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Notes From The Director
by Elaine A. Alexander

As we face a change of years with the advent of 2004, we also have some significant rule changes to consider. The Judicial Council has been rewriting the rules in installments, recasting them in plain English, reorganizing them in a logical sequence, and making some substantive changes to remedy problems or conform to actual practice.

The first installment (effective January 2002) revised the civil rules, and the second (January 2003) dealt with the rules governing hearing and decision in the Court of Appeal and Supreme Court. On October 21, 2003, the Judicial Council adopted the third installment, revising the criminal rules. They become effective January 1, 2004. The proposed revision for the fourth installment, for dependency and certain other cases, has been published with an invitation to comment.

We – the appellate defense community – have had considerable input on the rules relevant to our practice. We encourage attorneys to participate in our efforts by sending us your ideas on rule proposals issued by the Judicial Council and also by giving us suggestions on rule changes we can recommend to the Judicial Council. Of course, attorneys may comment directly to the Judicial Council, as well.

The changes going into effect in January 2004 are discussed below in narrative form. It highlights only selected rules. I have also prepared a chart of selected changes, included elsewhere in the newsletter.

The full text of the criminal rule and other amendments effective in January 2004 may be found at the ADI Web site, <www.adi-sandiego.com> or at the courts' Web site, <http://www.courtinfo.ca.gov/rules/amendments.jan04.pdf >.

The dependency proposals and an invitation to comment by January 23, 2004, can be accessed at: <http://www.courtinfo.ca.gov/invitationstocomment/bproposals.htm>.

RULE CHANGES GOING INTO EFFECT JANUARY 1, 2004

REVIEW AND REHEARING

Petitions for Review, Answers, Replies (New Rule 33.3, Amendments to Rules 28 and 28.1)

Exhaustion petition for review: Probably the most important change is new rule 33.3, which permits an abbreviated petition for review when no grounds for review under rule 28(b) exist, but a petition for review is needed to exhaust state remedies for potential habeas corpus relief in federal court. The Supreme Court may still grant review if the case warrants it.

The petition need not comply with rule 28.1(b)(1) and (2), which requires a non-exhaustion petition begin with a statement of the issues presented for review and explain how the case presents a ground for review under rule 28(b).[1]

The petition must say "Petition for Review To Exhaust State Remedies" prominently on the cover and must comply with rule 28.1(b)(3) through (5). It must state it presents no grounds for review under rule 28(b) and is filed solely to exhaust state remedies for federal habeas corpus purposes. It must also contain a brief statement of the underlying proceedings, including the conviction and punishment, and the factual and legal bases of the claim. (Rule 33.3(b).)

Only an original and *eight* copies need be filed in the Supreme Court – as opposed to an original and 13 for a non-exhaustion petition. (Rule 44(b)(1)(A) & (E).)

It is important, of course, for the abbreviated petition to present the facts and issues sufficiently to exhaust state

Contents

remedies under federal law. We are issuing guidance on federal exhaustion requirements.

Reply no longer limited to additional issues raised in answer: A petitioner may now file a reply to an answer to a petition for review whether or not the answer raised additional issues. (Rule 28(a)(3) amended; former rule 28.1(d) repealed.)

Rehearing: Petitions and Answers (Amendments to Rules 25 and 29.5)

Answer in Court of Appeal only on court request: Under amended rule 25(b)(2) a party may not file an answer to a petition for rehearing in the Court of Appeal unless the court so requests; the rule indicates a petition for rehearing normally will not be granted unless the court has requested an answer. The answer must be filed within eight days of the request (the current deadline) unless the court specifies another due date.

Answer in Supreme Court due eight days after petition: Amended rule 29.5(b) restates the existing rule that an answer to a petition for rehearing in the Supreme Court is due eight days after the petition is filed. It does not include the limitation of newly amended rule 25(b)(2), for Court of Appeal cases, that the court must request it.

Relief from failure to timely file: New subdivision (4) in rule 25(b) provides that, before a Court of Appeal decision is final and if good cause is shown, the presiding justice may relieve a party from failure to file a timely petition for rehearing or answer.[2] Rule 29.5(b) already contains an analogous provision for Supreme Court cases.

NEW RULES GOVERNING NON-CAPITAL CRIMINAL APPEALS

Taking the Appeal (New Rule 30)

Criminal cases charged as felony appealable to Court of Appeal: Rule 30(a)(2) describes cases that may be appealed to the Court of Appeal as "any criminal action in which a felony is charged, regardless of the outcome." The charge rather than the conviction determines the jurisdiction of the appellate court; for example, if the defendant is charged with a felony or "wobbler" but convicted of only a misdemeanor in the same or another count, the conviction is appealable to the Court of Appeal. This description is new to the rules but states existing statutory and case law.

Guilty plea appeals: Rule 30(b) deals with notices of appeal after a plea of guilty or nolo contendere or an admitted probation violation and incorporates the provisions of old rule 31(d). Important features include:

- Both notice of appeal and request for certificate of probable cause required if validity of guilty plea is to be an issue: A substantive change in rule 30(b)(1) is that if the appeal will contest the validity of the plea, the defendant must file *both* a notice of appeal and a statement requesting a certificate of probable cause. (Old rule 31(d) referred to a request for a certificate as an "intended notice of appeal.")

- Appeals not requiring certificate of probable cause: As before, a certificate of probable cause is not required if the notice of appeal states the appeal is from the denial of a suppression motion pursuant to Penal Code section 1538.5, subdivision (m) or grounds that arose after entry of the plea and do not affect the plea's validity, such as a non-stipulated sentence. (Rule 30(b)(4).)

- Requirement of certificate of probable cause to raise validity of the plea issues in appeals also based on non-certificate grounds: Rule 30(b)(5) expressly warns that a certificate of probable cause must be timely obtained in order to raise an issue challenging the validity of the plea, even if the appeal is otherwise operative under rule 30(b)(4) because the notice of appeal states non-certificate grounds. This states existing law. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1104.)

