

JUNE 2009 – ADI NEWS ALERTS

By

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This alert covers these topics:¹ claim payments; information for clients about the claims process; ADI's board of directors; and assertive issue selection.

Payments of claims; ADI hotline

Although the Administrative Office of the Courts does not yet know how much and in what ways the judiciary will be affected by the California budget situation and what impact that will have on the court-appointed counsel program, we are geared up for a claims crunch because of the shortage of money and imbalance in the budget. Any claims outstanding if the money runs out will not be paid until funds are obtained.

For these reasons, *we urge panel attorneys to submit claims at the earliest possible time*, in order to get in line before the funds are exhausted, should that happen. We, in turn, will make it a priority to expedite the processing of the claims.

To help attorneys avoid falling prey to unsubstantiated rumors, ADI has designated two staff attorneys, Cheryl Geyerman (cag@adi-sandiego.com, 619-696-0284, ext. 23) and Dave Rankin (dkr@adi-sandiego.com, 619-696-0284, ext. 33) as “claims hotline” contacts. Please direct inquiries to them; they will try to pin down the correct information. Attorneys can also keep in general touch with the situation at the Controller's website, http://www.sco.ca.gov/eo_news_fiscalissues.html. The May 29 letter from the Controller to the Governor outlines the current situation.

Information for clients about the appeals process

Appendix A of the ADI Criminal Appellate Practice Manual, at § 1.143,² has a copy of the standard information sheet, “Understanding Your Appeal,” that ADI sends to clients early in the processing of the case. It answers some of the most common questions clients have about the appellate process. A number of panel attorneys like to re-send it to

¹As a reminder: Counsel are responsible for all matters covered in e-mail alerts, newsletters, and other information made available to the panel. Past alerts and newsletters are at http://www.adi-sandiego.com/news_alerts.html and http://www.adi-sandiego.com/news_newsletters.html.

²<http://www.adi-sandiego.com/manual.html>.

their clients to reinforce the message. We are now making it available on the ADI website at http://www.adi-sandiego.com/practice_forms_motion.html, along with a version for non-criminal cases, in both English and Spanish.

ADI's board of directors

We have been remiss all these years in failing to inform readers adequately about a very important part of our program – our board of directors. I'd like to introduce the board and its members here.

As a nonprofit corporation chartered since 1972 under the laws of California, Appellate Defenders, Inc., is governed by a 13-member board of directors. The board, which also governs Federal Defenders of San Diego, Inc., selects and oversees the executive director of each organization. It meets approximately monthly to discuss the business of the organizations and the work of the board as a whole.

The board names four officers – President (two-year term) and the Vice-President, Secretary, and Treasurer (one-year term). To facilitate its work, it has a number of committees, both standing and ad hoc. Examples include Finance, Management Liaison, Awards and Annual Dinner, Board Development, Nominating, Audit, etc.

At the annual Defender Dinner, which it sponsors, the board presents the Paul Bell Award for excellence in appellate advocacy and the E. Stanley Conant Award for excellence in trial advocacy. Each year it also awards the Paul Bell Fellowship for newer appellate lawyers. In addition, the board confers recognition for lifetime achievement and other outstanding accomplishments.

Members are chosen by the present board for three-year terms. They receive no compensation for their service. At present they include:

President: Elizabeth Missakian, criminal defense attorney, criminal law specialist, former ADI panel attorney.

Secretary: Julie Greenberg, professor of law, Thomas Jefferson School of Law.

Treasurer: Ezekiel Cortez, criminal defense attorney, criminal law specialist.

Charles Bird, civil appellate attorney, Luce, Forward, Hamilton et al.

Gerald Blank, criminal defense attorney.

Arthur Campbell, professor of law, California Western School of Law.

Alex Landon, criminal defense attorney, criminal law specialist.

John Mitchell, criminal defense attorney.

Jean Ramirez, professor of law, University of San Diego School of Law.

Patricia Robinson, criminal defense attorney.

Charles Sevilla, criminal defense attorney.

Thomas Warwick, criminal defense attorney, Grimes & Warwick.

Non-directors serving on an advisory basis to the Audit Committee are Clancy Wilson, an attorney with Branton & Wilson, and Kim Ufford, Certified Public Accountant with Levitzacks.

With all the complexities of overseeing two corporations and the added responsibilities imposed on boards in the post-Enron era, the board is an active, hard-working one. If you know any of these people or happen to meet them, please take the time to thank them for their invaluable service.

Assertive issue selection

In April 2008 I wrote a news alert article and accompanying memo (“To Brief or Not to Brief: Marginal Issues”) about issue selection and especially the avoidance of frivolous issues. It discussed the ethical and strategic concerns in issue selection, outlined appellate standards for reviewing issues, and explored ways of arguing weak issues credibly.³

Here I would like to touch briefly on the flip side of assessing an issue as arguable merely because there is something favorable to say about the client: the tendency of some attorneys to reject an issue merely because there is something to be said in opposition to it. While we all know there can be legitimate reasons for not raising an arguable issue – adverse consequences, client wishes, strategic winnowing down of briefed issues, etc. – here I am talking about the error of rejecting an issue because it’s not a slam dunk.

An appellate attorney must be an assertive advocate. Assertive advocacy asks “How can I make this issue work?” rather than “Might the court reject this?” As I

³First alert in April 2008. http://www.adi-sandiego.com/news_alerts.html.

suggested in my article on marginal issues, the standard for arguability is whether an appellate court “could reasonably” order relief based on the issue, given the law, the facts, and the principles of appellate review. The standard is not whether it “actually will.” There are potential responses to almost every issue we raise – very few are obvious candidates for a concession from the opposing party. The question for us is whether those responses are truly insuperable, in which case the issue is frivolous, or whether they merely mean there are alternative reasonable outcomes to the case. Our job as lawyers is to present the court with arguments it could reasonably accept and do our best to persuade it to accept them; it is not our job to decide ahead of time whether they will or even should accept them. Keeping this model in mind will facilitate assertive issue selection.

Of course, I am not suggesting that one should invariably take an all-inclusive approach to issue selection and avoid any assessment of likely success. As explained in chapter 4 of the Manual (“On the Hunt: The Science and Art of Issue Spotting and Selection”), there are several steps in the selection process. First is “What *possible* issues are there?” (spotting issues); second is “*Can* I raise this issue?” (assessing arguability); third is “*Should* I raise it?” (deciding strategy). When there are some really good arguments in a case, leaving out the weaker ones is often a wise decision at step three. It’s a quite different matter when an attorney rejects an arguable issue at step two, on the ground it will probably lose, and opts for a *Wende* or *Sade C.* brief instead.

It is hard to lose as much as we do and feel confident we are making sound issue selection judgments. It also can be very hard to draw a line between arguable and unarguable issues. But defeat and difficulty do not relieve the attorney from the responsibility. Our articles and the Manual offer substantial general guidance for approaching the task, and one of the great resources of the project-panel system is the availability of second opinions. Skillful issue selection, this most important aspect of the job, can be done. And it is not optional.