

## **JUNE 2015 – ADI NEWS ALERT**

BY

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### **MCLE on appealability and forfeiture, June 24 in Riverside**

The Riverside County Bar Association is making special efforts to reach more practitioners in the Inland Empire area with its MCLE programs. On June 24, the Appellate Law Section will be presenting a program on appealability and issue forfeiture, with emphasis on juvenile and criminal cases. Carmela Simoncini, former ADI Staff Attorney and current Lead Appellate Court Attorney at Division Two, will be making the presentation at the Riverside County Bar Association building, 4129 Main Street, in the John Gabbert Gallery, 3d floor.

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

Practitioners should contact the [Riverside County Bar Association](#)<sup>2</sup> to get on the list for notification of future programs.

### **Coming to Div. One on July 1: mandatory electronic filing of writ documents**

New Fourth District [local rule 5](#), applicable to Division One only and effective July 1, 2015, makes electronic filing of writ pleadings mandatory. The court confirms this rule includes habeas corpus petitions filed by counsel and other criminal writ proceedings. It does *not* apply to juvenile dependency statutory writ proceedings under California Rules of Court, rules 8.450-8.456 (Welf. & Inst. Code, § 366.26, 366.28).

Subdivision [I](b) of the local rule makes exceptions for hardship, infeasibility, self-represented habeas petitioners, sealed and confidential records, and certain other situations. Subdivision [II] prescribes filing procedures, formatting requirements, form of signatures, redaction rules, deadlines and late filings, service, filing fees, and sanctions for noncompliance. The full text of local rule 5 is in the [Appendix](#) to this alert. Counsel should consult it carefully before making any writ filing in Division One on or after July 1. The clerk's office of the court may be contacted for clarification of any points about the new procedures.

The court website has [information about this program](#).<sup>3</sup> Counsel may also view the text of all [Fourth District local rules](#).<sup>4</sup>

### **Appellate review of rulings in trial court after appeal is filed requires new notice of appeal**

In a criminal case, if, during the pendency of the appeal and after the record is certified, the trial court amends or recalls the judgment or makes any new order in the case (such as an order affecting the sentence or probation), the superior court clerk must send copies of the amended abstract of judgment or new order and related proceedings, to the reviewing court and the parties as an augmentation of the record on appeal. (Cal. Rules of Court, rule 8.340(a).) In juvenile cases, the trial court clerk must notify each party to whom the record was sent. (Rule 8.410(b)(2).)

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<sup>2</sup><http://www.riversidecountybar.com/>

<sup>3</sup><http://www.courts.ca.gov/4dca.htm>

<sup>4</sup><http://www.courts.ca.gov/documents/4dca-local-rules.pdf>

A long-vexing question has been whether this automatic record augmentation required by the rules also permits appellate review of the subsequent proceedings. ADI has counseled attorneys to play it safe and file a new notice of appeal from the post-judgment proceedings within the usual time requirements. *People v. Denham* (2014) 222 Cal.App.4th 1210<sup>5</sup> has now confirmed this is legally necessary, holding that review of the later proceedings (in that case, victim restitution orders made more than five months after sentencing) requires a new notice of appeal.

Counsel should assume the *Denham* requirement applies to other post-sentencing proceedings, such as recalls, credit corrections, and various orders after judgment. Even though the record of the later proceeding is before the appellate court under rule 8.340(a), its purpose is to inform the Court of Appeal of *changes in the judgment it is currently reviewing*, not to enlarge the scope of appellate review to include orders after judgment.

Some practice tips:

- If the appeal from the judgment is still going on when the new notice of appeal is filed, it may be most efficient to move to consolidate the two appeals.
- Although rule 8.340(a) requires the superior court clerk proactively to do an automatic augmentation, in practice clerks most often overlook this rule. Appellate counsel should keep in close touch with the client and trial counsel to find about such developments and remind the superior court clerks of their duty.
- Counsel may seek an augmentation to include the later proceedings in the record for the appeal from the judgment, but if they are aware the subsequent ruling is going to be appealed, anyway, they should take care not to cause duplicate copies of the post-judgment record to be prepared.

### **Greenpath overcharge error under review; save documentation**

Because of a software bug, Greenpath overcharged some panel attorneys \$2 each for a “personal copy” of briefs. It is notifying the attorneys. The JCC is reviewing options. Meanwhile panel attorneys should retain any emails or other documentation received from Greenpath. Counsel should be aware that, as a broad rule, the state will not pay for hard copies of documents when electronic versions are reasonably available at little or no cost. Sending clients a hard copy is usually a compensable expense, but making a hard copy for one’s own records is not.

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<sup>5</sup>Review denied April 23, 2015.

## APPENDIX

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### LOCAL RULE 5. ELECTRONIC FILING (DIVISION ONE ONLY)

#### [I] Application

##### (a) [Mandatory electronic filing]

Pursuant to California Rules of Court, rules 8.70 through 8.79, the court requires all filings in writ proceedings (other than writs subject to California Rules of Court, rules 8.450 through 8.456) in the Fourth Appellate District, Division One, to be made through the court's electronic filing system (EFS), except as provided in subdivision (b) of this section or except as otherwise ordered by the court. For a writ proceeding to which mandatory electronic filing requirements apply (a Writ Proceeding), a filing in electronic format will be accepted in lieu of any paper copies otherwise required under California Rules of Court, rule 8.44 and will constitute the official record of the court.

##### (b) [Exemption from mandatory electronic filing]

(1) Exemption from the mandatory electronic filing requirements of this rule exists in the following circumstances:

(i) Undue Hardship. If complying with the electronic filing and/or service requirements of this rule would cause undue hardship or significant prejudice to any party, that party may file a notice of undue hardship and be exempted from such requirements. (See Cal. Rules of Court, rule 8.54(a)(1)&(2).)