Duties of clerk upon filing of notice of appeal: Rule 30 gives new responsibilities to the superior court clerk with respect to notices of appeal. These include:

- Notification of filing to parties and reporters: Rule 30(c)(1) gives the superior court clerk the responsibility for notifying parties and court reporters of the appeal. The notification is not to be sent until the court rules on the request for a certificate of probable cause if one is necessary to make the appeal operative. (See Advisory Committee Comment.)

- Notification to defendant and appellate project if lack of certificate of probable cause makes appeal inoperative: If a certificate is required to make the appeal operative and the defendant fails to file a timely request for one or the superior court denies it, the superior court clerk must mark the notice of appeal "Inoperative," notify the defendant, and send a copy of the marked notice of appeal to the district appellate project. (Rule 30(b)(3).)

Time To Appeal (New Rule 30.1)

New rule 30.1 incorporates current law as to the 60-day period for filing a notice of appeal, premature appeals, and prison-mail filings. The only substantive change is that if the notice is late the superior court clerk must notify not only the defendant but also the appellate project for the district.

Stay of execution and release on appeal (New Rule 30.2)

Rule 30.2 covers stays of orders granting probation and applications for release pending appeal, including the application, required showing, service, and interim relief. The changes for the most part fill gaps in the rules and reflect existing practices and law. These include provision for stay of a probation order, a requirement the application be served on the district attorney and Attorney General, provision for interim relief, and requirement of notice of a stay to the superior court.

Abandonment (New Rule 30.3)

This rule restates existing practices for filing an abandonment. It adds the requirement that the clerk notify the Court

of Appeal of an abandonment filed in the superior court and notify the reporter if the record has not yet been filed.

Normal record (New Rule 31)

This rule prescribes the contents and form of the clerk's and reporter's transcripts, makes exhibits part of the normal record to be transmitted to the Court of Appeal under rule 18, and provides for a stipulation for a partial transcript.

Application in Superior Court for Addition to Normal Record (New Rule 31.1)

New Rule 31.1 covers applications by either party for additions to the normal record and the procedures for ruling on them. A change is that the superior court clerk must notify the reporter of any additions to be prepared only when the application is approved or takes effect because of the judge's failure to rule on the application. Exhibits transmitted to the reviewing court at the request of a party are no longer treated as an addition to the record but are covered in rule 31(e) as part of the normal record.[3]

Sealed Records (New Rule 31.2)

Rule 31.2 covers transcripts of *Marsden*[4] hearings and other in-camera proceedings. In a substantive change, subdivision (a) now requires the superior court clerk to send the defendant's copy directly to the defendant's appellate counsel or the appellate project if the defendant has no counsel, rather than to the reviewing court. Subdivision (b) requires an index showing the date and persons present at in-camera proceedings, without disclosing the substance of confidential matters, as an aid to determining whether any portion should be unsealed.

Juror-Identifying Information (New Rule 31.3)

This rule contains no substantive changes and reflects the provisions of old rule 33.6 and Code of Civil Procedure section 237.

Preparing, Certifying, and Sending the Record (New Rule 32)

This rule is addressed primarily to the courts, their clerks, and reporters. It governs when record preparation begins, when the transcripts are due, how time is extended, how many copies are required, how the record is to be transmitted and to whom. A change to make the rule conform to actual practice is that under subdivision (c) each of several co-appellants is to get a copy of the record.

Augmenting or Correcting the Record in the Court of Appeal (New Rule 32.1)

This rule incorporates existing provisions requiring the superior court clerk to augment the record with any post-certification change in the judgment or order in the case and also to correct omissions in the normal record. (Old rules 33(d) and 35(e).) A change conforming the rules to practice is that if appellate counsel is not yet retained or appointed, the record is to be sent to the appellate project. Subdivision (d) cross-references rule 12 for augmentations and corrections.

Agreed and Settled Statements (New Rules 32.2 and 32.3)

The provisions on settled statements have been changed in two respects: (1) Any party, not just the appellant, may apply for permission to prepare a settled statement. (2) New rule 32.2 deletes the former requirement that the application be verified and contain a clerk's certificate of the unavailability of a reporter's transcript.

Briefs (New Rule 33)

New rule 33 governs briefing as to contents and form, length, time to file, service, cases in which both the defendant and the People appeal, and amicus curiae submissions.

Maximum length stated in terms of word count: Under new rule 33(b) the maximum length is now stated in terms of a word count rather than page length for computer produced briefs: 25,500 words, including footnotes but excluding tables, a word count certificate, and any attachment permitted under rule 14(d).[5] The presiding justice may permit a longer brief for good cause. A word count certificate, which may be based on the computer program, is required. No distinction is made between opening or respondent's briefs and reply or supplemental briefs.[6] The present 75-page limit is retained for typewritten briefs.

People required to serve project: Subdivision (d)(3) conforms the rule to practice by requiring the People to send a copy of their brief to the project.

When both parties appeal: If both the defendant and the People appeal, under new subdivision (e) the defendant files the first opening brief unless the court orders otherwise. Rule 16 governs the contents of the briefs.

Hearing and Decision in the Court of Appeal and Supreme Court (New Rules 33.1 and 33.2)

Under new rules 33.1 and 33.2, criminal proceedings in the Court of Appeal are governed by rules 21 through 27, and non-capital criminal proceedings in the California Supreme Court are governed by rules 28 through 29.9.

OTHER CHANGES RELEVANT TO APPOINTED APPELLATE PRACTICE

Death Penalty Appeals (New Rules 34 through 36.3)

Effective January 1, 2004, new rules 34 through 36.3 will govern automatic appeals from a judgment of death. They cover matters pertaining to the record, briefs, oral argument, and decision. Specific provisions are beyond the scope of this article.

Dependency Appeals (Amendments to Rule 39.1(d) and Invitation To Comment on Proposed General Revision)

County required to serve brief on project and give counsel extra copy: Rule 39.1(d) has been amended to require the county child welfare department to serve two

copies of its brief on appointed counsel as well as a copy on the district appellate project.

