3hotline/article_good.htm>.