(ii) Infeasibility. When it is not feasible for a party who is otherwise able to participate in mandatory electronic filing to convert a particular document to electronic form by scanning, imaging or other means, the party may file the document in paper form (see Cal. Rules of Court, rule 8.73(c)), together with a declaration setting forth the reasons that electronic filing was not feasible.

(iii) Self-Represented Litigants in Habeas Corpus Proceedings. Parties who are representing themselves in Writ Proceedings seeking habeas corpus relief are not required to comply with the mandatory electronic filing provisions of subdivision (a) above.

(iv) Sealed or Confidential Materials. A filer must not electronically file any sealed or confidential materials. Such materials must be submitted in accordance with California Rules of Court, rules 8.46 and 8.47.

(v) Administrative Records in Certain Writ Proceedings. Administrative records in Writ Proceedings under California Rules of Court, rules 8.495 through 8.498 or Business and Professions Code, section 23090 may be filed in paper form rather than electronically.

(2) Consequences of Exemption. A party that is permitted to file paper copies of documents in accordance with this rule must file one paper copy of any such document that complies with the requirements of the California Rules of Court and one paper copy that is unbound, without any tabs and with a white rather than a red cover.

## **[II] [Electronic filing procedures]**

### **(a) [Filing]**

Documents filed in any Writ Proceeding in this court are to be electronically filed at <http://www.courts.ca.gov/4dca-efile.htm>. All attorneys and unrepresented parties in such proceedings are required to keep the court updated as to their e-mail addresses and other information specified in California Rules of Court, rules 8.32, 8.71(d) and 8.76(a)(5).

### **(b) [Format]**

Documents filed electronically must (i) comply with the content and form requirements of the California Rules of Court, with the exception of those provisions dealing exclusively with requirements for paper filings, (ii) be in PDF, or readily capable of conversion to PDF while maintaining original document formatting, to permit text searches and facilitate transmission and retrieval and (iii) must use the naming conventions specified on the e-filing instructions set forth on the court's website at <http://www.courts.ca.gov/4dcaefile.htm>.

Except as provided in section (I)(b)(1)(ii), if the filer possesses only a paper copy of a document, the filer must scan and convert it to a searchable PDF document. It is the filer's responsibility to ensure that any document filed is complete and readable.

No single PDF file may exceed a total file size of 25 MB. Each file must be paginated with consecutively numbered pages, beginning on the cover page of the document, using the Arabic numbering system (1, 2, 3 and so on) ONLY, must not contain any tabs and must have a white rather than a red cover.

Each volume of exhibits must be filed as a separate PDF file. A filer in Writ Proceedings that involve more than ten volumes of exhibits may deliver all of the volumes of exhibits to the court in machine-readable optical media rather than by electronic filing.

Filers in Writ Proceedings are encouraged, but not required, to include electronic bookmarks from the table of contents for each heading in the text, and to the first page of any exhibit(s), with a description of the exhibit included in the bookmark.

### **(c) [Signatures]**

An electronic document must incorporate an electronic signature for the filing attorney or party by displaying the symbol "/s/" with the attorney's or party's printed name. For a document signed under penalty of perjury, the filer must comply with California Rules of Court, rule 8.77(a).

### **(d) [Mandatory redaction of personal identifiers and financial account information]**

To protect personal privacy, filers must redact personal identifiers, such as social security numbers, driver's license numbers, and financial account numbers, from all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court. (Cal. Rules of Court, rule 1.20(b)) If a social security number or financial account number is required to be included in a pleading or other paper filed in the public file, the filer must redact all except the last four digits of that number.

The responsibility for redacting identifiers from all documents electronically filed with the court rests solely with the parties and their attorneys. (Cal. Rules of Court, rule 1.20(b)(3).) The clerk of the court has no responsibility to review pleadings or other papers for compliance.

**(e) [Filing deadlines]**

Filing documents electronically does not alter any filing deadlines. (Cal. Rules of Court, rule 8.72(d)(2).) To be timely filed, all electronic transmissions of documents must be completed (i.e., received completely by the clerk of the court) prior to midnight, unless another specific time of day is set for filing by court order or stipulation, in which case the electronic filing shall be completed by that time.

**(f) [Technical failure/motions for late filing]**

If a filer fails to meet a filing deadline imposed by court order, rule, or statute because a technical problem with the EFS prevents the court from electronically receiving a document, the court will deem the document as timely filed if the filer transmits or files the document the next court day (or, for good cause shown, as soon thereafter as practicable), accompanied by a motion to accept the document as timely filed that demonstrates that the filer attempted to electronically file the document before the deadline expired. (Cal. Rules of Court, rule 8.79(d).)

The court shall not be responsible for malfunction or errors occurring in electronic transmission or receipt of electronically filed documents.

**(g) [Service]**

An attorney or party's participation in EFS constitutes consent to electronic service or delivery of all documents by any other party to the Writ Proceeding. (Cal. Rules of Court, rule 8.71.)

**(h) [Filing fees]**

The court will assess fees for any filing, and any associated credit card or bank charges or convenience fees (Cal. Rules of Court, rule 8.78; Gov. Code, § 6159). Electronic filing fees will be considered recoverable costs under California Rules of Court, rule 8.278(d)(1)(D).

**(i) [Sanctions for noncompliance]**

Failure of any attorney or party to comply with mandatory EFS filing requirements, unless exempted, may result in the court's imposition of sanctions against that attorney or party.

*(Adopted, eff. July 1, 2015. Previously repealed, eff. Apr. 3, 2013)*