No service on Attorney General or district attorney: Under an amendment to rule 39.1(d), the provisions of new rules 33(d)(1), and 44.5 requiring service on the Attorney General and/or district attorney under specified circumstances do not apply in dependency proceedings.[7]

General revision to dependency rules: As mentioned above, a general revision of dependency rules is underway, similar to the criminal rules revision recently adopted. ADI will be offering input in various ways, and we invite panel attorneys to participate, as well, by commenting individually or by giving us your ideas to incorporate into our comments. As indicated near the beginning of this article, the proposals are accessible on the courts' Web site.

Filing and Service

Number of Copies of Filings in the Supreme Court (Amendment to Rule 44(b)(1))

Rule 44(b)(1) as amended requires the following number of copies for filings in the California Supreme Court:

- Petition for review or answer: original and 13 copies;
- Brief: original and 13 copies;
- Writ petition, opposition, or other response: original and 10 copies;
- Motion, opposition, or other response: original and eight copies;
- Federal exhaustion petition for review, answer, or reply under new rule 33.3: original and eight copies.

Service on Attorney General or Other Public Officer or Agency (New Rule 44.5, Repeal of Rule 15(e), Amendment to Rule 28(f)(3))

Service on Attorney General: New rule 44.5(a), which replaces rule 15(e), requires that a brief or petition be served on the state Attorney General if it questions the constitutionality of a state statute or is filed on behalf of the state, a county, or a public officer in a criminal case or a case in which the state, a state officer, or a county is a party. (See also new rule 33(d)(1); amendment to rules 28(f)(3) and 56(b).) As noted above, rule 44.5 does not apply to dependency cases. (Rule 39.1(d).)

Statement re service on cover of briefs: In a case under rule 44.5, the cover of the document must contain a statement to the effect "Service on [Attorney General or other public officer or agency] required by [applicable statute or rule]."

Habeas Corpus

Documents Attached to Petition in Habeas or Other Original Proceeding Dealing with Custody (Amendment to Rule 56.5(c))

Under new subdivision (4) of rule 56.5(c), supporting documents accompanying a habeas corpus petition or other writ petition in a reviewing court seeking release from or modification of terms of custody must comply with the requirements of rule 56(d). That rule provides specifications for binding, length, pagination, tabbing, and indexing of supporting documents in writ proceedings in reviewing courts.

Habeas Corpus Petitions in Superior Court: Time for Decision; Procedures Upon Failure To Rule (Amendment to Rule 4.551(a)(3))

Court to rule in 60 days: Rule 4.551 requires the superior court to rule on a habeas corpus petition in 60 days (rather the old time of 30 days). (Amended rule 4.551(a)(3)(A).)

Petitioner's request for ruling if court fails to decide in 60 days: If the court fails to rule on the petition as required by (A), the petitioner may file a notice and request for ruling, with the original petition attached. (Amended rule 4.551(a)(3)(B)(i).)

Assigning case to judge; calendaring for decision in 30 days: After receiving a proper request for ruling, the presiding judge must assign the petition to a judge and calendar the matter for decision within 30 days of the filing of the request. (Amended rule 4.551(a)(3)(B)(ii).)

1 The most frequently invoked grounds for review under rule 28 are the importance of the issue and a conflict among lower courts on the issue. (Rule 28(b)(1).)

2 A petition for rehearing is due within 15 days of the filing of the decision, a later publication order restarting the period under rule 24(b)(5), or a modification changing the judgment. (Rule 25(b)(1).) As noted above, an answer is due eight days (or another time set by the court) after a court request for an answer.

3 The Advisory Committee Comment to rule 31.1 incorrectly refers to this provision as "rule 31.1(e)" rather than rule 31(e).

4 *People v. Marsden* (1970) 2 Cal.3d 118.

5 Rule 33(b) is based on the former 75-page limit, with one-and-a-half spaced lines. (Advisory Committee Comment.) In contrast, rule 14(c), imposing a 14,000 word limit on civil briefs, rule 28.1(c) on criminal and civil petitions for review and responses, and rule 29.1(c)(1) and (d)(2) on criminal and civil Supreme Court briefs convert the former page limits to word count limits using double spacing.

6 This is consistent with rule 14(c) for civil briefs. In contrast, rule 29.1 specifies varying limits for criminal and civil briefs in the Supreme Court: 14,000 words for an appellant's and respondent's brief, 4,200 for a reply brief, and 2,800 for a supplemental brief. (Rule 29.1(c)(1) and (d)(2).)

7 The first sentence of amended rule 39.1(d) obsoletely refers to former rule 16(c), whose provisions some time ago were moved to old rule 15(e) and as of January 1, 2004, will be moved to new rule 44.5. It also refers to old rule 37(a) instead of new rule 33(d)(1), which goes into effect at the same time as the amendment to rule 39.1(d).

RULE CHANGES EFFECTIVE 1/1/04 RELEVANT TO APPOINTED APPELLATE PRACTICE

TOPIC	NEW RULE	OLD RULE	COMMENT
REHEARING AND REVIEW			
Rehearing in Court of Appeal: answer	25(b)(2)	25(b)(2) amended	No answer allowed unless court requests it. Due 8 days after order unless court sets other date.
Rehearing in Supreme Court: answer	29.5(b)	25(b)(2)	Moves due date from 25(b) to 29.5(b). No substantive change. Request from court not required.
Rehearing: relief from late filing	25(b)(4)	New	Application to PJ for relief from failure to timely file petition for rehearing in Court of Appeal.
Review: federal exhaustion petition	33.3	New	Abbreviated petition for review permitted if only purpose is to exhaust state remedies for federal habeas corpus. Only original and 8 copies need be filed under new rule 44(b)(1)(E).
Review: general	33.2	New	Cross-reference to rules 28 through 29.2 for hearing and decision in Supreme Court in non-capital criminal cases.
Review: no. copies of petition, answer, reply	44(b)(1)(A),(E)	44(b)(1)(i) for subd. (A). Subd. (E) is new.	Change to subd. (A): original and 13 copies, except for exhaustion-only petitions (rule 33.3), which under new subd. (E) of rule 44 require an original and 8.
Review: reply to answer	28(a)(3)	28(a)(3)	Reply no longer limited to additional issues raised in answer.
NEW NON-CAPITAL CRIMINAL RULES: HIGHLIGHTS AND SUBSTANTIVE CHANGES			
Abandonment	30.3	38	Change in superior court clerk's duty to give notice of abandonment.
Appealability	30(a)(2)	New	Any criminal action with felony charge can be appealed to Court of Appeal, regardless of outcome.
Briefs: content and form	33(a)	37(c)	Rules 13 and 14 apply.
Briefs: length	33(b)	37(d)	New: word count maximum of 25,500 words for computer produced briefs. Certificate of word count required.
Briefs: No. of copies in	44(b)(1)(B)	44(b)(2)(ii)	Change: original and 13.
Briefs: service	33(d)	37(a)	Change reflecting existing practice: AG must serve a copy on project.
Briefs: service on AG	44.5	New. 15(e) repealed, 28(f)(3) amended	Incorporates requirements of repealed rule 15(e) for when AG must be served. Not applicable to dependency cases under rule 39.1(d). Statement on cover of brief re service requirement.
Briefs: time to file	33(c)	37(a)	No substantive changes.
Briefs: when both parties appeal	33(e)	New	Adapts rule 16 to criminal appeals. Defendant's brief due first unless court orders otherwise.
Certificate of probable cause: validity issues	30(b)(5)	New	Warns of law requiring timely certificate of probable cause to attack validity of plea, even if appeal operative without it.
Decision in reviewing court	33.1,33.2	New	Cross-reference to rules 21 through 27 and 28 through 29.2 for hearing and decision in Court of Appeal and Supreme Court.

NEW NON-CAPITAL CRIMINAL RULES: HIGHLIGHTS AND SUBSTANTIVE CHANGES (cont.)			
Notice of appeal: general requirements	30(a)	31(a),(b)	No substantive changes.
Notice of appeal: guilty pleas requiring certificate of probable cause	30(b)(1),(2)	31(d)	Certificate of probable cause needed to attack validity of plea; separate notice of appeal AND request for certificate of probable cause required; ruling on request for certificate.
Notice of appeal: guilty pleas not requiring certificate of probable cause	30(b)(4)	31(d), para. 2	No change: certificate of probable cause not required if notice of appeal says appeal is based on Penal Code §1538.5 or post-plea matters.
Notice of appeal: notification of filing	30(c)(1)	31(a)	Change: Clerk rather than appellant's counsel must notify parties and reporter of a notice of appeal.
Notice of appeal: time for filing	30.1	31	Change: Clerk must notify appellate project as well as appellant if notice is late.
Notice of inoperative appeal (no certificate of probable cause)	30(b)(3)	New	Clerk must notify appellant and appellate project appeal is inoperative if certificate of probable cause is not timely requested or is denied.
Oral argument	33.1,33.2	New	Cross-reference to rules 21 through 27 and 28 through 29.2 for hearing and decision in Court of Appeal and Supreme Court.
Record: additions in superior court	31.1	33(b)	Change in time clerk must notify reporter to prepare additional transcript. Transmission of exhibits at party's request not an addition, but part of normal record.
Record: augment order	32.1(d)	New	Adds cross-reference to rule 12.
Record: augment to reflect new judgment or order	32.1(a)	33(d),35(e)	No substantive changes.
Record: augment, where sent	32.1(c)	33(d)	Change: Augment to be sent to project if defendant has no counsel.
Record: clerk's transcript	31(b)	33(a)(1)	No substantive changes.
Record: exhibits	31(e)	33(a)(3), 33(b), 34(3), 35(e)	Incorporates rule 18 by reference.
Record: form	31(f)	35(f)	No substantive changes.
Record: juror identifying info.	31.3	33.6	No substantive changes.
Record: limited in certain appeals	31(d)	34	No substantive changes.
Record: normal record - general	31	33	No substantive changes.
Record: omissions	32.1(b)	35(e)	No substantive changes.
Record: reporter's transcript	31(c)	33(a)(2)	New: Normal record in People's appeal includes oral communications between court and jury.
Record: sealed (*Marsden*, other)	31.2	33.5	*Marsden* transcript sent directly to appellant's counsel or appellate project. Index to in camera proceedings required.
Record: settled or agreed statement	32.2, 32.3	36(a),(b)	Any party may apply for settled statement. Request need not be certified or have clerk's certificate.

NEW NON-CAPITAL CRIMINAL RULES: HIGHLIGHTS AND SUBSTANTIVE CHANGES (cont.)			
Record: time to begin preparation	32(a),(b),(c),(d)	31(d), 34.5, 35(a),(b)	Changes mostly directed at clerks. New: Each co-appellant receives copy of record.
Rehearing in reviewing court	33.1,33.2	New	Cross-reference to rules 21 through 27 and 28 through 29.2 for hearing and decision in Court of Appeal and Supreme Court.
Release pending appeal	30.2	32	Addition: States existing law on availability of interim relief.
Review: seeking in Supreme Court	33.2	New	Cross-reference to rules 28 through 29.2 for hearing and decision in Supreme Court.
Stay pending appeal	30.2	32	Minor changes re service and notice to superior court.

OTHER CHANGES RELEVANT TO APPOINTED APPELLATE PRACTICE			
Briefs: AG, service on	44.5	New. 15(e) repealed, 28(f)(3)	Incorporates requirements of repealed rule 15(e) for when AG must be served. Not applicable to dependency cases under rule 39.1(d). Statement on cover of brief re service
Briefs: no. of copies in Supreme Court	44(b)(1)(B)	44(b)(2)(ii)	Change: original and 13.
Death penalty appeals	34 through 36.3	34, 36.1, 36.2, 39.50-39.57	General revision. Changes not described here.
Dependency briefs: service on AG	39.1(d)	39.1(d) amended	Rules 33(d)(1) and 44.5 re service on AG and DA not applicable.
Dependency: service on project and appointed counsel	39.1(d)	39.1(d) amended	County must serve appellate project and serve two copies on appointed counsel.
Habeas corpus, superior court: time for decision; failure to rule	4.551(a)(3)	4.551(a)(3), amended	Decision on petition due in 60 days. If court fails to rule, petitioner may file request for ruling; presiding judge must assign case to judge and calendar it for decision in 30 days of the filing of the request.
Writs: attachments to habeas petition	56.5(c)(4)	New	Supporting attachments must comply with rule 56(d).
Writs: no. copies of petition or response in Supreme Court	44(b)(1)(C)	New	New: original and 10.

SUPPLEMENTAL BRIEFING AND PLEADINGS

by Howard C. Cohen, Staff Attorney

Counsel may decide to file supplemental briefing or pleadings (e.g., a reply to an opposition to a motion). Counsel must always be mindful of seeking a court's permission, if and when necessary, to file supplemental briefing or pleadings.

In a case pending before the Supreme Court, a party may file a limited supplemental brief as a matter of right. (Cal. Rules of Court ("Rule(s)), rule 29.1(d).) The briefing is "limited to new authorities, new legislation, or other matters that were not available in time to be included in the party's brief on the merits." (Rule 29.1(d)(1).) The brief may not exceed 2,800 words and must be filed no later than 20 days before oral argument. (Rule 29.1(d)(2).)

Generally, within 15 days after finality of a Supreme Court decision remanding or order transferring a cause to a Court of Appeal for further proceedings, any party may file a supplemental opening brief in the Court of Appeal.[1] (Rule 13(b)(1).) Within 15 days after the brief has been filed, any opposing party may serve and file a supplemental responding brief. (*Ibid.*) Such supplemental briefs must be limited to matters arising after the previous Court of Appeal decision, unless the presiding justice permits briefing on other matters. (Rule 13(b)(2).)

In addition to appellant's opening brief, respondent's brief, and an optional appellant's reply brief,[2] "no other brief may be filed except with the permission of the presiding justice," except supplemental briefing after remand or transfer from the Supreme Court noted above or an amicus curiae brief filed by the Attorney General. (Rule 13(a)(4), (b), (c)(6).)

Other than the supplemental briefing based on new matters under rule 29.1(d), no express provision is made in the rules to seek the Chief Justice's permission to file supplemental briefing generally in the Supreme Court. The court may, however, "request additional briefs on any or all issues, ..." (Rule 29.1(e).)

"Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party." (Gov. Code, § 68081.)

There is no express provision in the rules for a reply to an opposition to a motion. (Rule 41.) Some courts may indeed not accept a reply except with the court's express permission. Therefore, counsel should request permission and submit a separate request to file a reply in addition to the proposed reply itself.[3] The better practice would also be to call the court clerk and inform him/her of one's intention to submit a request to file a reply and the proposed reply so that the court may consider ruling on same before ruling on the motion per se.

1 This authority to file a supplemental brief does not apply if the previous decision of the Court of Appeal was a denial of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause. (Rule 13(b)(3).)

2 Rule 13(a)(3) does not require a reply brief. The better practice is for appellant's counsel to file a reply brief.

3 Because motions may have some urgency, it is the better practice to lodge for filing the proposed reply rather than await the court's order in response to the request. While the court may deny permission, more likely the court may grant the request, especially where the reply might be instrumental to the court's ruling.

Cumulative Error Revisited

by Lynell K. Hee, Staff Attorney

A cumulative-error analysis aggregates all of the errors which were individually found to be harmless and "analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." (*United States v. Rivera* (10th Cir. 1990) 900 F.2d 1462, 1470.) "[C]ourts look to see if the defendant's substantial rights were affected." (*Ibid.*) If any single error being aggregated is constitutional in nature, then courts must apply the harmless beyond a reasonable doubt standard enunciated in *Chapman*[1] to determine whether the defendant's substantial rights were affected. (*Id.* at p. 1470, fn. 6.) Otherwise, the state *Watson* standard of prejudice would apply, i.e. the conviction must be overturned if it is reasonably probable, that is, there is a reasonable chance, that a verdict more favorable to appellant would have resulted if the cumulative error had not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [a reasonable "probability . . . does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility".)

In any cumulative error argument, it is always important to discuss how the errors combined to result in cumulative error. For example, in *Cargle v. Mullin* (9th Cir. 2003) 317 F.3d 1196, 1220-1221, the Ninth Circuit reversed a conviction where defense counsel's ineffectiveness in failing to challenge and impeach two critical state witness combined with the prosecutorial misconduct in impermissibly bolstering and vouching for the same witnesses had an "inherently synergistic effect." Because the prosecution case depended upon the credibility of the two witnesses, the defense attorney's failure to properly attack the witnesses' credibility combined with the prosecutor's improper bolstering of the witnesses' credibility resulted in cumulative error. (*Ibid.*)

1 *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].

TIPS FOR PRACTICING BEFORE THE FOURTH DISTRICT COURT OF APPEAL:

A Seminar by Justice McIntyre

by Carmela F. Simoncini, Staff Attorney

On November 19, 2003, Justice James A. McIntyre addressed the monthly meeting of the Appellate Court Committee, to provide some tips for appellate practitioners. While some pointers related to things we all know intuitively, or that we may have heard from other sources, having a member of the appellate bench reinforce them highlights their importance. He broke the topic down into two major areas, brief-writing and oral argument, and addressed several pet peeves and irksome practices in several sub-areas. Since many of you may not have had the opportunity to attend the brown bag lunch presentation, I thought I would pass on some of his tips and observations.

A. Briefs

Justice McIntyre reminded us that the justices begin their work on a case by reading the briefs first, not the transcripts. It is therefore helpful to know up-front what the judgment below was, so the court knows immediately whether the appeal is from a court trial or jury trial, or some other order or judgment. If the appellant does not make it clear in the AOB, the justices may have to resort to the opposing party's brief to determine the nature of the appeal.

He began his presentation with a reference to a petition for rehearing which he felt was insulting and "irksome." He reminded us that telling the court, in a petition for rehearing, that it is "stupid" in its opinion does not do much to change the result and that professionalism in all briefing is important.

1. Introduction: The justices uniformly appreciate a good introduction which capsulizes the argument. This should not be too long, but should set out the nature of the case and the issues to be presented.

2. Statement of Facts: Edit for brevity; take out unnecessary facts, which are distracting to the readers. There is no need to insert every date on which some occurrence took place unless the chronology is important to the issue. When the justices see a lot of dates, they expect to see an issue in which the sequence of events is important. This problem appears most often in juvenile dependency appeals which include every date, every report, every review hearing, and a recitation of the testimony of every witness at each hearing. The justices prefer to see the nonessential facts summarized, with attention directed at the significant facts and occurrences. He felt the presenting problem in a dependency case [the reason the case was filed in the first place], and what the parent has done in the meantime [progress during reunification phase], were salient.

3. Standard of Review: Practitioners were encouraged to just state what the standard of review is for a particular issue, rather than spend an inordinate amount of time analyzing the standard of review. For the most part, the court is familiar with the standards of review and how to apply them, so it is only necessary to state which standard should be applied. Unless there are conflicting decisions relating to the proper standard of review, no more than a sentence or so is all that is necessary.

4. Arguments: In making legal arguments, counsel were cautioned against repeating the point too frequently. Once, or in some situations twice [such as where the issue is stated another way for emphasis and clarification], is usually all that is required to get the point across. As Justice McIntyre put it, if it is a good point, the court will get it; if it is not a good point, repeating it does not help. Too much repetition tends to make the reader skim the document, which is not good for getting points across. Many arguments are too long, in the court's opinion.

Addressing opposing points: It is important to address the arguments made by your opponent, whether it is the respondent in drafting the respondent's brief, or the appellant in drafting the reply. Failing to respond to points made by the adverse party makes the court's job harder, and gives the impression that the point has merit. Conceding obvious points is a good thing.

Credibility: Be careful not to misstate facts or evidence from the record, or take them out of context. The same is true for quotations and the holdings of the authorities upon which you rely. It destroys one's credibility when the adverse party points out that facts or authorities were taken out of context or misstated altogether.

5. Supplemental briefing: When the court requests supplemental briefing, it is important to address the specific questions posed by the court. The letter requesting additional briefing may be a signal that the dispositive issue has not been raised in any of the briefs and the court is required to give counsel an opportunity to brief the issue before deciding it. (See Gov. Code, § 68081.) One should take advantage of this opportunity. Sometimes, when the court sends out such a letter, the supplemental briefing does not address the specific issue for which the court sought guidance. If one does not understand the questions posed in the letter, one may write a letter to the court requesting clarification so that the supplemental brief will address the precise question; the letter should be served on opposing counsel.

B. Oral Argument

It is not necessary to recite the facts to the court; the court is familiar with the case by oral argument. Also, do not depend on oral argument to present a point you have not covered well in the briefs. The brief is the place to make your points. The biggest mistake Justice McInyre has observed in argument is counsel failing to answer questions posed by the bench. It is acceptable to ask for clarification of a

question if one does not understand what is being asked. However, if counsel does not answer it, the court may eventually give up seeking an answer, assuming that counsel either cannot or will not provide the information to the court. Neither of these assumptions is helpful to a client.

Also, respecting issues of first impression, the court may ask what the effect of a particular ruling might be because it is contemplating publication. Having counsel state at oral argument that he or she has not considered how a particular ruling will affect other cases is not a good thing. Justice McIntyre emphasized that in certain areas of law, attorneys may limit their practice to that area and they are in the best position to inform the court how its decision will relate to the bigger picture. With questions of public policy, the court looks to counsel for input on how the decision might serve or defeat that policy.

As always, Justice McIntyre's presentation was as interesting as it was informative. As a former trial litigator and trial judge, he understands what goes into the preparation and presentation of a case and the impact it will have on the client's rights and interests. Having input from the court enlightens us on what we need to know and reinforces what we may already know or suspect about effective appellate practices so that we may all improve our appellate abilities. For this reason, I wanted to share his observations with everyone.

A Seminar by Justice Aaron

by Arthur B. Martin, Staff Attorney

Justice Cynthia Aaron spoke with members of the San Diego chapter of California Appellate Defense Counsel at California Western School of Law on November 20. Along with describing some of her background and her perspectives as a relatively new justice, she proffered several tips to help appellate practitioners become more effective advocates.

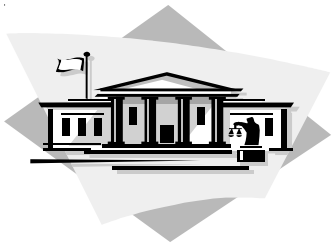
Justice Aaron, who was appointed to Division One of the Fourth District Court of Appeal in January 2003, said she was initially surprised how many cases turned on the standard of review. For instance, it is very difficult for an appellate court to reverse when the standard is abuse of discretion by the trial court, even when they disagree with the ruling below. She said the best chance for an appellant to overcome an adverse lower court judgment is by finding a way to raise the issue with a de novo standard of review. This leaves the Court of Appeal free to analyze the problem independently.

Justice Aaron also said she was surprised that she sees briefing from both parties that fail to cite the most relevant, controlling authority. It is important that the parties find and cite the pertinent cases rather than leave that job to the courts. If the court has to do it, the parties will have lost the opportunity to frame the necessary analysis themselves. In the same vein, appellants should not avoid the problematic aspects of their cases; it is better to be up front about problems and attempt to deflate them.

Justice Aaron and her research attorney Martin Buchanan both said that a major problem with briefs is their length. Many briefs are simply longer than they have to be to get their points across. For instance, a bare bones statement of relevant facts is preferable to a lengthy rehashing of the testimony of every witness. It was also recommended that appellants be somewhat selective in the arguments they make, focusing on viable ones and leaving out those that are weaker. The length problem is even more acute in reply briefs. Appellate courts want reply briefs to respond to the opponent's points, not restate the arguments made in the opening brief.

Justice Aaron said that oral argument is almost always enjoyable, but is not always helpful. She acknowledged that oral argument rarely makes a difference in the outcome. She recommended preparing for oral argument by focusing on the weaknesses in the respondent's brief.

Finally, prior to serving as a magistrate in federal district court, Justice Aaron was a criminal defense lawyer. She noted that while her background tends to make her sympathetic to appellants, she views the role of intermediate appellate courts as requiring strict following of the rules established by precedent. If justices were free to make decisions based on their sympathies rather than rule in accord with existing law, the result would be chaotic. Accordingly, arguments that rely more on invoking sympathy and the "interests of justice" than on analyzing the applicability of legal rules are not likely to succeed.



Paul Bell Memorial Fellowship

Each year the board of directors of ADI awards a fellowship in the name of our late colleague to an outstanding newer attorney. The fellowship allows the attorney to attend the annual National Legal Aid and Defender Association Appellate Defender Training Program in New Orleans. I am delighted to announce that this year's recipient was Maria Morrison, who attended the program December 4-7. Maria joined the panel in May 2003. She is a 1994 graduate of the Loyola Law School, Los Angeles. Past winners have reported that the program is exceptionally well done and proved very helpful to them. Maria has joined that chorus, reporting that the program was "an invaluable experience" that will beneficially improve her, and most importantly, her clients. "It was very hands-on, mostly conducted in small workshops where we discussed our own individual cases. . . . The emphasis was on making the appellate court *want* to grant your client relief through effective story telling."

Presiding Justice Judith McConnell Named to Top Post at Court of Appeal

Chief Justice Ronald M. George announced the appointment of Presiding Justice Judith McConnell, a longtime leader in court administration, as Administrative Presiding Justice of the Court of Appeal for the Fourth Appellate District.

In her new post, Justice McConnell will be responsible for financial, employment, and other administrative issues in the Court of Appeal, one of California six courts of review. Justice McConnell was recently confirmed as the new Presiding Justice of the Fourth Appellate District Division One (San Diego). That district has two other divisions in Riverside and Santa Ana.

Justice McConnell succeeds Acting Administrative Presiding Justice Richard Huffman, who filled the vacancy created by the July 2003 retirement of Administrative Presiding Justice Daniel J. Kremer.

Longtime Court Leader

Winner of the Judicial Council 2001 Jurist of the Year Award, Justice McConnell is widely known for her leadership and service to the judicial branch of government. In 1999 she received the Benjamin J. Aranda Access to Justice Award, presented by the Judicial Council, California Judges Association, and State Bar of California. A member of the Judicial Council from 1991 to 1994, she has had a leadership role in numerous efforts to improve California courts, including jury reform, gender fairness, trial court coordination, and community-focused court planning.

She is current chair of the Judicial Branch Budget Advisory Committee, which is instrumental in developing the annual budget for state courts, and is a member of the council Judicial Ethics Issues Task Force. Justice McConnell service on Judicial Council committees includes the Task Force on Jury System Improvement (member and vice chair, 1998-2003); the Commission on the Future of the Courts (member and chair of Committee on Civil Cases, 1990-1993); the Advisory Committee on Gender Bias in the Courts (member, 1988-1994); the Advisory Committee on Trial Court Coordination Standards (chair, 1991); the Judicial Council Superior Court Committee (chair, 1991-1992); the Statewide Community-Focused Court Planning Conference Steering Committee (chair, 1997-1998); and the Community-Focused Court Planning Implementation Committee (co-chair, 1998-2003).

In addition, Justice McConnell has been active in judicial education for the past 20 years, serving as a frequent lecturer for programs sponsored by the Judicial Council, the California Judges Association, the National Association of Women Judges, and other organizations.

A graduate of Boalt Hall School of Law at the University of California, Berkeley, she was appointed to the San Diego Municipal Court in 1977 and to the Superior Court in 1980, serving as Presiding Judge in 1990 and 1991. She was elevated to the Court of Appeal in 2001.

Free On-Line Legal Research Offered By The California Judicial Council

In October, the California Supreme Court announced a new online service that provides free public access to all state appellate court opinions published in the *California Official Reports* since 1850. The opinions are available on the California Courts Web site at http://www.courtinfo.ca.gov/opinions/continue.htm.

"This historic new service is another step forward in the judicial branch's efforts to increase public access to the work of the California courts," said Chief Justice Ronald M. George. "More than 132,000 opinions of the Supreme Court, Courts of Appeal, and superior court appellate departments are now available free of charge to all those interested in viewing the complete published work of our state courts of review."

The opinions are searchable by *Official Reports* citation, docket number, issues in the opinion, and the names of parties, judges and justices, and appellate counsel.

The new service is made possible under the terms of a contract announced earlier this year with LexisNexis, the new official publisher of the *California Official Reports*. Under the contract, other modes of *Official Reports* computer versions also will be provided, including an on-line official database in the LexisNexis system; off-line versions in both CD-ROM and DVD format; and an E-mail "alert service" to *Official Reports* subscribers and the general public.

LINKS IN THE LAW: ADI's Web Site <http://www.adi-sandiego.com>

Top 10 Web Sites For Appellate Practitioners

by Amanda Benedict, Staff Attorney

The Internet is a great repository of information. The only problem is locating it all. At first, I bookmarked every interesting Web site I came across. However, my bookmark list quickly became too lengthy and lost its purposes of helping me quickly find resources. Because time management is essential to appellate practitioners, I have come up with a list of the "Top 10" Web sites for the appellate practitioner. The following Web sites were included on the list based upon their applicability to appellate practice, the amount of resources offered, the ease of navigation, and the frequency with which I use information on the site.

1. Http://www.findlaw.com - FindLaw

If you could only bookmark one legal site, it would have to be FindLaw. The site started in 1994 as a list of Internet resources and has evolved into arguably the best starting point for finding legal information on the Web. The site offers free legal research in the federal and state courts. A key feature of this site is the free My FindLaw service. Register with FindLaw (free) and you can build your own home page with customized news feeds, recent decisions from California and the United States Supreme Court, as well as links to commonly used state resources. After you customize your page (a five minute task), you can make this your homepage so every time you access the Internet, you instantly see recent rulings and news. A final favorite feature of FindLaw is the free E-mail subscription service. At http://newsletters.findlaw.com you can sign up for free daily or weekly opinion summaries from the California Supreme Court, California Court of Appeal, the Ninth Circuit, and the United States Supreme Court.

2. Http://www.courtinfo.ca.gov - The Official Web Site for the California Courts.

The California Courts Web site is offered by the Judicial Branch of California. The site is easy to navigate and has a surprisingly rich array of information and resources. The best feature of this site for appellate practitioners may be the "Opinions" page. Here, you can obtain published and unpublished opinions from the California Court of Appeal and the California Supreme Court for the past 120 days. A new feature on the "Opinions" page is a searchable database of opinions dating back to 1850. The search engine is powered by Lexis and it is free. Cases can be found by party name, natural language search, or by citation. Other key features of the California Courts Web Site are the easily obtainable court forms, court rules, and a listing of addresses and the phone numbers for any court in California.

3. Http://appellatecases.courtinfo.ca.gov - The California Appellate Courts Case Information Site.

Running a close second to the California Courts Web site is the Case Information site which is also offered by the Judicial Council. The site provides case information for California Supreme Court and Court of Appeal cases. The information is updated once an hour throughout the day. You can search for cases by case number, attorney name, party name, or by case caption. With access to the courts' dockets, you no longer need to call the court clerks with routine questions regarding filings, due dates, and case status. A key feature of this site is the ability to sign up for E-mail notification of activity occurring on a chosen case. Simply click on the "E-mail" button on the left navigation bar, type in your E-mail address, the case number, and check activities about which you would like to be notified. I have found that with the E-mail notification, I am notified of an upcoming opinion or court order 1-2 days before actually receiving the order in the mail. However, confidential cases, such as juvenile (both delinquency and dependency) and sexually violent predator cases are not included.

4. Http://www.leginfo.ca.gov - The Official Site for California Legislative Information.

The site is maintained by the Legislative Counsel of California and provides a wealth of information on pending and passed bills. This site is a great starting point for conducting legislative history research. You can obtain the history and current status of a bill, the bill text as it was introduced, amended, and chaptered, the text from the various committees, the Senate floor and the Assembly Floor, and the voting records as the bill progressed through the legislative process. I love E-mail notification, and this site does not let me down. By clicking on the "Subscribe" button at the bottom of the page, you can sign up for a free bill tracking. Enter in your E-mail address and you will be automatically notified whenever there is any action taken on the designated bill.

5. Http://www.llrx.com - LLRX

LLRX is an innovative Webzine for legal professionals and has remained on the leading edge, spotting new trends, zeroing in on key developments, and often being first to report important news. The site is free and is updated monthly. A key features of the site are the articles and regular columns on legal research, technology and management. Authors on LLRX include law librarians, attorneys, and legal technology consultants. The site is well maintained and is easy to navigate

the archives, the specialized research libraries, and the practice centers. Oh - and did I mention, LLRX also offers a free E-mail subscription service.

6. Appellate Project Web Sites

Each of the appellate projects now have an Internet presence:

- Appellate Defenders, Inc. (http://www.adi-sandiego.com) maintains a deep site with easy navigation and links to numerous resources and forms. The site is a "must bookmark" for panel attorneys accepting cases out of the Fourth Appellate District, as counsel are required to be familiar with its contents.

- California Appellate Project, Central (http://www.ccapcentral.org) is a database-driven site and is rich with features. The site is continually updated. It has a searchable briefbank, news from the court, helpful "how-to" articles for attorneys, on-line CLE, and more. Clean design, coupled with a logical navigation structure, make this a premier site for appellate practitioners.

The remaining three projects also have clean, well designed, site; however, the depth of resources do not yet match what is currently available on CAPCentral's site.

- The California Appellate Project site (http://www.lacap.com) has a "knowledge base" section with great articles, forms, and reference materials. CAP was also the first project to test the eClaims program and at their site you can register for on-line claim filing.

- At the First District Appellate Project site (http://www.fdap.org) there are great articles on appellate practice and issue spotting as well as news for attorneys practicing within that district.

- The Sixth District Appellate Project site is the newest site on the block (http://www.sdap.org). The site is very similar in design and resources to the FDAP site. It has many tools and appellate practice resources.

7. Http://www.cadc.net - The California Appellate Defense Counsel Web Site.

This is the only "paid" Web site on this list. To access the main areas of CADC's site you need to be a member of CADC. However, because over 400 appellate practitioners are current members of CADC and because the Web site has a vast amount of resources, I have included this site as a "must" for appellate practitioners in California. The site offers access to an extensive briefbank, discussion forums, newsletters, and relevant CLE activities.

8. Http://www.calbar.ca.gov - The Official Web Site of the State Bar of California.

I am frequently surprised at the depth of information and resources on this site. This is not just a bare-bones membership site. The State Bar Web site has on-line copies of the California Bar Journal, ethics opinions, free and low-cost MCLE courses, meeting announcements, and hotline numbers. The State Bar site recently added a new key feature, "My State Bar." This feature is located in the "Attorney Resources" section of the site. "My State Bar" allows attorneys to set up a profile, pay bar fees on-line, update personal information, and report MCLE compliance.

9. Http://www.google.com - The Google Search Engine

Have you heard of the phrase "Just google it"? Then you have heard of one of the most popular search engines on the Internet. Google allows you to search the entire Internet, search for images only, search in specified topical areas, or search through news pages. Google is rich with tools to make your Internet research easier and faster. For instance, if you want to find Web pages containing an exact phrase, place quotation marks around the words (ex: "Appellate Defenders"). However, if you are looking for Web pages containing multiple words, but not necessarily a phrase, use the "+" sign before each word (ex: +motion +suppress +gun). To learn about more of Google's powerful and timesaving features, just click on "Services and Tools" at the bottom of the Google home page.

10. Http://www.elawcentral.com - eLawCentral

eLawCentral is a one-stop destination for wired legal professionals on the Web. The site offers relevant user friendly resources for legal processionals and is organized for easy reference and use. A customizable homepage, E-mail service, and large searchable database are just some of the features of this site. Registration is required to access all the features, but it is free.

So there you have it, my top 10 Web sites for the appellate practitioner. I encourage you to check them out and let me know what you think. In the next newsletter, I will help you save time through E-mail management.